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Remarks

Lisa Foster
Fines & Fees Justice Center

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REMARKS

Lisa Foster*

In both Greek and Roman mythology, a Hydra guards the entrance to the underworld. For those who don't remember their mythology, a Hydra is a multi-headed serpent who exhales poisonous fumes. If you get close enough to the Hydra and are able to cut off one of its heads, two grow back in its place. Slaying the Hydra was number two on Hercules' famous list of Labors. He was successful, but not without a fierce struggle.

As you've heard over the last four days, fines and fees are Hydra-like. Fines are imposed for almost every minor offense—misdemeanors, infractions, and code violations—and fees are assessed at virtually every step of the criminal legal process. For every fine, fee, or particularly egregious collection practice that is stopped, dozens of others that are equally harmful remain in place. The collateral consequences of fines and fees wreak havoc on the lives of individuals and families. The impact that these policies have on the economic health and stability of communities—particularly communities of color—is truly poisonous. Too often it feels like it will take a Herculean effort to end the regime of monetary sanctions.

I am confident, however, that though the struggle will be long and arduous we will succeed. Indeed, there have been many successes through litigation, legislation, and policy change. That is why the last session of the Symposium is dedicated to reform. Before we talk about reform, I want to share just a few thoughts with all of you.

First, like any public policy, fines and fees regimes can have unintended consequences. We must be particularly mindful of the potential consequences of reforms as we propose them. For example, many people advocate for “ability-to-pay” hearings before fines and fees are imposed, giving judges the authority to waive or reduce fines and fees.¹ But if all we do is put language in the law that tells a judge to

* Co-Director, Fines & Fees Justice Center. These remarks were delivered on Friday, January 29, 2021, to introduce reform discussions that took place on the final day of the *Journal's* Symposium, *The Poverty Penalty: America's Overuse of Fines and Fees*.

1. See, e.g., MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., *THE STEEP COSTS OF CRIMINAL JUSTICE FINES AND FEES* (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [<https://perma.cc/PHE3-XAA9>]; Cristina Rodrigues, *The Cost of Justice: The Importance of a Criminal Defendant's Ability to Pay in the Era of Commonwealth v. Henry*, 10 NE. U.L. REV. 204 (2018). But see Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 377 (2009)

perform ability-to-pay assessment without providing specific guidance on how that determination should be made and by how much to reduce the fines and fees once the assessment is made, we may end up with a problematic situation: a judge looking at a person's shoes or their pocketbook, or the fact that they have a cell phone, and deciding that they have the ability to pay the fines and fees imposed.

Additionally, an ability to pay hearing before a judge likely means that there will be a court hearing. This means that a person has to come to court, sit in a courtroom until their case is called, and bring evidence to court about their financial circumstances. All of those things are often difficult for people, particularly low-income people.² Attending a court hearing in many instances requires that people take off work, obtain childcare, and find transportation to the courthouse. Many people also may not feel comfortable in a courthouse. Court is where people get arrested, are sent to jail, get evicted, feel degraded, and—especially for people of color—are treated with suspicion. For many, a court appearance may be the proverbial straw that breaks the camel's back. A person may not show up, their ability to pay may never be assessed, and then they suffer the additional punishments that are imposed for their failure to pay.

Second, fines and fees implicate many different disciplines. During this Symposium, you have heard from a wide array of speakers who reflect those disciplines. Sociologists, historians, political scientists, lawyers, judges, and public administrators have all engaged with this issue. When we think about reform, we should think broadly about the potential impacts of our proposals across all these disciplines.

For example, if we eliminate fees as a revenue source for courts, what alternative source of revenue will take its place? Will it be regressive? Will it fall disproportionately on people of color? Can we enlist allies in other disciplines to argue that perhaps the revenue does not need to be replaced at all?

(citing NAT'L STUDY COMM. ON DEF. SERVS., NAT'L LEGAL AID & DEF. ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (BLACK LETTER), GUIDELINE 1.7 (1976), <http://www.nlada.org/defender-standards/guidelines-legal-defense-systems/black-letter> [<https://perma.cc/GT86-9JNS>]).

2. See Theresa Zhen, (*Color*)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 201, 205 (describing difficulties of proving financial circumstances, particularly for low-income people); cf. MYESHA BRADEN, LEAH WATSON, TALIA GILBERT & JASON ENOS, LAW.'S COMM. FOR C.R. UNDER L., TOO POOR TO PAY: HOW ARKANSAS'S OFFENDER-FUNDED JUSTICE SYSTEM DRIVES POVERTY & MASS INCARCERATION, <https://lawyerscommittee.org/executive-summary/> [<https://perma.cc/B7KN-2RZ3>] (last visited Apr. 25, 2021) (describing challenges of proving inability to pay in Arkansas courts such as the absence of guidance on what evidence is needed, as well as judges' broad discretion to consider irrelevant information). See generally Daniel Bernal, Note, *Taking the Court to the People: Real-World Solutions for Nonappearance*, 59 ARIZ. L. REV. 547 (2017) (discussing the challenges that individuals face in coming to court for hearings and other proceedings).

The best the way to ensure that advocates address all of these concerns is to involve from the outset the individuals, families, and communities most impacted by the fines and fees regime. They have to be at the table. We must look to impacted communities to set priorities and ask whether a proposed reform is workable or whether it may do more harm than good. Importantly, we also have to provide the financial support and other resources that will allow communities to participate actively in this work.

That’s the approach that my organization Fines and Fees Justice Center has taken.³ Fines and Fees Justice Center is the only national organization focused exclusively on fines and fees. Our mission is to eliminate all fees in the criminal legal system, and to make fines proportionate to the offense and to an individual’s financial circumstances. We are developing replicable models for reform in four different states—Florida, New York, New Mexico, and Nevada—where we have staff on the ground working with impacted communities, and where we provide funding to impacted individuals and organizations so that they can participate fully with us.⁴ We also organize and lead national campaigns like *Free to Drive*—a national campaign to end debt-based driver’s license suspensions everywhere in the United States. In addition, we work with organizations throughout the country many of whom you’ve heard from over the course of the Symposium, and whose work is found within this Issue, to provide strategic assistance, resources, and tools for their campaigns. And finally, we have an online clearinghouse that gathers in one easily accessible database research, litigation, legislation, guidance, and tools—all related to fines and fees reform.⁵

Progress has been made. We have seen fourteen states reform their driver’s license suspension practices over the last two years; we have seen some states and several local jurisdictions—cities and counties—eliminate fees; and we have seen the practice of jailing people for unpaid fines and fees end in many parts of the country. Gatherings like this Symposium give me hope. We may not have a Hercules among us, but working together across disciplines and with impacted communities, we can slay the Hydra.

3. See FINES & FEES JUST. CTR., <https://finesandfeesjusticecenter.org/> [<https://perma.cc/NS3D-CWX2>] (last visited Feb. 23, 2021).

4. *Campaigns*, FINES & FEES JUST. CTR., <https://finesandfeesjusticecenter.org/campaigns/> [<https://perma.cc/R8T5-B3JM>] (last visited Feb. 23, 2021).

5. *The Clearinghouse*, FINES & FEES JUST. CTR., <https://finesandfeesjusticecenter.org/clearinghouse/?sortByDate=true> [<https://perma.cc/8YL3-PEN3>] (last visited Feb. 23, 2021).

