

2021

Debt to Society: The Role of Fines & Fees Reform in Dismantling the Carceral State

Wesley Dozier
Just City

Daniel Kiel
University of Memphis

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Recommended Citation

Wesley Dozier & Daniel Kiel, *Debt to Society: The Role of Fines & Fees Reform in Dismantling the Carceral State*, 54 U. MICH. J. L. REFORM 857 (2021).

Available at: <https://repository.law.umich.edu/mjlr/vol54/iss4/4>

<https://doi.org/10.36646/mjlr.54.4.debt>

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DEBT TO SOCIETY: THE ROLE OF FINES & FEES REFORM IN DISMANTLING THE CARCERAL STATE

Wesley Dozier & Daniel Kiel*

ABSTRACT

Fines and fees that result from contact with the criminal legal system serve as a suffocating debt for those against whom they are assessed. Many states have countless laws that require taxes, fines, and fees to be assessed against individuals involved in the criminal legal system at various stages of the criminal legal process, and they have the effect of permanently trapping individuals within the system. In Tennessee, for example, these debts, which can accumulate to over \$10,000 in a single criminal case, stand in the way of individuals getting their criminal records expunged, keeping valid driver's licenses, and restoring their voting rights, among other things. However, as in many other states, Tennessee's legislature is decidedly hostile to the poor (particularly when poor people's issues compete with the perceived financial health of government entities), and the urgency of the problem cannot wait for unwilling lawmakers to realize the change that thousands of people need. Using Tennessee as a case study and drawing on the author's experiences working within the State's system, this Article considers ways to effectively advocate for the elimination of court debt as a punishment for poverty. First, it provides an abbreviated history of court debt and explains how that history still impacts individuals today. This Article also draws upon the author's experiences representing individuals in court, appearing before judges, and collaborating with other stakeholders to show the difficulty of achieving a state-wide movement for reform in Tennessee's current political climate, a problem not unique to this state. Finally, the Article concludes by discussing how local actors can work within current legal frameworks to protect people from extortionist fine and fee policies and limit the harmful growth of the criminal legal system.

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* Wesley Dozier, Equal Justice Works Fellow, Just City; Daniel Kiel, Professor of Law, University of Memphis.

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INTRODUCTION

Mr. Smith is an African-American man living in Memphis, Tennessee. He lives with his three children and girlfriend, all of whom he supports financially. Unfortunately, because of a charge that Mr. Smith picked up in his early twenties, he was fired by his employer, a local insurance company. The manager at the insurance company explicitly told Mr. Smith that she would rehire him if he could get this charge off of his record. Fortunately for Mr. Smith, the charge on his record—theft of property, \$500 or below—is one that can be removed under Tennessee state law. In this regard, Mr. Smith is one of relatively few people who have criminal charges that are expungement-eligible.¹ To get the charge removed from his record, however, Mr. Smith would have to pay more than \$10,000, the total amount of fines and fees assessed against him as a result of his criminal charge and the subsequent criminal process. This, for a theft of less than \$500.

In this respect, Mr. Smith is far from alone. In Tennessee and across the country, individuals who come into contact with the criminal legal system are required to pay exorbitant sums of money after the completion of their criminal punishments.² These fees stand apart from and in addition to any punishment imposed, financial or otherwise. In Tennessee, no assessment is made as to whether the individual is able to pay before these fines and fees are applied.³ While the state, under the Fourteenth Amendment's Equal Protection Clause, ostensibly cannot put

1. See TENN. CODE ANN. § 40-32-101 (2021) (illustrating a severely limited list of eligible Class E felonies and strict requirements for eligibility after a certain date, while remaining silent as to waiting periods for eligibility, fees an individual must pay, and the number of offenses one can have).

2. See Neil L. Sobol, *Charging the Poor: Criminal Justice Debt and Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 508 (2016) (noting that “[c]ourts have imposed legal financial obligations on [66%] of felons sentenced to prison, and more than [80%] of other felons and misdemeanants.”) (quoting Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 515 (2011)).

3. See JENNIFER BARRIE, TYLER CARPENTER, LEAH ELDRIDGE & TERESA GIBSON, TENN. ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., TENNESSEE’S COURT FEES AND TAXES: FUNDING THE COURTS FAIRLY 27–28 (2017), https://www.tn.gov/content/dam/tn/tacir/documents/2017_CourtFees.pdf [<https://perma.cc/Y4NK-W4WH>] [hereinafter TENNESSEE FINES & FEES REPORT].

someone like Mr. Smith in jail for his failure to pay,⁴ many states have found loopholes to this constitutional bar, such as contempt of court charges.⁵ Additionally, there remains a host of negative repercussions that flow from having outstanding court debt, as if the criminal punishment itself was not enough. In Tennessee, individuals with outstanding court debt cannot get their criminal records expunged,⁶ cannot vote,⁷ and can have their licenses suspended.⁸ Additionally, commercial databases allow businesses, such as apartment leasers, to search and discover people's criminal histories and, thus, discriminate against them on that basis. The consequences of this practice are immeasurable.⁹

For the past year, I¹⁰ have worked on the issue of court debt as a result of contact with the criminal legal system in Memphis as an Equal Justice Works¹¹ fellow at Just City.¹² My work approaches the issue from multiple angles, including representing individuals in court by bringing petitions to have their fines and fees waived. In fact, Mr. Smith was a client of mine.¹³ He diligently sought out my services, and we successfully petitioned the court to waive almost all of his court debt. His record has now been expunged, and he has moved on with his life. While this is a good

4. See *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970); *Bearden v. Georgia*, 461 U.S. 660, 666–69 (1983).

5. ALEXANDRA BASTIEN, POLICYLINK, ENDING THE DEBT TRAP: STRATEGIES TO STOP THE ABUSE OF COURT-IMPOSED FINES AND FEES 3 (2017), <https://www.policylink.org/sites/default/files/ending-the-debt-trap-03-28-17.pdf> [<https://perma.cc/A9VG-YLKB>].

6. See § 40-32-101.

7. TENN. CODE ANN. § 40-29-202 (2021). With regard to voting, the Eleventh Circuit ruled that the Constitution was not violated by requiring individuals to pay fines and fees before having voting rights restored despite a state constitutional amendment in Florida easing restoration. *Jones v. Governor of Florida*, 975 F.3d 1016, 1080–81 (11th Cir. 2020) (citing *Johnson v. Bredesen*, 624 F.3d 742, 746–50 (6th Cir. 2010)); see also *Thompson v. Merrill*, No. 16-CV-783, 2020 WL 7080308, *21–22 (M.D. Ala. Dec. 3, 2020) (granting summary judgment in favor of state on plaintiffs' wealth discrimination claim on lines consistent with *Jones*).

8. TENN. CODE ANN. § 40-24-105 (2021).

9. See Vidhi S. Joshi, *Sentenced to Debt: The True Cost of Raising Revenue Through Tennessee's Criminal Court*, 53 TENN. BAR J. 18, 20–21 (2017) (listing various repercussions of court debt in Tennessee).

10. First person narrative throughout the Article references author Wesley Dozier's experiences.

11. See *Become a Fellow: Follow Your Passion for Equal Justice*, EQUAL JUST. WORKS, <https://www.equaljusticeworks.org/become-a-fellow/> [<https://perma.cc/5LPU-66AM>] (last visited Mar. 28, 2021) (“Candidates for an Equal Justice Works Fellowship can create a Fellowship project of their own design or can apply to join an established Fellowship program dedicated to serving a specific population or addressing an unmet legal need.”).

12. *Our Mission*, JUST CITY MEMPHIS, <https://justcity.org/about/> [<https://perma.cc/GL4K-JPV4>] (last visited Mar. 28, 2021) (“Our mission is to advance policies and programs within Shelby County and the State of Tennessee that strengthen the right to counsel and mitigate the damage caused to families and neighborhoods as a result of contact with the criminal justice system.”).

13. Name changed for the purposes of this article.

outcome for Mr. Smith, the complexity and arbitrariness of this process reveals deep flaws in how fines and fees prevent those who have completed their punishment from fully returning to society.

The other part of my work focuses on pushing for policy change. I strategize with other stakeholders on policy initiatives that can be implemented in Tennessee, or at least in Shelby County, to avoid burdening individuals who cannot afford to pay their court debt. In a state like Tennessee, however, where the legislature has increased financial burdens on the criminalized poor¹⁴ and has not shown enthusiasm for legislation that would aid those in poverty,¹⁵ a state-wide initiative to change the substantive law regarding fines and fees is a nonstarter.¹⁶ As a result, debt-burdened individuals and their advocates are left fighting local battles and skirmishes in individual courtrooms. Our policy efforts focus on the discretion that individual judges have to waive these costs.¹⁷ We also deliberate on more creative solutions to the problem, seeking out local partners interested in helping people pay otherwise insurmountable court costs.

In this Article, I will reflect on my and other advocates' efforts over the past year to relieve some of the most vulnerable members of our community of the burden of criminal court debt. My perspective highlights both the struggle to push for changes in policy under conditions where the change we seek is unlikely, and the creative alternatives we rely on to provide relief for vulnerable people. I will start with an overview of the fines and fees policies in Tennessee to provide some historical grounding and a glimpse into what these policies mean for individuals and government entities today. Then, I will turn to solutions that I and others have tried, and are trying, with hopes of relieving individuals of their court debt burdens.

14. TENNESSEE FINES & FEES REPORT, *supra* note 3, at 2 (discussing increasing costs between 2005–2017).

15. See, e.g., Joel Ebert, *Republican-Sponsored Medicaid Expansion Bill Halted for the Year in Tennessee Legislature*, TENNESSEAN (Mar. 11, 2020, 5:16 PM), <https://www.tennessean.com/story/news/politics/2020/03/11/tennessee-medicaid-expansion-bill-halted-year-ron-travis/5024454002/> [<https://perma.cc/B9SK-7SN3>] (highlighting a failure to expand Medicaid); *State Minimum Wage Laws, Tennessee*, U.S. DEPT LABOR, <https://www.dol.gov/agencies/whd/minimum-wage/state#tn> [<https://perma.cc/XVE2-BH9QJ>] (last updated May 1, 2021) (noting a lack of state minimum wage law).

16. Rather than decreasing legal financial obligations, Tennessee has instead passed more than sixty statutes to institute new fees or increase existing fees and taxes for criminal cases. See TENNESSEE FINES & FEES REPORT, *supra* note 3, at 119 (listing each statute passed between 2005 and 2017); see also Tenn. H.B. 0880, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017) (unenacted legislation that would have established the court fee and tax advisory council), <https://finesandfeesjustice-center.org/articles/tennessee-house-bill-880-creates-the-court-fee-and-tax-advisory-council/> [<https://perma.cc/F4KC-DWHR>].

17. Joshi, *supra* note 9, at 21 (“Tennessee statutes provide judges with full discretion to determine whether a person is entitled to a reduction or waiver.”).

I. FINES & FEES IN TENNESSEE

Rising fines and fees is a phenomenon that has occurred across the country.¹⁸ As more people have been ensnared in the grips of the criminal legal system's hold, states have scrambled to sufficiently resource these systems to accommodate increased "use."¹⁹ This is true in Tennessee.²⁰ Between 2005 and 2017, the Tennessee General Assembly passed forty-six bills that increased the amount of debt owed by individuals who make contact with the criminal legal system.²¹ These increases have taken the form of taxes, fines, and fees.²² Taxes are set amounts imposed with the purpose of raising government revenue.²³ Fines are "monetary penalties for violations of the law."²⁴ Fees are "moneys paid for services rendered by court or law enforcement personnel."²⁵

Court debt is triggered at various phases of the criminal legal process, becoming due at the case's disposition. For example, a person that is pulled over in Tennessee is assessed a five-dollar fee if they receive a

18. Sobol, *supra* note 2, at 519–20; Bastien, *supra* note 5, at 2; Judith Resnick & David Marcus, *Inability to Pay: Court Debt Circa 2020*, 98 N.C. L. Rev. 361, 363 (2020); see also ACLU, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [<https://perma.cc/8GXX-GM7T>] (profiling the proliferation of legal financial obligations in five states). Other jurisdictions have seen policy efforts aimed at reducing such debt, such as San Francisco and Alameda County, California, which have eliminated local government fees, and New Orleans, which has eliminated fees within its juvenile justice system. In 2018, Metro Nashville eliminated its daily jail fee and daily pretrial release fee. Samantha Max, *Report Urges Nashville to Cut Back on Criminal Justice Fines and Fees*, WPLN News-Nashville Pub. Radio (Nov. 5, 2020), <https://wpln.org/post/report-urges-nashville-to-cut-back-on-criminal-justice-fines-and-fees/> [<https://perma.cc/7YK7-TCUR>].

19. In its investigation into the police department of Ferguson, Missouri, in the wake of the shooting of Michael Brown, the U.S. Department of Justice lamented the use of the police department as a source of revenue generation. C.R. DIV., U.S. DEP'T OF JUST., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–12* (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/5PVY-LHM3>]; see CTR. FOR JUST. & SAFETY FIN., *REDUCING RELIANCE ON CRIMINAL FINES & FEES 6* (2020), https://static1.squarespace.com/static/5f0735ceb487f10af7ea8372/t/5fa45f0e5ffd6d20eca39e3d/1604607760901/Fines+and+Fees_Final+Report_Nashville-Davidson+County.pdf [<https://perma.cc/7YJU-365H>] [hereinafter *NASHVILLE FINES & FEES REPORT*] (noting a 2018 National League of Cities Report that states, "[a]s has been the case for much of the past two decades, the most common action taken to boost city revenues, regardless of broader economic trends, has been to increase fees charged for services.").

20. *TENNESSEE FINES & FEES REPORT*, *supra* note 3, at 2.

21. *Id.*

22. *Id.* at 12.

23. *Id.*

24. *Id.*; see TENN. ADVISORY COMM. TO THE U.S. COMM'N ON C.R., *LEGAL FINANCIAL OBLIGATIONS IN THE TENNESSEE CRIMINAL JUSTICE SYSTEM 4–5* (2019), <https://www.usccr.gov/pubs/2020/01-15-TN-LFO-Report.pdf> [<https://perma.cc/JE6K-8PKA>] (providing an overview of fines and fees in Tennessee) [hereinafter *LFOs IN THE TENN. CRIM. JUST. SYS.*].

25. *TENNESSEE FINES & FEES REPORT*, *supra* note 3, at 12.

traffic citation resulting in a conviction under TCA § 55-10-207, a fee birthed out of one of the forty-six bills passed between 2005-2017 that increased or added new court fees and taxes.²⁶ Though the five dollars assessed is relatively little compared to other fines, fees, and taxes assessed, it is only the first drop in the bucket of court debt that will accrue over the life of a case. Defendants that have been jailed pre-trial are assessed jail fees,²⁷ which toll daily.²⁸ Some types of criminal charges incur fees if the defendant is found guilty or pleads guilty.²⁹ Clerk fees are assessed on each defendant's case.³⁰ In some jurisdictions, fees are charged when indigent defendants secure the assistance of a public defender.³¹ Fees are even charged for a defendant to get her criminal record expunged.³² At every turn in this criminal process—from the first step of receiving a citation to the very last step of getting a conviction removed from one's criminal record—the assessment of fines, fees, and taxes is triggered. These amounts can be small, like the five-dollar fee assessed for receiving a citation, or they can be large, like the seventy-five-dollar fee assessed for pleading or being convicted of certain drug crimes. Even the most minor offense can burden a defendant with a substantial amount of court debt.³³

A. *Measuring the Scope of Fines and Fees*

The Tennessee Code describes the amounts of fees, taxes, and fines, as well as when they are applied and how they should be distributed.³⁴

26. TENN. CODE ANN. § 55-10-207(e)(1) (2021); TENNESSEE FINES & FEES REPORT, *supra* note 3, at 2, 38.

27. TENN. CODE ANN. § 8-26-105 (2021).

28. Item No. 21, Shelby Cnty. Comm'n, A Resolution to Fix the Jailer's Fee of Shelby County, Tennessee and to Establish a Budgetary Funding Method for the County Jail in Lieu of Fees for Individual Prisoners (Apr. 7, 1997) (on file with author); *see* Samantha Max, *supra* note 18.

29. *See, e.g.*, TENN. CODE ANN. § 16-22-109 (2021) (for fees specific to drug-related offenses).

30. TENN. CODE ANN. § 8-21-401 (2021).

31. TENN. CODE ANN. § 40-14-210 (2021).

32. TENN. CODE ANN. § 40-32-101(a)(1)(B), (i) (2021) (giving authority to local clerks to set and charge expungement fees). While the state eliminated some of its expungement fees, local clerks are still allowed to set and charge their own fees. *See* 2019 Tenn. Pub. Acts 200.

33. TENNESSEE FINES & FEES REPORT, *supra* note 3, at 3 ("Even for a relatively minor offense such as driving with a revoked, suspended, or canceled license, the costs charged in general sessions criminal court could include up to 17 separate fees and taxes totaling a minimum of approximately \$112 to over \$300."). *See* Elizabeth Forester, *Impact of Criminal Justice Debt on Indigent Defendants in Tennessee*, 61 WASH. U. J.L. & POL'Y 253, 264–65 (2020) (providing a list of various types of fees in Tennessee).

34. *See, e.g.*, TENN. CODE ANN. §§ 8-21-401, 40-14-210, 40-32-101, 55-10-207 (2021).

Keeping track of the breadth of this practice, however, is difficult.³⁵ Neither the State of Tennessee nor its counties have a standardized or reliable way of calculating how much revenue each county brings in from court costs or the extent to which these costs fund the courts.³⁶ One county report, however, gives a helpful glimpse into just how much revenue is generated by court costs. In 2018, the Shelby County General Sessions Court-Criminal Division, one of the largest General Sessions Courts in the state, brought in \$6,106,644.48 from taxes, fines, and fees.³⁷ This information is obviously helpful for what it shows—the total amount of revenue that this particular county court generated from court debt in 2018. But it is also telling for what it does not show. Across the state, there is limited data demonstrating the total amount of court debt that has been assessed against individuals that have contact with the criminal legal system.³⁸ Thus, it is not apparent how much \$6 million in 2018 is relative to the presumably larger amount of court debt owed.

The limited statewide data that do exist similarly suggest that the amount of court debt paid pales in comparison to the amount assessed. A 2016 survey of court clerks in Tennessee asked the clerks for the amount of court debt assessed and receipted in their courts.³⁹ The results revealed that only an estimated 45% of debt from the criminal division of general sessions courts across the state was actually collected.⁴⁰ It is estimated that between the criminal division of the general sessions courts, the state Criminal Court, and the state Juvenile Court,⁴¹ only 30% of all criminal debt was actually collected.⁴² A 2011–2012 report on court fees, fines, and costs suggested that the percentage yielded on court

35. TENNESSEE FINES & FEES REPORT, *supra* note 3, at 18; *see also* NASHVILLE FINES & FEES REPORT, *supra* note 19, at 2 (“The result of this complex system is that most governments do not know the total number and dollars of fines and fees assessed, collected, and distributed in their criminal justice system.”).

36. TENNESSEE FINES & FEES REPORT, *supra* note 3, at 18.

37. SHELBY CNTY. GEN. SESSIONS CT., CRIM. DIV., MONTHLY FEES FY2018 (2018) (on file with author).

38. *See* TENNESSEE FINES & FEES REPORT, *supra* note 3, at 18, 35. One report estimated an outstanding balance of debt owed to the Shelby County Criminal Court as high as \$555 million from 1995–2015.

39. *Id.* at 35.

40. *Id.*

41. In Tennessee, the criminal division of the General Sessions Court is a statutorily authorized court that handles certain parts of felony cases and adjudicates misdemeanor cases. The state circuit courts are constitutionally created courts of general jurisdiction that handle criminal cases. TENN. CODE ANN. §§ 16-10-101, 16-15-401 (2021); TENN. CONST. art. VI, § 1; *About General Sessions Courts*, TENN. STATE CTS., <https://www.tncourts.gov/courts/general-sessions-courts/about> [<https://perma.cc/R5WL-CYJN>] (last visited May 18, 2021).

42. TENNESSEE FINES & FEES REPORT, *supra* note 3, at 35 (citing Appendix J at 149–63).

costs assessed was even lower.⁴³ That report details that out of a little over \$39 million assessed, the Shelby County Criminal Court received only about \$2.5 million, a mere 6%.⁴⁴ Marginally better, the Shelby County General Sessions Court-Criminal Division assessed almost \$29 million on individuals and only received about \$6 million, or around 21%.⁴⁵ Overall, the State of Tennessee assessed a grand total of \$259,293,424.81 in criminal court (general sessions-criminal division, criminal court, and juvenile court) costs in 2011–2012 and received \$77,649,708.47 in payments, a 29.95% yield.⁴⁶ Despite the absence of systematic reporting across the state, the data that does exist overwhelming supports the claim that Tennessee’s criminal courts are assessing large sums of money on its residents and that the state is collecting a substantial amount, though only a fraction of what has been assessed.⁴⁷ These residents, as Section C shows, are most often those who cannot afford additional debt.⁴⁸

B. *Evaluating the Underlying Purpose of Imposing Fines and Fees*

The abysmal return rates that local courts experience highlight the failure of assessing court costs on individuals as a policy and a practice. State legislatures justify placing this massive debt burden on their citizens with the idea that those individuals who “use” the criminal legal system should bear some of the costs associated with its “use.”⁴⁹ The past forty years have seen a massive increase in the use of fines and fees within the criminal legal system. That growth has been explained by financial stresses on the system coming from two directions. On one hand, mass incarceration has substantially increased the number of individuals in prison or otherwise ensnared in the system, thus increasing costs to states. At the same time, state and local budgets have been squeezed, leaving policymakers in search of alternative forms of revenue.⁵⁰ So-called offender-based funding has been utilized to close the gap.⁵¹

43. *Id.* at 163; see also NASHVILLE FINES & FEES REPORT, *supra* note 19, at 8 (noting that Metro Nashville General Sessions and Criminal Court judges waived 56% of assessed fines and fees in FY2018, up from 34% in FY2015).

44. TENNESSEE FINES & FEES REPORT, *supra* note 3, at 161.

45. *Id.*

46. *Id.*

47. See TENNESSEE FINES & FEES REPORT, *supra* note 3, at 161–63.

48. See *Id.*

49. BASTIEN, *supra* note 5, at 3.

50. See Sobol, *supra* note 2, at 508–09.

51. Sobol, *supra* note 2, at 509 n.191 (citing reports from the ACLU and Human Rights Watch).

According to Human Rights Watch, some localities expect their criminal court operations to be fully funded through fines and fees extracted from the very individuals caught up in the system.⁵²

Fees, in particular, skyrocketed. Between 1991 and 2004, the percentage of individuals with felony convictions who were assessed fees increased from approximately 10% to over 50%.⁵³ These fees take a wide variety of forms and are assessed by agencies throughout the system, but they are consistent in their justification as a cost-shifting scheme. For example, Ohio's "pay-to-stay" program, which charges individuals housed in Ohio prisons something akin to room and board, has been promoted as a way to "offset the costs associated with the housing of [offenders]."⁵⁴ Shifting funding from the state to offenders themselves was said to recognize "the importance of offender accountability" and relieve the "increasing tax burden on the citizens of Northwest Ohio" caused by mass incarceration.⁵⁵

It is not difficult to see the political attractiveness of programs like that in Ohio. Rather than raising revenue through taxes or shifting resources from other government programs, lawmakers can simply make those already ensnared in the system foot the bill. At least in theory, this cost-shifting transfers the financial obligations of mass incarceration onto those populations that constituents are told are the primary cause for it: offenders themselves. This temptation is compounded by the fact that so many of those labeled as offenders have their voting rights suspended, potentially making them politically invisible to elected lawmakers. In sum, moving to a "user-funded" model for the criminal legal system purports to solve a fiscal problem, has political advantages, and is far easier to sell to constituents than alternatives. The entire premise, however, is flawed.

C. *Upending the Justification for Imposing Fines and Fees*

To describe individuals who make contact with the criminal legal system as "users" misunderstands how the criminal legal system functions from beginning to end. In Tennessee, an estimated 75% of people

52. Human Rts. Watch, *Profiting for Probation: America's "Offender-Funded" Probation Industry* (Feb. 5, 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry> [<https://perma.cc/LDD7-KEGH>].

53. Sobol, *supra* note 2, at 510 (citing Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1756 (2010)).

54. Katherine Porter, A "Debt" to Society?: *Reassessing the Constitutionality of Pay-to-Stay Programs in Ohio's Jails and Prisons*, 44 OHIO N. UNIV. L. REV. 415, 417 (2018).

55. *Id.*

charged with criminal offenses are indigent.⁵⁶ Additionally, African Americans are overrepresented in Tennessee's criminal legal system.⁵⁷ These same communities are also over-surveilled and over-policed, leading them to have more contact with the criminal legal system.⁵⁸ Thus, the "user-funded" model does not rightfully place costs on those who are processed through the system, because those who are processed through the system are most often targeted by said system. In this way, the "user-funded" model simply perpetuates the disparities that are widely known to exist in the criminal system: by putting vulnerable people in a more precarious condition by burdening them with court debt that they cannot pay.⁵⁹

The data also support this conclusion. Individuals that have court debt assessed against them experience life-altering consequences as a result of nonpayment. Tennesseans with outstanding court debt cannot have their criminal records expunged.⁶⁰ Additionally, individuals with outstanding court debt cannot have their voting rights restored,⁶¹ and can have their driver's licenses revoked.⁶² Ironically, many of these consequences, specifically ineligibility for expungement and driver's license suspension, only perpetuate the difficulty those with criminal records have in reentering society.⁶³ If the State of Tennessee wants individuals to pay court costs, those individuals need jobs that will provide them with the financial resources that will enable them to pay their court debt. With convictions on their criminal records, however, it is very difficult for people to find jobs that will provide them with enough income to pay their bills, let alone their court costs.⁶⁴ In my work, I have encountered

56. TENNESSEE FINES & FEES REPORT, *supra* note 3, at 30.

57. *Tennessee Profile*, PRISON POLY INITIATIVE, <https://www.prisonpolicy.org/profiles/TN.html> [<https://perma.cc/GV92-M95U>] (last visited May 5, 2021).

58. See SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/BSQ6-36LC>]; see also Joshi, *supra* note 9, at 20 (noting that African Americans are 4.5 times more likely to be arrested and 3.7 times more likely to be incarcerated than white individuals in Tennessee, an arrest disparity that is larger than nearby states).

59. See BASTIEN, *supra* note 5, at 2. The Nashville Fines & Fees Report describes this as a policy of "High Pain, Low Gain," because the revenue generated is relatively small, while the burden on individuals and families of outstanding debt is significant. NASHVILLE FINES & FEES REPORT, *supra* note 19, at 11.

60. TENN. CODE ANN. § 40-32-101 (2021).

61. TENN. CODE ANN. § 40-29-202 (2021).

62. TENN. CODE ANN. § 40-24-105 (2021).

63. See LFOs IN THE TENN. CRIM. JUST. SYS., *supra* note 24, at 16. See generally *Robinson v. Purkey*, No. 17-cv-01263, 2018 WL 5023330, at *7 (M.D. Tenn. Nov. 5, 2018), *rev'd and remanded sub nom.*, *Robinson v. Long*, 814 F. App'x 991 (6th Cir. 2020).

64. See LFOs IN THE TENN. CRIM. JUST. SYS., *supra* note 24, at 13–17 (detailing findings of an investigation into the consequences of outstanding fees and debt on individuals attempting to re-enter society after contact with the criminal justice system).

countless people who are eligible for expungement under Tennessee's expungement statute but are barred from expungement because of the exorbitant costs that stand in their way. Additionally, suspending a person's driver's license for their inability to pay court debt confounds logic, especially in a state like Tennessee where walking is not a viable option to get to most destinations and the public transportation infrastructure is unreliable.⁶⁵ A federal judge acknowledged as much about Tennessee's former (and harsher) driver's license suspension law:

What a suspension does do, however, is impose a significant material hardship on the driver that is likely to make him less able to develop the resources and, if possible, the economic self-sufficiency necessary to pay the underlying debt. Suspending the driver's license of an indigent person because he has failed to pay his traffic debt is not only wholly ineffective, but powerfully counterproductive.⁶⁶

The consequences that individuals with outstanding court debt face are not trivial. There is certainly enough motivation to pay off the debt. Because of this, the low rates of return in court debt across the state seem to suggest that inability to pay is a more likely cause of nonpayment than sheer unwillingness. That the great majority of individuals who cycle through the criminal legal system are poor is further evidence that the obstacle of inability to pay plays a central role in the phenomenon of widespread nonpayment.⁶⁷ This troubles the states' justification for assessing these costs on citizens altogether. Such low rates of return relative to the amounts actually assessed call into question the notion of court debt as the reliable source of revenue that it was ostensibly created to be. This is not to say that these small rates of return are always insignificant dollar amounts. To the contrary, in large counties, such as Shelby County, low returns still generate revenue in the millions of dollars.⁶⁸ The cost, however, of this practice is more significant. Saddling individuals with debt that they are unable to pay and subsequently

65. See *Robinson*, 2018 WL 5023330, at *7.

66. *Id.* In partial response to the *Robinson* litigation, Tennessee amended its driver's license revocation statute in July 2019, though it did not eliminate all circumstances in which licenses might be revoked for failure to pay. See Forester, *supra* note 33, at 261–62.

67. Joshi, *supra* note 9, at 19 (noting that 75% of individuals prosecuted in Tennessee are indigent and unlikely to pay off their debt); Forester, *supra* note 33, at 259 (noting a 2015 local investigative news report that showed one Tennessee County collected nearly \$6 million in fees and fines but had an outstanding balance of \$555 million); NASHVILLE FINES & FEES REPORT, *supra* note 19, at 12 (noting that it took on average four years for individuals to complete payment).

68. *E.g.*, TENNESSEE FINES & FEES REPORT, *supra* note 3, at 161; see also NASHVILLE FINES & FEES REPORT, *supra* note 19, at 13.

holding their lives hostage for their inability to pay is a heavy burden for citizens to bear, hardly justified by money received in government coffers. Disrupting this practice is an important step toward divesting from a parasitic, ever-growing criminal legal system weaponized to further oppress the poor.

II. STRATEGIES FOR RELIEF

Structural change in Tennessee's current system of assessing court costs must come from the Tennessee General Assembly. All of the laws that require the assessment of court costs or that allow local governments to assess court costs are products of that legislative body.⁶⁹ Unfortunately, while the General Assembly has demonstrated concern about persistently rising court costs, their concern has not been followed up by any change in the substantive law.⁷⁰ To the contrary, the changes they have made over the past two decades have only increased the court costs assessed on individuals, particularly those in Tennessee's criminal court system.⁷¹ Saddled with these costs, Tennesseans are left with very few alternatives to free themselves from these often-massive—especially to the poor—debt burdens. Advocates for these issues have thus turned to more local strategies for finding relief for individuals affected by these laws. This Article discusses two such strategies: (1) partnering with other interested stakeholders to relieve individuals of their court debt, and (2) leveraging judicial discretion to waive court debt.

A. Community Partnership

Some of my clients have found relief through funds specifically created to pay individuals' court debt. These funds directly pay qualified individuals' costs with the ultimate goal of expunging the individuals' records. The City of Memphis ran one of these funds, limited to individuals that met their program-specific criteria.⁷² The program succeeded in

69. See TENNESSEE FINES & FEES REPORT, *supra* note 3, at 2.

70. See *id.* at 1–2.

71. See TENNESSEE FINES & FEES REPORT, *supra* note 3, at 1–2; Joshi, *supra* note 9, at 19–20 (summarizing legislative action on this front and arguing that “the state’s utilization of people in the criminal system to fund courts and state budgets not only ties successful re-entry back to society to wealth rather than rehabilitation, but it also engenders a system that creates revenue for the greater public good at the expense of poor, minority populations.”).

72. SHELBY CNTY. GOV'T EX REL. GEN. SESSIONS CT. CLERK'S OFF. & CITY OF MEMPHIS, INTERAGENCY MEMORANDUM OF UNDERSTANDING (Dec. 20, 2018) (on file with author); CITY OF MEMPHIS CITY COUNCIL MLK50 WORKSHOP, DRIVER'S LICENSE REINSTATEMENT AND DIVERSION FEE PROGRAM (Mar. 28, 2018) (on file with author).

helping individuals pay their court costs. I often referred some of my own clients to this program when they could not, or were unlikely to, get the relief they sought through judicial waiver. For example, one of my clients with over \$1,500 in unpaid court debt was able to use this fund when his judge was willing to waive the debt only after he paid around \$300. This highlights the predatory nature of court debt, the failure of the mechanism of judicial discretion, and the importance of alternatives (such as relief funds) to help individuals burdened by court debt.

Sustainability is an obstacle for this solution. Programs of this type only work when there is enough money to pay off people's court debt. When these funds dry up, however, individuals are left with few alternatives. For this reason, funds of this sort might limit the amount that they are willing to pay for an individual. The City of Memphis' fund did this, and only accepted applicants with costs at or below \$1,200.⁷³ While these limits help to get as many people into the program as possible, they exclude a significant number of people whose costs exceed their cap, such as my client Mr. Smith. Additionally, these funds will inevitably dry up unless they are continuously replenished. This happened with the City of Memphis' fund. Now, my clients that meet the program criteria and are unable to get a judicial waiver have nowhere else to turn for relief from their court debt.

This short-lived program provides an important lesson: individuals can receive the debt relief they seek if other individuals or entities who have the ability to provide that relief view their interests as aligned with the cause. While the State of Tennessee is, at this point, unwilling to provide relief to the many people suffering under its anti-poor legislation, the City of Memphis saw the value in its citizens no longer being burdened by court debt. Creating a fund to relieve citizens of the burden of their court debt helped people to free themselves from the grips of the criminal legal system, giving the city more unencumbered workers and eligible voters and fewer drivers on the streets with suspended licenses. If the funding existed to scale up these programs, it could have a tremendous aggregate impact and provide much-needed relief for more individuals. Getting more funding for programs like this requires highlighting the harms that court costs have on individuals and the benefits that relieving those individuals of their court debt would have for the community.

While this type of interest alignment and community partnership would benefit community members saddled with court debt, it is important to recognize the costs of the State of Tennessee's fines and fees policy. That these programs are even necessary confounds the logic of a "user-funded" system and reveals the emptiness of the broader practice

73. CITY OF MEMPHIS CITY COUNCIL MLK50 WORKSHOP, *supra* note 72.

of assessing fines and fees on a population that is disproportionately in poverty. Because courts impose these fees largely on “users” who are unable to pay them, other entities, such as the City of Memphis, are being used to subsidize the operation of the criminal legal system. While the City recognized the value in freeing its residents from significant debt burdens that held back lives, moving public money from one government entity to another hardly builds a compelling case for the practice of imposing fines and fees, or at least for doing so without a systematic method for removing them when payment by an individual is not possible. The same is true for community partners other than the City of Memphis. The creation of funds to free people from the burden of court debt is of great value to the debt-burdened people, but it is a troubling solution because it does not challenge the state power that is harming Tennesseans. Ultimately, the greater benefit of the introduction of other interested individuals into this issue area is the creation of more stakeholders, some with power and influence, that could push for the elimination of court fines, fees, and taxes altogether.

B. *Judicial Discretion*

A number of statutes in the Tennessee Code grant judges discretion in waiving court costs.⁷⁴ Judges are relatively unrestricted in what they can waive and when they can waive court debt.⁷⁵ Additionally, there is no avenue for appeal laid out in statute,⁷⁶ and failure to waive costs for an indigent criminal defendant is not considered an abuse of a trial judge’s discretion.⁷⁷ Thus, there is little oversight on how judges utilize this discretion. An individual petitioning the court to waive their court debt might view such unrestricted discretion as the perfect avenue for relief. It is true that a judge’s ability to waive court debt sometimes provides a promising path for many a debt-burdened petitioner.⁷⁸ This was, after all, the way that my client, Mr. Smith, was able to get his more than \$10,000 court debt waived. A fuller look at how this broad discretion is applied in Shelby County, however, reveals a lack of uniformity among

74. See, e.g., TENN. CODE ANN. §§ 40-14-202, 40-24-102, 40-24-104, 40-25-123, 39-17-428 (2021); see also *State v. Whitehead*, No. M2016-00160-CCA-R3-CD, 2016 WL 4135878, at *2 (Tenn. Crim. App., Aug. 3, 2016) (dismissing appeal of denial of request for waiver of fees).

75. See, e.g., §§ 40-14-202, 40-24-102, 40-24-104, 40-25-123, 39-17-428; see also NASHVILLE FINES & FEES REPORT, *supra* note 19, at 7.

76. See, e.g., §§ 40-14-202, 40-24-102, 40-24-104, 40-25-123, 39-17-428; see also *Whitehead*, 2016 WL 4135878, at *2 (dismissing appeal of denial of request for waiver of fees).

77. *State v. Black*, 897 S.W.2d 680, 683 (Tenn. 1995).

78. See NASHVILLE FINES & FEES REPORT, *supra* note 19, at 8 (noting that 56% of assessed fines and fees were waived by judges in FY2018).

judges and uncertainty for petitioners seeking to have their court debt waived.

Of the nineteen judges that handle criminal matters in Shelby County, I have appeared before thirteen of them to petition for waiver of my clients' court debt. While some judges liberally waive all or most of my clients' court debt with little probe into their personal finances, others waive debt only for individuals who meet very specific criteria. For example, one judge only waives petitioners' court debt if they are receiving monthly Social Security Disability payments, the rationale being that if individuals are physically able to earn an income, they will be able to pay their court costs. Another judge grants waivers only to petitioners who are veterans or current students. Generally, most judges only waive costs when they feel that the petitioner has made sufficient effort to pay off the costs, which typically requires that the petitioner pay between \$50 and \$500, depending on the total costs assessed. Because waiver hearings must take place in the courtroom through which the underlying criminal case proceeded,⁷⁹ clients with similar circumstances get dissimilar results depending on the whims of the judge before whom they petition.⁸⁰

Of the individuals at Just City found to be expungement-eligible through the Clean Slate Fund, 46% have court costs that bar them from accessing their expungement.⁸¹ Most of these candidates find out when they apply that they owe court debt that is keeping them from having their records expunged. In the past year, I have handled approximately

79. While state statutes grant judges the ability to waive court debt, local court processes prohibit cost waiver petitioners from "forum shopping" by requiring that their petitions be heard in the courtrooms out of which they originated. TENN. R. CRIM. P. 18(a) ("Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was committed."). The rigidity of this process is also notable during times when courts are closed or in-person hearings are severely restricted, like during the COVID-19 pandemic.

80. See LFOs IN THE TENN. CRIM. JUST. SYS., *supra* note 24, at 19–20. The report summarizes the inconsistent and largely ineffective procedures for an indigent defendant to receive relief from fines and fees in Tennessee: "Experts, however, pointed to the difficulty of establishing indigency status in courts. The process is neither straight-forward nor user-friendly and defendants often lack legal counsel. Courts do not have the time, information and resources to conduct individual investigations into whether a defendant can afford to pay LFOs. Further, judges vary in their willingness to waive debt, with many opting to create long-term payment plans. Commentators have observed variation in practices between urban centers and rural counties, such that the question of whether the poor have to pay—and if they do, how much—can ultimately end up becoming a matter of geography or the particular court." LFOs IN THE TENN. CRIM. JUST. SYS., *supra* note 24, at 19–20.

81. Just City calculated this percentage by using numbers in its client database. The Clean Slate Fund at Just City is a program designed to determine applicants' eligibility for expungement, help them understand the expungement process, and navigate it with them. See *Clean Slate Fund*, JUST CITY, <https://justcity.org/what-we-do/clean-slate-fund> [<https://perma.cc/NTV6-WRYJ>] (last visited May 5, 2021).

thirty-five petitions for waiver of court costs, with associated debts ranging from around \$500 to over \$10,000 per petitioner. Of these petitions, twenty-nine individuals succeeded in having all or most of their debts waived. While this is a great victory for my twenty-nine clients, they represent only a small portion of the people in need of this type of assistance. There are over 550 additional individuals that have applied to Just City's Clean Slate Fund and meet the criteria for expungement, but who nonetheless are barred from accessing their expungement due to their substantial court debts. This highlights the limitations of judicial waiver to provide mass relief under Tennessee law and court policy and the substantial need that remains unmet.

Judicial discretion, though undoubtedly beneficial for some clients, is an imperfect solution. Relying on such discretion puts clients at the mercy of the individual judge's inclinations and often removes the actual petitioner's financial capacity from the decision-making process.⁸² In this way, judicial discretion provides a remedy short of what petitioners seek and less than what the statutes' broad language is intended to provide. Still, because there is no promise of a more fundamental change in the legislation that would result in less burdensome costs for clients, aggressively utilizing judicial discretion becomes a critical path for the relief our clients seek.⁸³ In turn, it is the job of advocates to make this path a more viable option for more people.

One way of accomplishing this is through long-term strategic engagement with judges, aimed at getting more judges to waive more court debt. While I bring court cost waiver petitions in the courtroom on an individual basis, I, along with a coalition of interested stakeholders, also consider other avenues to demonstrate to judges the plight of debt-ridden individuals. While this team is only at the beginning of this engagement strategy, we have contemplated how we might ethically lobby judges to use the judicial waiver more widely across the criminal courts. Avenues through which we seek to advance this goal include continuing legal education trainings, group discussions with judges, and partnerships with other stakeholders in the community—like elected officials and members of the business community—to whom the judges are more beholden. As an advocate for clients who could benefit from effective representation before a judge, I must be mindful to ensure that alternative forms of advocacy do not negatively impact my clients. Though I am an advocate for the elimination of court debt, getting individual relief for clients is my first priority. Strategizing public pressure campaigns while

82. There are no statutory factors guiding judicial discretion in making a waiver decision. Joshi, *supra* note 9, at 21.

83. See NASHVILLE FINES & FEES REPORT, *supra* note 19, at 17 (including in its calls for action coordination by judges, clerks, and district attorneys to maximize discretion in granting waivers).

also appearing before the targets of this pressure is a delicate balance that has the potential to put my clients' relief in jeopardy. Thus, these strategies have to be considered carefully and executed intentionally to benefit individuals who are typically never benefited in the criminal legal system.

Durham, North Carolina provides an example of judicial waiver being used to provide large-scale relief to debt-burdened individuals. There, the District Attorney partnered with a community-based collaborative to have the debt of 11,000 residents waived between 2018 and 2020.⁸⁴ This significant undertaking was first initiated by the local community group Durham Expunction and Restoration Program,⁸⁵ and eventually scaled up into a larger community-wide initiative.⁸⁶ Additionally, this effort was undertaken in spite of the North Carolina legislature's disapproval of such actions.⁸⁷ In 2015, North Carolina legislators passed a statute that requires the North Carolina Administrative Office of the Courts to report how many court costs, fines, and fees are waived, by district and by judge.⁸⁸ This resulted in a sharp decline in the number of court debt waivers issued in the state.⁸⁹ Despite the State's efforts, however, Durham leaders in partnership with community stakeholders were able to get approximately \$2.7 million in court debt waived.⁹⁰ Their work is instructive for local actors in Tennessee and across the country seeking relief for clients through similar means.

CONCLUSION

Court debt is only one of many ways that the criminal legal system causes harm to individuals that make contact with it. Of course, assessed court costs and the consequences of outstanding court debt are not the harshest repercussions that the criminal legal system doles out. Still,

84. News Release: *DEAR Program Extends Court Debt Relief to 11,000 Residents with Suspended Licenses*, CITY OF DURHAM (Oct. 26, 2020), <https://durhamnc.gov/ArchiveCenter/ViewFile/Item/5003> [<https://perma.cc/UX9Y-7UM8>] [hereinafter *News Release*].

85. *About DEAR*, CITY OF DURHAM, <https://www.deardurham.org/about> [<https://perma.cc/AQQ7-3Y9B>] (last visited May 5, 2020) ("DEAR is a collaboration of local government, court, and community actors who together embrace a vision for a court system that ensures all parties, regardless of race, gender, ethnicity, sexual orientation or income, have equal access to the legal relief guaranteed by law, and vision for a city that believes in second chances.").

86. See *News Release*, *supra* note 84.

87. Melissa Boughton, *ACLU Report: NC Court Fines, Fees Create Modern-Day Debtors' Prison*, N.C. POL'Y WATCH (Apr. 17, 2019), <http://www.ncpolicywatch.com/2019/04/17/aclu-report-nc-court-fines-fees-create-modern-day-debtors-prison> [<https://perma.cc/V2W3-9P22>].

88. See N.C. GEN. STAT. § 7A-350 (2021).

89. See Boughton, *supra* note 87.

90. *News Release*, *supra* note 84.

they are consequences worth discussing, not only because they impact large numbers of people, but also because court debt has facilitated the growth of our criminal legal system and allowed for the exploitation of more people in its ambit. Imagine a system that did not seek to further complicate the lives of people in our communities, including those who themselves cause harm, but sought to address the needs of those individuals. Not only is our criminal legal system not doing this, but it is affirmatively adding obstacles that set back individuals that interact with it. One of these obstacles is court debt and its attendant prohibitions. As I continue to work to relieve clients of their individual debt burdens and change policies in the state, I also fight to create a system that meets the needs of its people, instead of creating more need.