MERCENARY CRIMINAL JUSTICE

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To some degree, money has always figured in criminal justice. Early on, private enforcers of the criminal law received payments for their work. Remuneration played a less explicit but still prominent role in the nineteenth and twentieth centuries as public actors carried out the work of criminal justice. Today, amid significant budget pressures brought on by the Great Recession and the costs of running the nation's massive criminal justice apparatus, courts and other system actors rely heavily on a growing number of legal financial obligations ("LFOs") as revenue sources. When this happens, courts and other system actors become mercenaries, in effect working on commission.

While a significant body of literature now exists on the adverse personal consequences of LFOs for offenders, this Article is the first to offer a comprehensive examination of their legal, policy, and institutional ramifications. To date, courts have provided little principled basis to regulate the risks associated with LFOs; nor have governments monitored their creation and use on a systematic basis. To mediate these risks, and to create an institutional check on LFOs, the Article proposes the use of LFO commissions. Commissions, because of their system-wide vantage point, will be able to inventory and assess the propriety of existing LFOs, and monitor their use going forward. In so doing, they will lend order and transparency to LFOs, and mitigate the risks they present to individual offenders and the integrity of the criminal justice system as a whole.

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I. INTRODUCTION

It is often said that a criminal offender owes a debt to society. Lately, though, it seems that a growing number of bill collectors are trying to cash in on that debt. Courts ask for payment of costs, corrections officials demand recovery of incarceration-related expenses, and legislatures levy surcharges for convictions. Even private, for-profit entities get a piece of the action, collecting fees for probation supervision and other services. Some of these collectors knock on the door even before a final bill is due, such as when prosecutors require suspects to pay diversion fees before charges are filed. The payment demands have become so

numerous and complex that they have earned their own acronym: LFOs, or "legal financial obligations."[1]

While it might be easy to understand the rationale for each LFO standing alone, taken together they often have debilitating consequences for individuals.[2] Today, it is not uncommon for costs, fees, surcharges, and the like to exceed the amount of restitution or fines that a defendant owes in a given criminal case.[3] Recent academic work and advocacy group studies have condemned LFOs for their economically regressive impact on poor defendants,[4] the barriers they present to reentry,[5] and the racial disparities they reflect.[6]

In this Article, we consider LFOs from a different vantage point: we explore the legal and policy ramifications for government institutions (and private entities acting in tandem with them) when they can generate revenue for themselves. Today, criminal justice actors increasingly rely on the income from LFOs to fund ordinary system operations[7] and to expand the system's reach. When this happens, courts and other criminal justice actors become mercenaries, in effect working on commission.

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1. *See, e.g.*, REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, THE HIDDEN COSTS OF FLORIDA'S CRIMINAL JUSTICE FEES 5 (2010), http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf [hereinafter DILLER, HIDDEN COSTS].

2. *See, e.g.*, *id*. at 10–13; REBEKAH DILLER ET AL., BRENNAN CTR. FOR JUSTICE, MARYLAND'S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY 7–14 (2009), http://www.brennancenter.org/publication/marylands-parole-servision-fee-barrier-reentry [hereinafter DILLER ET AL., MARYLAND'S PAROLE]; John Gibeaut, *Get Out of Jail—But Not Free: Courts Scramble to Fill Their Coffers by Sticking Ex-Cons with Fees*, 98 A.B.A.J. 51, 54 (2012); R. Barry Ruback, *The Imposition of Economic Sanctions in Philadelphia: Costs, Fines, and Restitution*, 68 FED. PROBATION 21, 25 (2004); Alan Rosenthal & Marsha Weissman, Sentencing for Dollars: The Financial Consequences of a Criminal Conviction 16–18 (Feb. 2007) (unpublished manuscript) (on file with Brennan Center for Justice), *available at* http://www.brennancenter.org/sites/default/files/legacy/Justice/CCA%20Sentencing%20for%20Dollars%20Feb%202007.pdf.

3. *See, e.g.*, ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [hereinafter BANNON ET AL., CRIMINAL JUSTICE DEBT] (noting that individual in Pennsylvania faced almost $2,500 in costs and fees, roughly three times the amount imposed for fines and restitution).

4. *See* AMERICAN CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 6–10 (2010), http://www.aclu.org/files/assets/ InForAPenny_web.pdf [hereinafter *ACLU, IN FOR A PENNY*]; Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 516–17 (2011); Alexes Harris, et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756 (2010) [hereinafter Harris et al., *Drawing Blood*].

5. *See, e.g.,* ACLU, IN FOR A PENNY, *supra* note 4, at 69–79; BANNON ET AL., CRIMINAL JUSTICE DEBT, *supra* note 3, at 27–29.

6. *See* Research Working Group, *Preliminary Report on Race and Washington's Criminal Justice System*, 87 WASH. L. REV. 1, 26–29 (2012).

7. *See, e.g.,* ACLU, *IN FOR A PENNY, supra* note 4, at 52 (noting that the "mayor's court" in the Village of New Rome, Ohio, population 60, collects an average of $400,000 per year); RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOVERNMENTS, REPAYING DEBTS 8 (2007), *available at* http://tools.reentrypolicy.org/repaying_debts/ (noting that administrative assessments on misdemeanor citations funded nearly all of the budget of the Nevada Administrative Office of the Courts and that probation fees accounted for forty-six percent of the Travis County, Texas supervision and corrections budget); Gibeaut, *supra* note 2, at 54 (noting that the City of Philadelphia collected $2 million and wrote off another $1 million as uncollectible); Steve Thompson, *Judges Key to Plan to Fix City Courts,* DALLAS MORNING NEWS, June 19, 2012, at A1 (describing pressure from city council on local courts to increase collection efforts).

The incentives surface at various times, including shortly after arrest, when payments from arrestees can short-circuit the criminal justice process. Demands for payment at a point so early in the process, when institutional oversight is weak, threaten the presumption of innocence. They also raise equal justice concerns.

Yet the troubling effects of LFOs extend beyond individual case outcomes. When the tax-paying public is not asked to fund criminal justice, it gets a distorted message about the real costs of enforcement. While requiring offenders to internalize the costs associated with their wrongdoing can be justified in principle (for instance, by promoting an offender's acceptance of responsibility), doing so weakens one of the key moderating influences in public safety politics. As one commentator has observed, a "government that can fob off costs on criminals has an incentive to find criminals everywhere."[8]

This Article proceeds as follows. Part II surveys the historical extraction of payments from suspects and convicts, dating back to the earliest English practices. Part III maps the many ways that this same impulse marks modern-day American criminal justice, through the lens of LFOs, which have proliferated in form and number since the 1980s.[9]

Part IV examines the effort by courts, including the U.S. Supreme Court, to regulate the flow of payments. The case law underscores three basic concerns. First, that LFOs will corrode the neutrality of government officials and others, who feel the gravitational pull of money as they resolve cases and process offenders. Second, that LFOs, when applied uniformly to broad groups of offenders, will undermine the capacity of the criminal justice system to treat those offenders as individuals. Finally, that when there is a disconnect between the nature of the offense and the entity getting the LFO funds, a risk arises that defendants will pay amounts driven more by the needs of government in a given moment than by the nature and consequences of their crimes.

Despite several decades of effort, case law has developed little in the way of principled limits on the use of LFOs. Part V, however, builds on the common law foundation and offers an institutional alternative to regulate and rationalize modern LFOs. In particular, we explore the possible use of a LFO Commission to assess, monitor, and control the ever-expanding, pell-mell collection of LFOs.

8. *See* Kevin Baker, *Cruel and Unusual Punishment: Why Prisoners Shouldn't Pay Their Debt*, AMER. HERITAGE MAG., at 22, 22 (July 2006), www.americanheritage.com/content/cruel-and-usual. In this sense, the rent-seeking dynamic resembles government behavior outside the criminal justice context. *See. e.g.,* Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical Assessment of the PTO's Granting Patterns*, 66 VAND. L. REV. 67 (2013) (discussing the self-interested actions of the U.S. Patent and Trademark Office in collecting fees).

9. *See* Harris, et al., *Drawing Blood*, *supra* note 4, at 1769; Paul Peterson, *Supervision Fees: State Policies and Practice*, 76 FED. PROBATION 40, 40 (2012) (noting mere handful of states in 1980s, aligned with privatization movement taking root during the time).

The task we undertake here comes at an important time, as the nation rethinks its decades-long resort to mass imprisonment.[10] It remains to be seen whether correctional options that are less expensive than prison will satisfy the nation's punitive appetite.[11] If governments do resort to less expensive (non-brick and-mortar) community corrections strategies, LFOs will very likely grow in tandem. This is because they actually produce revenue for cash-starved criminal justice systems. LFOs also benefit profit-seeking private vendors, who can wield political influence. In the absence of principled limits on LFOs and a way to monitor their creation and use, the nation's criminal justice systems are vulnerable to mercenary market forces. Treating this risk as a systemic problem with incentives rather than simply a form of injustice in particular cases will allow us to find a way forward.

II. A BRIEF HISTORY OF CRIMINAL JUSTICE PAYMENTS

The recent surge in LFOs might appear to be an outgrowth of a modern cost-benefit mindset or perhaps an example of privatization trends. In actuality, however, criminal justice payments have a long pedigree. Until the late nineteenth century, private actors dominated criminal justice, with government playing a secondary role in crime investigation and in the prosecution and punishment of criminal offenders. It was the aggrieved private party and private counsel, not the publicly paid constable and prosecutor, who held wrongdoers accountable. These private criminal justice actors—including "thief takers," such as prosecutors and judges—mainly earned their income by collecting from defendants and offenders. We summarize this history to show how the American justice system addressed, with varying degrees of success, the problem atic incentives influencing private fee-based actors.

A. English Experience

Over a millennium ago in England, parties to disputes of all kinds resolved their disagreements without government intermediaries, whether by violence or through transfer of goods among themselves.[12] Until the tenth century, criminal wrongs met with private prosecutions, and offenders were forced to pay, rather than being killed. In non-homicide cases, compensation went to the victim ("bot"); in homicide cases, to the

10. *See* NICOLE D. PORTER, THE SENTENCING PROJECT, ON THE CHOPPING BLOCK 2012: STATE PRISON CLOSINGS 1 (Dec. 2012), *available at* http://sentencingproject.org/detail/publication.cfm?publication_id.=421 (discussing the decline in prison population due to policy changes and practices).

11. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 55–56 (2011) (tracing the nation's evolution from a predisposition for punishment parsimony to the view that "a healthy criminal justice system should punish all the criminals that it can"); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 44–49 (2011) (lauding recent decreases in imprisonment rates but questioning whether they will be sustained when budgetary conditions improve).

12. *See* Daniel R. Coquillette, *The Lessons of Anglo-Saxon "Justice"*, 2 GREEN BAG 251, 252–54 (1999).

victim's survivors ("wergild"), based on the victim's social status.[13] Under the reign of Anglo-Saxon kings in the late tenth century, the government increased its role in criminal prosecutions, requiring local noblemen to accuse and arrest suspected criminals in their districts.[14] Alongside this shift, compensation ("amercement") became payable to the church, king, or community, rather than the injured party.[15]

The 1300s witnessed major changes in the government actors who enforced the criminal laws. Most significant was the creation of the office of the justice of the peace ("JP"), who assumed responsibility for local law enforcement. JPs typically were local landowners without formal legal training, serving under a royal commission.[16] They served on a part-time basis, and presided over petit and grand juries.[17] Constables, who replaced the ancient system of sheriffs,[18] were also employed part-time, and apprehended suspects upon orders from a JP, who decided what further action to take.[19]

The JPs and constables benefited financially from their criminal justice work. While corruption had been a constant threat in the past,[20] the office of the JP heightened concerns about self-dealing. As England became more urbanized, and crime became more visible, the Crown was obliged to expand the pool of JPs, deploying men who treated the position less as a social responsibility and more as a source of income. The JP came to be known as the "trading justice," who sustained himself on the basis of fees.[21]

Judicial officials worked in tandem with part-time police officers, assuming most prominent form in the mid-1700s with the "Bow Street runners," who served the London court situated on Bow Street.[22] The runners were compensated by direct government payment, reward mon-

13. *See* 2 FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 450–51 (2d ed. 1923).

14. *See* Patrick Wormald, *Frederic William Maitland and the Earliest English Law*, 16 LAW & HIST. REV. 1, 11 (1998).

15. *Id.* at 17. English law further commanded that all convicted felons forfeit their chattel to the king and their land to their lords. *See* K.J. Kesserling, *Felons' Effects and the Effects of Felony in Nineteenth-Century England*, 28 LAW & HIST. REV. 111, 115 (2010). In the 1200s, the Crown grew more sophisticated and comprehensive in its revenue collection, including in criminal matters. *See generally* David Crook, *The Later Eyres*, 97 ENG. HIST. REV. 241 (1982); J.B. Post, *Local Jurisdictions and Judgment of Death in Later Medieval England*, 4 CRIM. JUST. HIST. 1, 12 (1983).

16. *See* JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 230 (2009).

17. *Id.*

18. *See* R. P. MEAGHER ET AL., EQUITY: DOCTRINES AND REMEDIES § 1-1005, at 3 (1975); *see also* LANGBEIN ET AL., *supra* note 16, at 233.

19. *See* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 415 (2d ed. 1981).

20. This was especially true with respect to the forfeiture of chattel. Kesserling, *supra* note 15, at 115 ("Medieval petitioners cited abuses by rapacious officials who skimmed profits or even indicted the innocent in hopes of personal gain."). Forfeiture thefts remained endemic through the nineteenth century, with constables and gaolers (jailers) inspiring particular suspicion. *Id.* at 122–24.

21. *See* Norma Landau, *The Trading Justice's Trade*, *in* LAW, CRIME AND ENGLISH SOCIETY, 1660–1830 46, 46 (Norma Landau ed., 2002).

22. *See generally* John Beattie, *Garrow and the Detectives: Lawyers and Policemen at the Old Bailey in the Late Eighteenth Century*, 11 CRIM., HIST. & SOCIETIES 2 (2007) (discussing the Bow Street men and the magistrates on Bow Street during the 1700s).

ey, and preferment to other offices.[23] Around this same time, in an effort to boost incentives for private prosecution, the Crown instituted a reward system for successful prosecutions of particular serious felonies, such as highway robbery.[24] Rounding out this incentive-based investigative system were the "thief-takers," entrepreneurs—often with close connection to the criminal underworld—who gathered evidence and contraband and received rewards.[25]

The threat to integrity created by such a system of reward was obvious from the outset. With the promise of private gain, individuals were tempted to accuse falsely; the history of eighteenth-century London contains vivid stories of individuals meeting the hangman as their accusers profited.[26] Indeed, as John Langbein and his co-authors note, concern over official deceit inspired the English in the 1730s to allow the accused to employ defense counsel, who could probe the validity of evidence and cross-examine witnesses.[27]

The reward system also tainted street-level police behavior, motivating officers to act when rewards were large and dampening their interest when "profits were slight."[28] Sometimes an officer would even ignore a theft as it was about to happen, in the hope of later catching the thief and securing a reward.[29]

The last actor on the English enforcement landscape, the public prosecutor, did not materialize until later. While public officials took charge of prosecutions in some non-felony offenses starting in 1790 (crowding out private victims as prosecutors), the office of public prosecutor was not created until 1870.[30] Before then, prosecutors were compensated like private attorneys for the victims of alleged crimes; they shared an "entrepreneurial outlook," and the primary prosecutorial goal was extraction of payment rather than punishment of defendants.[31]

23. *See* ELAINE A. REYNOLDS, BEFORE THE BOBBIES: THE NIGHT WATCH AND POLICE REFORM IN METROPOLITAN LONDON, 1720–1830 46–48 (1998) (discussing the Runners on Bow Street being retained by the magistrates); J.M. Beattie, *Early Detection: The Bow Street Runners in Late Eighteenth-Century London*, *in* POLICE DETECTIVES IN HISTORY, 1750–1950 15–32 (Clive Emsley & Haia Shpayer-Makov eds., 2006).

24. *See* LANGBEIN ET AL., *supra* note 16, at 674, 676–77.

25. *Id.* at 677–78; *see also* GERALD HOWSON, THIEF-TAKER GENERAL: THE RISE AND FALL OF JONATHAN WILD (1970) (discussing the life of thief-taker Jonathan Wild); Ruth Paley, *Thief-Takers in London in the Age of the McDaniel Gang, c. 1745-1754*, *in* POLICING AND PROSECUTION IN BRITAIN 1750–1850 301 (Douglas Hay & Francis Snyder eds., 1989) (discussing thief-takers during the 18th century).

26. *See* LANGBEIN ET AL., *supra* note 16, at 678–81.

27. *Id.* at 686.

28. *See* WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830-1870 28 (1977).

29. *Id.*

30. *See* LANGBEIN ET AL., *supra* note 16, at 712.

31. *See* Norma Landau, *Indictment for Fun and Profit: A Prosecutor's Reward at Eighteenth-Century Quarter Sessions*, 17 LAW & HIST. REV. 507, 536 (1999).

B. Criminal Justice Payments in the United States

Britain's colonies in North America created a similar for-profit environment. The amateurs who comprised the early constabulary were paid through a combination of government and private rewards.[32] Sheriffs, for instance, received fees when they issued subpoenas.[33] JPs also earned fees for their work.[34] Forfeiture proceeds were split between the government and the enforcement officials involved.[35]

Post-colonial criminal justice systems left these financial incentives in place. Prior to the advent of full-time, professional police forces—which took root in places such as Boston in the mid-nineteenth century[36]—the fee and reward system held complete sway. State and local governments developed fee schedules, specifying the monetary benefit tied to solving different crimes. Naturally, law enforcement focused on better-paying crimes at the expense of less remunerative ones.[37] Private party rewards, tied to the value of the property allegedly stolen, also shaped enforcement priorities.[38] In such a system, murders received less attention than robberies and theft, because the latter offered more financial benefit.[39]

Systemically, the fee and reward system also had other independent negative effects. Direct monetary payments encouraged collusion between law enforcement and the criminal element, in the form of pay-offs and kickbacks for orchestrated crimes, with outlaws being set free.[40] The system also discouraged cooperation, as law enforcement officers became disinclined to work with one another for fear of a diminished take.[41]

The advent of full-time salaried police changed this landscape.[42] These enforcers began to think of themselves as professionals, subject to professional norms; they wore indicia of government authority, such as uniforms and badges. Police officers (as they came to be known) measured their success on the job through something other than personal

32. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 28, 68 (1993); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 19–21 (1980).

33. *See* WALKER, *supra* note 32, at 19.

34. Elizabeth Dale, *Criminal Justice in the United States, 1790-1820: A Government of Laws or Men?*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 133, 161 (Michael Grossberg & Christopher Tomlins eds., 2008).

35. *See* Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1314–15 (2006) (noting that percentage of bounty was accorded customs officers, postmen, tax collectors and naval officers).

36. FRIEDMAN, *supra* note 32, at 69.

37. *See* JAMES F. RICHARDSON, THE NEW YORK POLICE: COLONIAL TIMES TO 1901 19 (1970).

38. *See* MILLER, *supra* note 28, at 28; RICHARDSON, *supra* note 37, at 30–32.

39. *See* RICHARDSON, *supra* note 37, at 37–49.

40. *Id.* at 30–32. The arrangement was similar to that characterizing English "thief-takers." *See supra* notes 23–25 and accompanying text.

41. It was even possible that fees and rewards induced criminal activity, because criminal opportunities would increase the enforcers' monetary intake. *See* RICHARDSON, *supra* note 37, at 30–32.

42. *See* FRIEDMAN, *supra* note 32, at 70 ("[T]he rise of the police was . . . an event of huge significance. The police interposed a constant, serious, full-time presence into the social spaces of the cities.").

profit.[43] They ramped up the investigation of "victimless" crimes such as gambling, drunkenness, and prostitution, even though no reward typically attached to those crimes.[44]

Private monetary incentive, however, did not disappear.[45] Because the fee and reward system remained in place, strategically minded officers benefited when they were detailed to the most lucrative areas for patrol.[46] In addition to direct compensation from fees and rewards, officers benefited indirectly from the favorable treatment of politically connected businesses and individuals, allowing them to retain their jobs and advance in departments.[47] Officers also benefited from graft and bribes, based on their power to selectively enforce less serious offenses, such as those concerning Sabbath observance and operation of brothels.[48]

Monetary influence also continued to be an issue in the courts. Although victims remained prime instigators of criminal cases,[49] more public prosecutors began work in the late nineteenth century. While paid on a salary basis in some jurisdictions, fee-based systems for prosecutors continued to predominate, often supplementing the meager public salaries of the day. In New Jersey, for instance, prosecutors received $10 for a guilty plea, $15 for a jury-determined guilty outcome, and nothing at all if the jury acquitted the defendant.[50] In Philadelphia, prosecutors were paid for filing charges but not for evaluating or dismissing them.[51]

43. *See* Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and* Miranda*-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777, 797–98 (2007).

44. *See* FRIEDMAN, *supra* note 32, at 70.

45. Fee and reward inducements remained available to police officers, and a new actor emerged—the detective—who proved susceptible to influence. Detective squads were established in Boston (1846), New York (1857), Philadelphia (1859), and Chicago (1861). This distinct unit in the police force was prone to private reward or collusion with members of the underworld. *See id*. at 203–06; ROGER LANE, POLICING THE CITY: BOSTON 1822-1885 148–52 (1967); ERIC H. MONKKONEN, POLICE IN URBAN AMERICA: 1860-1920 35–36 (1981). Again, in this sense the detectives resembled the "thief-takers" of late eighteenth century London.

46. *See* RICHARDSON, *supra* note 37, at 62–63.

47. *See id*. at 57.

48. *See* FRIEDMAN, *supra* note 32, at 154–55; RICHARDSON, *supra* note 37, at 182–210; WALKER, *supra* note 32, at 64–65.

49. *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995).

50. *See* WALKER, *supra* note 32, at 71. In early twentieth-century Chicago, the unsalaried office of the state's attorney received $20 for each felony conviction and $5 for each misdemeanor conviction, along with ten percent of all forfeited bonds. MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 15 (2003). In late nineteenth century Kentucky, prosecutors received a percentage of fines recovered, and because fines were imposed only in misdemeanor and minor felony cases, more serious felonies got short shrift. *See* Robert M. Ireland, *Law and Disorder in Nineteenth-Century Kentucky*, 32 VAND. L. REV. 281, 283 (1979).

51. *See* ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880 82 (1989). The Fugitive Slave Act of 1850 provides an earlier illustration; the Act authorized federal commissioners to adjudicate claims that a person was a runaway slave, paying commissioners $10 per case in which the accuser won and only $5 per case in which the alleged slave won; ninety percent of the accusations were upheld. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 226 (5th ed. 2006). Thanks to Michael O'Hear for pointing this out to us.

Judges personally benefitted from payments to an even greater extent.[52] JPs and aldermen, who presided over high-volume, low-level offense courts, secured private money in cases from start to finish.[53] At times, the flow of money triggered concern about conspiracies between police officers and judicial officials to arrest large numbers of poor people for vagrancy and drunkenness without legal justification.[54] It was even difficult to get a sense of how much money flowed to judges. In 1842, Pennsylvania adopted a law that required judge-aldermen to post a quarterly statement with the county treasurer specifying all payments received.[55] The law, however, was met with widespread underreporting.[56] What Allen Steinberg has referred to as "pay-as-you-go" justice predominated until the early part of the twentieth century.[57] In Chicago, JP tribunals were maligned as "justice shops," a phrase coined by historian Michael Willrich, which captured "the unapologetically entrepreneurial spirit"[58] and where justice was quite literally for sale.

Finally, no discussion of criminal justice payments would be complete without mention of the corrections system. Dating back to precolonial times, jailers could recover for themselves the costs of incarceration.[59] The financial benefits of prison labor, in particular, were also quite readily apparent to governments. While states contracted out convicts to private business owners prior to the Civil War,[60] the practice came into its heyday in the Reconstruction Era South. During that time, emancipated African-Americans were frequent targets of police sweeps for minor offenses such as vagrancy or "suspicious behavior."[61] Upon

52. *See* James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 8–14 (2008).

53. *See* STEINBERG, *supra* note 51, at 38–44, 121–25.

54. *Id.* at 173–76.

55. *Id.* at 107.

56. *Id.* at 174, 190.

57. *Id.* at 106.

58. WILLRICH, *supra* note 50, at 3–4; *see also id.* at 10 (noting that "JPs grabbed any business, civil or criminal, that came their way"); *see also* STEINBERG, *supra* note 51, at 192 ("The fee system negated the magistrates' ability to properly dispense justice. Selling justice was their living, and their need to secure that living forced them to modify the product in order to suit those who could pay the most. One need not be dishonest at all. . . . What was obviously necessary was a new relationship that placed more distance between the alderman and his 'customers.'"). The JP system operated until 1905 in Chicago when the city implemented the nation's first modern municipal court. WILLRICH, *supra* note 50, at 40.

59. *See, e.g.,* MARION L. STARKEY, THE DEVIL IN MASSACHUSETTS: A MODERN INQUIRY INTO THE SALEM WITCH TRIALS 238 (1949) (noting that, in Salem witchcraft era, "[e]ven if you were wholly innocent . . . you still could not leave unless you had reimbursed the jailer for his expenses in your behalf, the food he had fed you, the shackles he had placed on your wrists and ankles"). Prisons and jails, first taking root in Jacksonian America, replaced more physical carceral punishments such as whippings and the pillory. FRIEDMAN, *supra* note 32, at 155.

60. *See* JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 153–54 (2005) (noting that Massachusetts contracted out prison labor in 1807 and that in the following decades New York, Ohio, and other states followed suit); *see also* Dale, *supra* note 34, at 161.

61. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 39–57 (2008); Martha A. Myers, *Inequality and the Punishment of Minor Offenders in the Early 20th Century*, 27 LAW & SOC'Y REV. 313, 320–23 (1993); *see generally* MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996).

conviction, states would "lease" the individuals to businesses operators operating coal and phosphate mines, pine tree forests (to collect turpentine), and plantation farms.[62] Proceeds from the arrangements were far from insignificant, with one-third of the annual budgets of Alabama and Tennessee at the time derived from convict leases.[63] Leasing continued well into the twentieth century, with New Hampshire not abandoning the practice until 1932.[64] Also, then as now, state and local governments used convict labor to perform public work, such as street sweeping and landscape maintenance.[65]

* * * * *

The foregoing account does not paint a complete historic picture of criminal justice revenue-generation in the United States. The story continues to the present day. As we discuss later, payments to criminal justice actors, and the potential problems they present, were the subject of several Supreme Court cases, in the 1920s, 1970s and 1980s. What changed over time was the precise mix of revenue-generating methods available to the system. The past three decades have been remarkably creative times when it comes to devices that financially benefit criminal justice institutions and actors.[66] Part III surveys this expanding menu of options.

III. SURVEY OF CURRENT LFO PRACTICES

The LFOs that interest us most are typically connected to low-level offenses, such as misdemeanors and infractions, which dominate the criminal justice diet.[67] Such LFOs thrive in dimly lit institutional environments, attracting less attention than felonies, and typically are imposed by local governments that attract less public scrutiny.[68]

The LFOs that suspects, defendants, convicts, and prisoners pay during their modern journeys through the criminal justice system accrue at different times. Some are extracted before the formal start of any proceedings, such as upon arrest or as a payment to a prosecutor's office as

62. *See* Dale, supra note 34, at 162; FRIEDMAN, *supra* note 32, at 157; TRAVIS, *supra* note 60, at 154.

63. *See* Dale, *supra* note 34, at 162. Governments profited from the operation of their payment systems more generally. Oakland, California, for instance, put judges on salary in 1880 and did away with its system, allowing all monies to go to the city treasury, accounting for a "tidy profit." LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870-1910 45 (1981).

64. Dale, *supra* note 34, at 162. Prison labor also netted benefits for states as a result of the building of furniture and the like, a practice that met its demise as a result of pushback from free labor. TRAVIS, *supra* note 60, at 155.

65. Dale, *supra* note 34, at 162–63 (noting that practice was first evidenced in 1790 Philadelphia); Robbie Brown & Kim Severson, *Enlisting Prison Labor to Close Budget Gaps*, N.Y. TIMES, Feb. 24, 2011, http://www.nytimes.com/2011/02/25/us/25inmates.html?pagewanted=all&_r=1& (discussing contemporary use of convict labor in public spaces).

66. *See supra* notes 1–7 and accompanying text.

67. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320–27 (2012).

68. *See* Ethan J. Lieb, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 907–08 (2013) (noting same and discussing reasons for lack of public salience).

part of an agreement to defer prosecution. Some arise after the filing of charges but before any entry of judgment, such as the up-front fees that some jurisdictions charge for access to public defense attorneys. Others take hold after the entry of judgment, such as the fee an offender pays to participate in a probation program.

Criminal justice LFOs also vary in the incentives they create for full-time system insiders: the public and private actors who operate the criminal justice system. In some situations, the actor who assesses the LFO is different from the one who collects the LFO and the one who receives the financial benefit from it. In other cases, the assessor, collector, and recipient of the LFO might all be the same person or entity; and in other cases still, the funds might go to a cause unrelated to criminal justice.

A. Pre-Judgment LFOs

The presumption of innocence does not slow the onset of LFOs. Criminal suspects and defendants incur these obligations—sometimes by consent and sometimes not—before a court ever enters judgment or imposes sentence. The obligations are not a consequence of a criminal conviction; rather, they are the practical result that flows from a criminal charge, or sometimes from a potential charge.

1. Booking Fees

Individuals ensnared in the criminal justice system feel the financial consequences at the very outset of the process when they are booked at a police station. At least six states authorize local governments to assess fees[69] and several local governments in other states impose fees on their own.[70] The fee amounts range from twelve dollars (Michigan)[71] to several hundred dollars (California).[72] The state provisions apply only to booked individuals who are actually convicted of a crime; local laws are less clear on the issue.[73] Some of these booking fees are justified as an effort to recover the government's enforcement costs. In Colorado, for instance, sixty percent of fees generated go to a county's general fund, twenty percent go to deputy sheriff training, and twenty percent to mental health programs.[74]

69. *See* CAL. GOV'T. CODE § 29950.1 (West 2014); COLO. REV. STAT. § 30-1-104 (2014); MICH. COMP. LAWS. § 801.4b (2014); MINN. STAT. § 641.12 (2014); OHIO REV. CODE ANN. § 341.12 (West 2014); WASH. REV. CODE § 70.48.390 (West 2014).

70. *See, e.g.*, City of Hammond, Indiana, *available at* http://www.hammondpolice.com/Jail.htm.

71. MICH. COMP. LAWS. § 801.4b.

72. *See* People v. Almanza, 142 Cal. Rptr. 926, 929 (Cal. App. 2013) (noting Riverside County fee of $414.45).

73. *See, e.g.,* Markadonatos v. Village of Woodridge, 739 F.3d 984 (7th Cir. 2014) (discussing Village of Woodridge, Illinois law).

74. Manny Gonzales, *County Jails' Booking Fees Cause Clamor*, DENV. POST, July 12, 2005, at A1.

2. Prosecutorial Intervention

Prosecutors decide whether or not to file charges and thus wield major gate-keeping authority over the system. While in some cases prosecutors decline to file charges because the evidence is not sufficient, in others they defer prosecution by agreement with the defendant. Under these "deferred prosecution agreements," the potential defendant agrees to perform community service, to obtain drug treatment, or to take other actions that are commonly associated with criminal sentences.[75] If the suspect successfully completes the agreed-upon program, the prosecutor declines prosecution. If the individual fails to complete the program, the criminal case goes forward, often on the basis of an admission of guilt built into the initial agreement.

A variation on this theme is known as "pre-trial diversion."[76] In such circumstances, a prosecutor can suspend criminal proceedings for a defendant, after filing initial charges, based on the defendant's willingness to complete probation-like conditions.[77] Again, if the defendant completes the preconditions, the prosecutor dismisses the pending charges. A similar type of program allows the prosecutor to supervise the defendant after a criminal conviction but before the court imposes sentence; if the offender successfully completes the conditions, the court does not enter judgment on the conviction.[78]

Some prosecutors have the power to collect fees from suspects during the period that they monitor the suspect's progress. About two-thirds of the states that authorize deferred prosecution programs by statute also allow prosecutors to collect LFOs.[79] For example, Oklahoma allows for local creation of a "supervision" program, which empowers the district attorney to enter into a pre-charge agreement with a criminal suspect for up to three years.[80] Individuals who enter this program pay a

75. While such agreements are best known in the white collar criminal cases, they are enjoying increasing use in more traditional criminal justice contexts. *See* Matthew J. Parlow, *The Great Recession and Its Implications for Community Policing*, 28 GA. ST. U. L. REV. 1193, 1233–35 (2012).

76. *See* NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, PROMISING PRACTICES IN PRETRIAL DIVERSION 5 (2009), *available at* www.napsa.org./publications.htm.

77. *See* BEN KEMPINEN, DIVERSION PROGRAMS: A SURVEY OF WISCONSIN PRACTICES 8–10 (2010), *available at* https://media.law.wisc.edu/m/xmzdm/diversion-report-2010.pdf.

78. *See* NAT'L ASS'NO OF PRETRIAL SERVS. AGENCIES, *supra* note 76, at 5; Tom Humphrey, *House Votes to Abolish Pre-Trial Diversion Program*, KNOX NEWS (May 15, 2011), http://blogs.knoxnews.com/humphrey/2011/05/house-votes-to-abolish-pre-tri.html.

79. *See* NAT'L ASS'N OF PRETRIAL SERVS AGENCIES, PRETRIAL DIVERSION IN THE 21ST CENTURY 8 (2009) [hereinafter IN THE 21ST CENTURY], *available at* http://www.napsa.org/publications/NAPSAPretrialPracticeSurvey.pdf. In Texas, a court may impose a $60 per month supervision fee for a defendant who participates in a pre-trial intervention program. TEX. CODE CRIM. PROC. ANN. art. 102.012(a) (West 2014). The court also has the discretion to order the defendant to reimburse the corrections department for additional expenses related to the supervision. *Id*. 102.012(b). As of 2007, the district attorney may also impose an additional fee of up to $500 to reimburse the county for the defendant's participation in the program. Acts 2007, 80th Leg., ch. 1226, § 2.

80. OKLA. STAT. tit. 22, § 305.1 (West 2014). Oklahoma has authorized such programs since 1979. 1979 Okla. Sess. Law ch. 226, § 1. When the accused enters into the agreement, he or she agrees to "waive any rights to a speedy accusation, a speedy trial, and any statute of limitations, and agrees to fulfill such conditions to which the accused and the State . . . may agree including, but not limited to, restitution and community services." OKLA. STAT. tit. 22, § 305.2(A)

$40 monthly supervision fee, and the proceeds support the operation of prosecutor offices.[81] In 2009, hoping that program proceeds would offset a twenty-three percent decrease in prosecutor funding,[82] the Oklahoma Legislature increased the length of the supervision period and the monthly fee amount from $20 to $40.[83] Prosecutor supervision in Oklahoma ballooned during the period, from 16,000 offenders in 2008 to 38,000 in 2010.[84] Similarly, a pretrial diversion program in Alabama supports major portions of the travel budget and other functions for state prosecutors.[85]

3. Pre-Trial Abatement

In some instances, local law or practice allows defendants in minor cases to pay an amount to the police or the courts that stops the prosecution from going forward. The payment, which takes various names, results in a dismissal of the charges or a "stay of adjudication," blocking any conviction from appearing on the defendant's criminal record. Minnesota, for instance, empowers localities to impose a "prosecution cost," permitting defendants in traffic and lesser misdemeanor cases to pay an amount above and beyond the face amount of a traffic ticket to resolve the case without a conviction.[86] Similarly, under the District of Columbia's "post-and-forfeit" statute, the police can offer minor offense arrestees the chance to "post" and immediately "forfeit" a relatively small amount of money (typically on the order of $50 to $150) that flows to the Metropolitan Police Department, in exchange for waiving any right to an adjudication on the merits.[87] The law treats the payment as bail to secure the defendant's release, and the "forfeiture" of the bail leads to a dismissal rather than a conviction.[88]

81. OKLA. STAT. tit. 22, § 991d(A)(2). The Oklahoma District Attorneys Council receives the fees and disburses all funds to individual prosecutorial districts. OKLA. STAT. tit. § 215.30(D).

82. *See* Nathan Koppel, *Probation Pays Bills for Prosecutors*, WALL ST. J., Jan. 20, 2012, http://online.wsj.com/news/articles/SB10001424052970203750404577171031387548446.

83. *Compare* OKLA. STAT. tit. 22, § 991d(B) (2003 & Supp. 2011) (effective July 1, 2009) *with* OKLA. STAT. tit. 22, § 991d(B) (2003).

84. *Id.* This 38,000 includes 27,600 individuals with potential misdemeanor charges and 10,500 people with potential felony charges. Jaclyn Cosgrove, *Supervision Program Earns Millions*, OKLAHOMA WATCH, Dec. 12, 2011, http://oklahomawatch.org/2011/12/12/supervision-program-earns-millions/.

85. *See* Debbie Ingram, *DA Oversees Spending of Pretrial Diversion Receipts Totaling $310,000*, DOTHAN EAGLE, May 5, 2009, http://www.dothaneagle.com/news/article_4a4d89ea-095e-5eb4-89a3-46fdf09f877d.html.

86. *See* Pam Louwagie & Glenn Howatt, *Some Drivers Find That Cash Can Make the Ticket Go Away*, STAR TRIBUNE (Minneapolis), Apr. 16, 2012, http://www.startribune.com/local/144099386.html.

87. *See* Zoe Tillman, *D.C. Judge Weighs Constitutional Challenge to "Post and Forfeit*," THE BLT: THE BLOG OF LEGAL TIMES (Mar. 20, 2012), http://legaltimes.typepad.com/blt/2012/03/dc-judge-weighs-constitutional-challenge-to-post-and-forfeit.html.

88. Although the charges remain on the person's arrest record, for most offenses a request can be made to seal the record, either immediately upon an assertion of actual innocence or within two years after dismissal of the charges. *See* Jamison Koehler, *Constitutionality of D.C.'s "Post-and-Forfeit" Statute Upheld*, KOEHLER LAW (Apr. 3, 2012), http://koehlerlaw.net/2012/04/constitutionality-of-d-c-s-post-and-forfeit-statute-upheld/.

4. Bail

Bail also asks that defendants open their wallets. Criminal courts in most states release some defendants before trial based on a payment, either present or future. In all but a few states, commercial bail bond dealers promise the courts to pay the bail amount if the defendant fails to appear for a later hearing; they make this promise after receiving payment (typically ten percent of the total bail amount) from the defendant.[89] When bailees abscond, it is common for courts to waive their right to collect the full bond amount, resulting in economic windfalls for dealers.[90] Moreover, states sometimes tack on "administrative" LFOs to bail amounts and collect them from bond dealers or defendants, even after acquittals.[91] Finally, bailees can incur added expense when they are required to pay the public or private entities overseeing their pretrial supervision in the community.[92]

5. Application Fees for Defense Counsel

While the state must provide a defense attorney without charge to an indigent defendant who faces charges that could end in the deprivation of physical liberty,[93] that lawyer is often not cost-free. Even if an individual qualifies as indigent, many jurisdictions require the defendant to pay an up-front "application" fee or "co-payment" for appointed counsel, in an amount tied to the severity of the seriousness of the charge.[94] Some, but not all, of these jurisdictions allow judges to waive the fees in cases of extreme poverty.[95]

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89. *See generally* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 105–14 (4th ed. 2011).

90. *See* Yamil Berard, *Defendants, Bondsmen Sometimes Get Off the Hook in Tarrant County*, STAR-TELEGRAM (Dallas), Apr. 1, 2012, http://www.star-telegram.com/2012/04/01/3852095/defendants-bondsmen-sometimes.html; Yamil Berard, *Millions of Dollars Go Uncollected in Tarrant County Bail Bond System*, STAR-TELEGRAM (Dallas), Apr. 1, 2012, http://www.star-telegram.com/2012/04/01/3850904/millions-of-dollars-go-uncollected.html; Yamil Berard, *Bail Bond System Rife with Controversy About Preferential Treatment*, STAR-TELEGRAM Dallas, Apr. 2, 2012, http://www.star-telegram.com/2012/04/02/3855175/bail-bond-system-rife-with-controversy.html.

91. *See, e.g.*, LA. REV. STAT. ANN. § 22:822 (2014) (imposing two percent "fee on premium for all commercial surety underwriters who write criminal bail bonds in the State of Louisiana"); *see also* Larry Flowers, *State Law Allows Sheriffs to Collect Bail Bond Fee*, WSMV.COM (July 25, 2011), http://www.wsmv.com/story/14985604/state-law-authorities-tn-sheriffs-to-collect-500-bail-bond-fee (describing bail bond fee in Tennessee).

92. *See, e.g.*, *Pretrial Services,* ALACHUA COUNTY, FLORIDA, http://www.alachuacounty.us/Depts/CourtServices/Pages/PretrialServices.aspx (noting that "defendants supervised on electronic monitoring pay nominal fees to defray program costs"); THE FL. LEGISLATURE OFFICE OF PROGRAM POLICY ANALYSIS & GOVT. ACCOUNTABILITY, *Pretrial Release Programs Generally Comply with Statutory Data Collection Requirements* (Dec. 2011), http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/.pdf (noting that programs most commonly charged fees for electronic monitoring).

93. *See* Alabama v. Shelton, 535 U.S. 654, 662 (2002) (reaffirming the "actual imprisonment" standard).

94. *See* Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2051–54 (2006).

95. In two states, Florida and Ohio, the fee must be paid even if the defendant is acquitted or the charges are dropped. *See* FLA. STAT. § 27.52(1)(b) (2014); OHIO REV. CODE ANN. § 120.36(A)(1) (West 2014).

B. Post-Judgment LFOs

Once the justice system evaluates the evidence and adjudicates the charges, LFOs really come into their own. Post-judgment LFOs go by many different names, many different actors assess and collect them, and they serve many different avowed purposes.

1. Investigation, Prosecution, and Court Costs

Criminal courts in all but a few states have the power to assess costs against convicted offenders, and the majority of states have legislation *mandating* assessments after conviction.[96] A smaller number of states permit assessment of costs as a discretionary matter.[97] Local governments in some states have the express authority to impose assessments on their own.[98] The variety of costs and the amounts they entail have increased significantly over time, often serving as a major fiscal benefit for governments.[99]

Consider first the LFOs that apply across the board to all offenders. In Florida, such assessments include a mandatory court cost ranging from $60 (traffic offenses) to $225 (felonies),[100] and a mandatory minimum $50 assessment for the "cost of prosecution" payable to the "State Attorneys Revenue Trust Fund."[101] This is in addition to a non-waivable $50 cost payable to the "Crimes Compensation Trust Fund,"[102] a $20 court cost for "crime stoppers" programs,[103] and a $3 cost directed to the "Additional Court Cost Clearing Trust Fund" (required even when prosecution is withheld).[104] Defendants might also be required to pay for investigative costs incurred by law enforcement agencies, including the salaries of permanent employees and prosecutors[105] and $100 allocated to the "Operating Trust Fund of the Department of Law Enforcement" to help fi-

96. *See, e.g.,* ALA. CODE § 12-19-182 (2014); GA. CODE. ANN. § 17-11-1 (West 2014); KY. REV. STAT. ANN. § 23A.205 (West 2014); NEB. REV. STAT. ANN. § 29-2207 (West 2014); N.C. GEN. STAT. ANN. § 7A-304 (West 2014); OHIO REV. CODE ANN. § 2947.23 (West 2014); VA. CODE ANN. § 17.1-275 (West 2014); WASH. REV. CODE ANN. § 36.18.020 (West 2014); WASH. REV. CODE ANN. § 10.46.190 (West 2014).

97. *See, e.g.,* CAL. PENAL CODE § 1203.1m (2014); IOWA CODE ANN. § 356.7 (West 2014); MONT. CODE ANN. § 46-18-232 (West 2014); NEV. REV. STAT. ANN. § 207.410 (West 2014); N.J. STAT. ANN. § 22A:3-4 (West 2014); N.M. Stat. Ann. § 31-12-6 (West 2014); N.D. CENT. CODE ANN. § 27-01-10 (West 2014); WYO. STAT. ANN. § 7-11-505 (West 2014). Three states do not assess costs against defendants after conviction. HAW. REV. STAT. § 706-640 (West 2014); ME. REV. STAT. ANN. tit. 15, § 1901 (2014); UTAH CODE ANN. § 77-18-7 (West 2014).

98. *See* BANNON ET AL., CRIMINAL JUSTICE DEBT, *supra* note 3, at 36–37 n.26 (noting such authority in seven of fifteen states surveyed).

99. *See generally* CARL REYNOLDS & JEFF HALL, CONFERENCE OF STATE COURT ADMIN'RS, *2011-2012 Policy Paper: Courts Are Not Revenue Centers* (2012), *available at* http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx.

100. FLA. STAT. ANN. § 938.05 (West 2014).

101. *Id.* § 938.27(8).

102. *Id.* § 938.03.

103. *Id.* § 938.06(1).

104. *Id.* § 938.01(1).

105. *Id.* § 938.27(1).

nance state crime laboratories.[106] The state also allows counties with "teen courts" to require anyone convicted of any nontraffic offense to pay $3 to help fund the court.[107]

Other states have similar laws. In Illinois, for instance, a $10 medical assessment is levied on persons convicted of crimes, regardless of whether the individual receives any medical treatment in the corrections system.[108] The California legislature, to "maintain adequate funding for court facilities," assesses $30 for misdemeanor and felony convictions and $35 for each infraction,[109] and extracts a $20 "court security fee" for every conviction.[110] In Alabama, increased court fees allow the judiciary to hire additional courtroom personnel.[111]

Second, consider the cost assessments that are tied to particular kinds of cases. Colorado, for instance, targets convicted sex offenders with "surcharges," ranging from $150 for a class three misdemeanor to $3000 for a class two felony.[112] States also extract fees when they require convicted sex offenders to register.[113] With drug cases, jurisdictions commonly seek payment for laboratory services.[114] State pension funds for police officers and court clerks in Georgia receive state contributions based on the number of police officer traffic tickets that result in convictions.[115]

106. *Id.* § 938.055; *see also* Laurie Mason Schroeder, *Cost of Crime Going Up in Bucks County*, BUCKS COUNTY COURIER TIMES, Mar. 22, 2011, http://www.buckscountycouriertimes.com/news/local/cost-of-crime-going-up-in-bucks-count/article_53130385-0d57-5342-86c9-d409d4dd6319.html (describing new policy of the Bucks County DA's office to bill some discovery and investigatory fees, such as DNA and forensic tests, to the defendant).

107. FLA. STAT. ANN. § 938.19(1)–(3).

108. People v. Coleman, 936 N.E.2d 789, 793 (Ill. App. Ct. 2010) (interpreting 730 ILL. COMP. STAT. ANN. § 125/17 (West 2008), known as the County Jail Act, which provides for an "Arrestee's Medical Costs Fund").

109. CAL. GOV. CODE § 70373(a)(1) (West 2014).

110. CAL. PENAL CODE § 1465.8(a)(1) (West 2014); *see also* Duane D. Stanford, *Audit Urges End to Court Fees: Agencies Would be Funded Directly*, ATLANTA J. CONST., Dec. 3, 2001, at B1 (stating that police officers and prosecutors receive money from court fees for training programs; police officers, court clerks, and sheriffs receive money from court fees for retirement).

111. *See* Elane Jones, *Rise in Court Fees May Help Some Offices at Courthouse*, DAILY MOUNTAIN EAGLE (Jasper, Ala.), July 6, 2012, http://www.mountaineagle.com/view/full_story/19215963/article-Rise-in-court-fees-may-help-some-offices-at-courthouse?instance=yourstories (describing how a new law that raises court costs and creates a new fee for posting bonds will increase the budget for the Walker County, Alabama courthouse and allow the courthouse to hire more employees).

112. COLO. REV. STAT. § 18-21-103(1)(a)-(h) (2014); *see also* Thomas Content, *Proposal Pulls Plug on Utility Surcharge: Proceeds Are Used to Pay District Attorneys*, MILWAUKEE J. SENTINEL, Apr. 6, 2011, at D1 (describing "justice information system surcharge" assessed as part of speeding tickets and other violations that goes to retain experienced DAs).

113. *See, e.g.,* ARIZ. REV. STAT. § 13-3821(Q) (2014) ($250 fee); COLO. REV. STAT. § 16-22-108(7)(a) (West 2014) ($75 fee); GA. CODE ANN. § 42-1-12 (West 2014) ($250 fee).

114. *See, e.g.,* People v. Taylor, 12 Cal. Rptr. 3d 923, 925 (Cal. Ct. App. 2004) (discussing various surcharges imposed as a result of assessing mandatory "drug laboratory analysis fee").

115. *See* Wesley Brown, *Police Retirement Fund, County Programs Benefit From Traffic Ticket Fines*, AUGUSTA CHRONICLE, June 12, 2013, http://chronicle.augusta.com/news/crime-courts/2013-06-12/police-retirement-fund-county-programs-benefit-traffic-ticket-fines (describing a program where police officers' retirement funds and pensions are directly increased by how many traffic tickets the individual officer and entire police force writes. A portion of the traffic tickets also goes to the retirement funds for Superior Court clerks).

If an offender is late in paying a LFO, a penalty can be imposed, based on a flat rate or a percentage of the amount owed.[116] Late payment can also get private collection agencies involved, who themselves impose charges.[117] Separate charges for extended payment plans can also ratchet up payments, with penalties again attaching to late payments.[118]

2. "Pay-to-Stay": Detention LFOs

Assessments are also very commonly imposed upon offenders sentenced to prison or jail terms. Despite the typically limited financial means of inmates, state and local governments usually charge offenders for the costs of incarceration.[119] Michigan, for instance, allows counties to recover up to $60 per day from inmates,[120] and Arizona authorizes a $2 monthly electric utility fee.[121] The total amounts collected can be substantial: New York State, for example, collected $22 million between 1995 and 2003.[122]

Charges for telephone calls are also a significant moneymaker. The charges—paid by recipients of "collect" calls from inmates, based on rates far above the prevailing market—generate millions of dollars annually, with most of the money going to contractors.[123]

3. Probation and Parole Fees

Jurisdictions also increasingly impose fees for community corrections services, with amounts tied to the duration of supervision.[124] In Maryland, the parole supervision fee is $40 per month, which can amount to several hundred dollars during a parole term.[125] In Pennsylvania, pris-

116. BANNON ET AL., CRIMINAL JUSTICE DEBT, *supra* note 3, at 17 (twenty percent rate in Michigan, thirty percent rate in Illinois, and $300 flat rate in California).

117. *Id.* (noting thirty percent rate in Alabama and forty percent rate in Florida).

118. *Id.* at 41 n.65 (noting inter alia $135 fee in one Florida county and $100 fee in New Orleans).

119. *Id*. at 7 (noting that all fifteen sates surveyed authorize recovery of jail and prison costs); Fox Butterfield, *Many Local Officials Now Make Inmates Pay Their Own Way*, N.Y. TIMES, Aug. 13, 2004, at A1; Nate Rawlings, *Welcome to Prison. Will You Be Paying Cash or Credit?*, TIME, Aug. 21, 2013, http://nation.time.com/2013/08/21/welcome-to-prison-will-you-be-paying-cash-or-credit/.

120. MICH. COMP. LAWS ANN. § 801.83(1)(a)(3) (West 2014).

121. ARIZ. REV. STAT. ANN. § 31-239(A) (2014).

122. BRENNAN CENTER FOR JUSTICE, THE NEW YORK BAR RE-ENTRY REPORT CHAPTER ON FEES AND FINES 178 (2006) [hereinafter NEW YORK BAR RE-ENTRY REPORT], *available at* http://www.brennancenter.org/sites/default/files/legacy/Justice/F&F%20CollateralConsequencesRepor-section3.pdf.

123. *See* Peter R. Shults, Note, *Calling the Supreme Court: Prisoners' Constitutional Right to Telephone Use*, 92 B.U.L. REV. 369, 371 (2012) (noting that state prison systems receive over $152 million annually from the commissions and that the market itself yields more than $362 million in annual gross revenue).

124. David E. Olson & Gerard F. Ramker, *Crime Does Not Pay, But Criminals May: Factors Influencing the Imposition and Collection of Probation Fees*, 22 JUST. SYS. J. 29, 30 (2001); Laura Maggi, *"Pay or Stay" Jail Terms Decried: System is Unfair to Poor, Reports Say*, NEW ORLEANS TIMES PICAYUNE, Oct. 4, 2010, http://www.nola.com/saintsbeat/weblog/index.ssf?/printer/printer.ssf?/base/news-15/1286173220306110.xml&coll=1&style=print; Cristeta Boarini, *State Law Allows Sheriffs to Collect Bail Bond Fee*, WSMV.COM (Jul. 25, 2011), http://www.wsmv.com/story/14985604/state-law-authorities-tn-sheriffs-to-collect-500-bail-bond-fee.

125. DILLER ET AL., MARYLAND'S PAROLE, *supra* note 2, at 5.

oners are ineligible for probation, parole, or accelerated disposition unless they pay a $60 fee, not subject to waiver for indigents.[126] In many states supervision periods can be extended for failure or inability to pay.[127]

It is also common for profit-oriented private firms to contract with the government to provide probation services.[128] A court, for example, might place an offender on probation for public drunkenness and assess a fine of $270. The private probation company will then add a $15 enrollment fee and $39 per month for supervision and services.[129] Use of Global Positioning System devices to track probationers, parolees, and others (typically convicted sex offenders "off-paper"),[130] and operation of halfway houses[131] are other ways for private contractors to get involved. When individuals are sentenced to community service, they can be required to buy an insurance policy from a private provider.[132] Finally, as with costs, governments frequently outsource the collection of supervision-related fees and allow private firms to levy significant additional surcharges.[133]

4. Fines

Fines are intended to punish individuals for misconduct and are typically set by statute. They can be mandatory or discretionary, and the court can make individualized findings about the offender's ability to pay before setting the amount of the fine.[134] While U.S. courts have traditionally relied less on fines than their western European counterparts,[135] today, fines are imposed on thirty-three percent of convicted felons[136] and enjoy even greater use in lower-level courts of limited jurisdiction.[137] While the law often specifies a fine amount, tied to the severity of the

126. BANNON ET AL., CRIMINAL JUSTICE DEBT, *supra* note 3, at 22.

127. *Id.* at 35 n.19, 54–55 nn.170–176.

128. *See, e.g.*, FLA. STAT. ANN. §§ 948.15, 948.09 (West 2014); GA. CODE ANN. § 42-8-100 (2014).

129. *See* Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES, July 2, 2012, http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all&_r=0.

130. *See* Adam Liptak, *Debt to Society Is Least of Costs for Ex-Convicts*, N.Y. TIMES, Feb. 23, 2006, http://www.nytimes.com/2006/02/23/national/23fees.html?_r=1&oref=slogin.

131. *See, e.g.,* FLA. STAT. ANN. § 944.026 (West 2014) (authorizing contracts for community-based facilities to provide services for probationers).

132. Liptak, *supra* note 130.

133. *See* BANNON ET AL., CRIMINAL JUSTICE DEBT, *supra* note 3, at 6 (noting that Florida law allows private collection agencies to charge up to a forty percent surcharge on amounts collected); *id.* at 45 n.94 (noting that Maricopa County, Arizona allows private agencies to collect an eighteen percent surcharge); *id.* at 45–46 n.94 (twenty percent private surcharge in Missouri); *Pay to Stay: Jails Raise Revenue by Charging Inmates*, WASHINGTON POST TV (Sept. 5, 2013), http://www.washingtonpost.com/posttv/video/onbackground/payi-to-stay-jails-raise-revenue-by-charging-inmates/2013/09/06/8398a526-164f-11e3-be6e-dc6ae8a5b3a8_video.html.

134. *See, e.g.,* State v. Cooper, 760 N.E.2d 34, 36–37 (Ohio Ct. App. 2001).

135. Martin H. Pritikin, *Fine-Labor: The Symbiosis between Monetary and Work Sanctions*, 81 U. COLO. L. REV. 343, 353–55 (2010).

136. R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 DUQ. L. REV. 751, 753 (2011).

137. One study reported that fines are used in eighty-six percent of such courts. *Id.* at 754.

offense, sometimes only a statutory range applies. In such instances, courts impose a "going rate" for a fine, assessing amounts based on local norms.[138]

Fines can also trigger "surcharges." In California, a surcharge allocated to the "State Court Facilities Construction Fund" can amount to fifty percent of any fine imposed,[139] and fines require six additional payments, based on state or local law.[140]

Experience suggests that fines often figure centrally in budgets, especially for local governments.[141] For instance, there is empirical support for the common anecdotal observation that police departments use traffic fines to generate revenue for local government coffers.[142] Recent controversy has swirled around aggressive towing for parking violations[143] and traffic light cameras that generate automatic citations and large amounts of revenue.[144]

Some statutes also direct portions of a criminal fine or restitution to the prosecutor's office. For instance, a Louisiana statute awards a twenty percent fee to the District Attorney for successful collection of a worthless check.[145] The law led to the potential collection of $300,000 for the prosecutors in one case involving gambling debts.[146]

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138. *Id.* at 755.

139. *See* People v. Taylor, 12 Cal. Rptr. 3d 923, 925–26 (Cal. Ct. App. 2004) (discussing CAL. GOV. CODE § 70272 (West 2003)). Arizona adds a surcharge of forty-seven percent to the fine. ARIZ. REV. STAT. ANN. § 12-116.01(A)-(C) (2014); *see also, e.g.*, CAL. PENAL CODE § 1464(a) (West 2014) (imposing additional $10 penalty every fine, penalty, or forfeiture imposed); GA. CODE ANN. § 15-21-73(a)–(b) (2014) (ten percent of fine amount plus lesser of $50 or ten percent of fine).

140. People v. Castellanos, 98 Cal. Rptr. 3d 1, 7–8 (Cal. Ct. App. 2009).

141. *See* Todd C. Elliott, *Taking Jail Time Over Fines Affecting City Revenues*, EUNICETODAY.COM (Sept. 20, 2013), http://www.eunicetoday.com/taking-jail-time-over-fines-affecting-city-revenues (describing impact on city operations in small Louisiana city when fine revenues decrease).

142. *See* Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 71 (2010) (noting, based on 1990-2003 data, that tickets increase in volume in tandem with budgetary stress).

143. *See, e.g.*, Ashley Halsey III, *District Rakes in $92 Million from Parking Tickets*, WASH. POST (Mar. 11, 2013), http://www.washingtonpost.com/local/trafficandcommuting/district-rakes-in-92-million-from-parking-tickets/2013/03/10/10270022-8835-11e2-9d71-f0feafdd1394_story.html; Victor Zapana, *Angry About Towing? If You're in Montgomery, Join the Club*, WASH. POST (June 14, 2012), http://www.washingtonpost.com/local/dc-politics/angry-about-towing-if-youre-in-montgomery-join-the-club/2012/06/14/gJQAwwVodV_story.html.

144. *See* William D. Mercer, *At the Intersection of Sovereignty and Contract: Traffic Cameras and the Privatization of Law Enforcement Power*, 45 U. MEM. L. REV. 379 (2013); Larry Copeland, *Questions Cloud Red-Light Camera Issue*, USA TODAY, Apr. 9, 2012, http://usatoday30.usatoday.com/news/nation/story/2012-04-08/red-light-cameras-debate/54117382/1; Jason Noble, *States Split Over Traffic Cameras*, USA TODAY, Feb. 2, 2012, http://usatoday30.usatoday.com/news/nation/story/2012-02-02/traffic-cameras/52931270/1. In a recent brazen (or refreshing, depending on one's perspective) reflection of the profit motive at work, a Tampa, Florida, city council member, in reaction to concerns raised over a shabby area of town negatively affecting reaction of attendees at the 2012 Republican National Convention in Tampa, urged that the city pay for improvements with "fines [from the cameras], which are currently on a pace to generate almost triple the originally projected revenue . . . ." Richard Danielson, *Tampa's Bayshore Boulevard Criticized as Too Shabby for Republican National Convention*, TAMPA BAY TIMES (Jan. 7, 2012), http://www.tampabay.com/news/localgovernment/tampas-bayshore-boulevard-criticized-as-too-shabby-for-republican-national/1209582.

145. LA. REV. STAT. ANN. § 16:15(C)(5) (2014).

146. *See* John Simerman, *DA May Get Windfall From Collecting Gambling Debt: Car Dealer's Lawyer Says Game is Rigged*, TIMES PICAYUNE (New Orleans), Nov. 11, 2011; *D.A. Doubles Restitution Collection*, CLOVIS NEWS J. (Jan. 3, 2013), http://cnjonline.com/2013/01/03/d-a-doubles-restitution-

5. Forfeiture

Asset forfeiture laws allow governments to seize money and property from individuals or entities after proving some connection to commission of an offense.[147] Such laws are commonly deployed in drug cases, with proceeds often going directly to police[148] and prosecutors,[149] presenting obvious enforcement incentives. At the same time, forfeiture proceeds are known to influence fiscal appropriations, with state and local budgets relying on seizure amounts in place of tax revenue.[150]

Some forfeitures only occur after a criminal conviction and are a component of the sentence. Others, however, go forward regardless of the outcome in criminal proceedings, and the government proves its case under specialized procedural rules drawn from the world of civil litigation. Lately, news reports have surfaced of troubling instances of "cash-for-freedom deals," involving police vehicle stops that result in no charges being brought, although individuals are allowed to leave only if they forfeit property.[151] In some cases, the government dismisses criminal proceedings in exchange for a defendant's agreement not to contest civil forfeiture claims.[152] For example, in Shelby County, Texas a woman caught with $620,000 cash was allowed to go forward without criminal charges after forfeiting the money to the DA's office.[153]

An extensive scholarly body of literature examines the distorting influence of asset forfeiture laws.[154] We note the laws here simply to call

collection/ (noting that in 2012, $7000 of $77,152 collected by the local DA's office in restitution fees were pre-prosecution fees paid to a state fund to pay for training for law enforcement and prosecutors).

147. *See* Asset Forfeiture, FBI, http://www.fbi.gov/about-us/investigate/white_collar/asset-forfeiture (last visited Jan. 26, 2014).

148. *See, e.g.,* Michael Sallah & Daniel Chang, *Feds Probe Bal Harbour Police Department over Seized Millions*, MIAMI HERALD, Oct. 28, 2012, http://www.miamiherald.com/2012/10/27/3070784/feds-probe-bal-harbour-police.html; Radley Balko, *Under Asset Forfeiture Law, Wisconsin Cops Confiscate Families' Bail Money*, HUFFINGTON POST (May 21, 2012), http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-confiscated_n_1522328.html.

149. *See, e.g.,* David B. Smith, *New Jersey's Statute Held Unconstitutional: Prosecutors May Not Benefit from Forfeiture Cases*, 27 CHAMPION 12 (2003).

150. *See* Katherine Baicker & Mireille Jacobsen, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007).

151. *See, e.g.*, Sarah Stillman, *Taken*, NEW YORKER, Aug. 12, 2013, http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman?currentpage=all (recounting widespread resort to practice in remote areas of eastern Texas); Isaiah Thompson, *The Cash Machine*, PHIL. CITY PAPER, Nov. 28, 2012, http://citypaper.net/article.php?The-Cash-Machine-19189 (describing forfeiture practices in Philadelphia, Pennsylvania).

152. *See* Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 207 (2011).

153. Danny Robbins, *Texas DA Reportedly Offered Leniency for Cash*, HOUSTON CHRONICLE, Oct. 25, 2011, http://www.chron.com/news/article/Texas-DA-reportedly-offered-leniency-for-cash-2235636.php.

154. *See, e.g.*, Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgeted Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171 (2001).

attention to the connection between them and various LFOs that create similar incentives for government agents who enforce the criminal laws.[155]

6. Expungement Fees

The opportunities to collect revenue even extend beyond the end of the criminal sentence. Every state allows some offenders convicted of certain crimes (typically minor ones) to expunge their conviction or arrest record after completing a designated community service program or probation condition. After expungement, searches of public documents by most users will produce no record of the arrest or conviction. But this expungement comes with a financial string attached: many states charge an "expungement fee" to complete the transaction. Maryland, for example, charges $30 to expunge an offender's record.[156]

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As the preceding survey makes clear, LFOs assume a broad variety of forms and emerge at just about every juncture of the criminal justice process. Public interest groups and commentators have discussed the negative consequences of LFOs for individuals, as well as concerns over their racially disparate impact.[157] As we noted at the outset, our goal here is complementary to this work on individual impact, focusing on the institutional effects of LFOs. We begin this effort by examining the reactions of courts to LFOs. That judicial doctrine provides the foundation for a broader institutional solution to the challenges of LFOs.

IV. JUDICIAL LIMITS ON REVENUE GENERATION

Judges find themselves in the middle of this thicket of criminal justice LFOs. The judicial branch administers many of the collection systems and judicial budgets benefit from the funds generated. At the same time, defendants regularly ask judges to exempt them from payments on an individual basis or to invalidate or limit the entire payment system. In response, state and lower federal courts, building on Supreme Court precedent, have articulated principles that set some outer boundaries for revenue generation.

In this Part, we review a complex and at times contradictory body of case law. For every theme that appears in the opinions, there often is a crosscurrent; the cases point to no single outcome. However, in the spirit

155. Restitution payments go directly from convicted and sentenced offenders to victims of the crime, not to government agencies or cooperating private firms that support criminal justice functions. For that reason, we do not include these payments in our survey.

156. *See Expungements,* MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, http://www.dpscs.state.md.us/publicservs/expung.shtml (last visited Feb. 7, 2014); *see also* TENN. CODE ANN. § 40-32-101(g)(10) (2014); *Basics on Criminal Expungement*, MINN. JUDICIAL BRANCH, http://www.mncourts.gov/selfhelp/?page=328 (last visited Jan. 28, 2014).

157. *See supra* notes 4–6 and accompanying text.

of *Restatement* reporters or drafters of the *Model Penal Code,*[158] we highlight some basic principles that can guide the creation of a fair and coherent system of LFOs. We begin with a discussion of the handful of Supreme Court decisions on revenue generation in criminal justice. Discerning several themes in the cases, we then examine how the principles have played out in decisions of state and lower federal courts over the years.

A. The Supreme Court Weighs In

In the 1920s, money flowing into the coffers of criminal justice actors caught the attention of the Supreme Court. The Court first addressed the matter in the context of judicial payments, in *Tumey v. Ohio*.[159] The general principles formulated in that context later shaped the judicial response to monetary benefits flowing to other criminal justice actors.

In *Tumey*, the Court unanimously condemned a local government arrangement involving a mayor, who also functioned as a judicial officer, receiving a salary that was paid in part by fees imposed on convicted defendants (but not those who were acquitted).[160] The *Tumey* Court condemned the practice on due process grounds, finding that the fee structure cast doubt on the impartiality of the judge-mayor, who had a personal pecuniary interest in each conviction ($12).[161] Writing for the Court, Chief Justice Taft stated that "the prospect of receipt or loss of such an emolument in each case" cannot be regarded as a "minute, remote, trifling, or insignificant interest."[162] It is not fair to a defendant "that the prospect of such a prospective loss [of money] by the Mayor should weigh against his acquittal."[163] And while there were "doubtless" mayors whose judgment would not be affected, the "possible temptation to the average man"[164] raised constitutional concern. Due process is violated, the Court held, when a judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against" a defendant.[165]

The *Tumey* Court, however, was troubled by more than the judge's personal financial interests. *Tumey* also addressed the incentives for judges whose decisions could affect the money flowing to local governments.[166] In an effort to encourage localities to prosecute liquor violators more aggressively, Ohio's Prohibition law gave local governments a share of any fines imposed after conviction,[167] and instructed judge-

158. *See generally* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1953) (describing the proposal to create a model penal code).
159. 273 U.S. 510 (1927).
160. *Id.* at 523.
161. *Id.* at 535.
162. *Id.* at 532.
163. *Id*.
164. *Id.*
165. *Id.* at 523.
166. *Id.* at 533.
167. *Id.* The fines provided revenue sufficient to obviate the need to raise taxes. *Id.*

mayors not only to determine guilt, but also to set appropriate fine amounts.[168] The problem with this arrangement, according to the Court, was not the mingling of executive and judicial function.[169] Instead, problem was the financial benefit to local government: the "official motive to convict and to graduate the fine to help the financial needs of the village."[170]

One year later, in *Dugan v. Ohio*,[171] the Court qualified its views on the corrosive effects of money. In *Dugan*, the judge-mayor presided over criminal liquor law violations and received a salary that was fixed, regardless of the number of convictions. While case outcomes could have affected the financial health of the city, the judge-mayor lacked "general responsibility" for the city's fiscal balance, as he shared executive powers with others, including control over prosecutions.[172] Because of those shared powers, the Court held that the judge-mayor's relationship to the city's general fund was too "remote" to trigger constitutional concern.[173]

The Court did not return to the issue for over forty years. In *Ward v. Village of Monroeville*,[174] the Court continued to treat the issue of judicial financial motives as a matter of degree, but this time the incentives were strong enough to constitute a due process violation.[175] In *Ward*, a judge-mayor oversaw a court that generated fines, fees, and costs accounting for a substantial portion of local government funds.[176] Two facts distinguished *Ward* from *Dugan*. First, the judge-mayor in *Ward* held greater executive duties alongside his judicial duties, making him more responsible for the overall fiscal health of local government.[177] Second, the fees from convictions in *Ward* added up to a larger portion of the local government's budget, increasing the incentive for the judge-mayor to consider government finances when deciding cases.[178] This arrangement violated due process even though the Village judge-mayors had no personal financial stake in the cases before them.[179]

Five years later, in 1977, the Court addressed the propriety of judges receiving compensation for issuing search warrants in *Connally v. Georgia*.[180] In a unanimous opinion,[181] the Court applied the *Tumey* "possible temptation" test to invalidate a state regime that paid JPs a fee

168. *Id.* The statutory amounts ranged from $100 to $2000. *Id.*

169. *Id.* at 534. The Court allowed that "the legislature of a State may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people." *Id.* at 535.

170. *Id.*

171. 277 U.S. 61 (1928).

172. *Id.* at 63.

173. *Id.* at 65.

174. 409 U.S. 57 (1972).

175. *Id.* at 60.

176. *Id.* at 58.

177. *Id.* at 60.

178. *Id.* at 58.

179. *Id.* at 60.

180. 429 U.S. 245 (1977).

181. *See id.*

($5) only when they issued a warrant.[182] Despite the small size of any single fee, what mattered was that the judge's "financial welfare" was enhanced by "positive action," not by denials of warrants.[183]

In 1980, in *Marshall v. Jerrico, Inc.*,[184] the Court turned its attention to potential pecuniary bias within the executive branch, in particular the collection of civil penalties by the U.S. Department of Labor for violations of the federal child labor laws. The Court found the *Tumey* neutrality principle to be inapplicable, reasoning that the Secretary of Labor was engaged solely in a prosecutorial or enforcement function, not a judicial one.[185] However, the Court also emphasized that principles formed in the judicial context might be relevant, noting that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."[186] Just the same, the *Marshall* Court found it unnecessary to "say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function," finding in the case at bar that no government official stood to benefit financially from vigorous enforcement of the Act.[187] Moreover, the Court found no "realistic possibility" of a broader institutional incentive to take enforcement action because penalties collected under the Act represented less than one percent of the budget for the agency charged with enforcement.[188] The likelihood of institutional self-dealing was further undercut because agency headquarters, not a regional administrator, decided how to allocate penalties, meaning that local administrators had no assurance that any penalties they assessed would be remitted to their offices.[189] Finally, the penalties allocated to regional offices were proportional to the Department's expenses for investigating and prosecuting child labor violations. For this combination of reasons, the possibility of bias was "too remote to violate the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plaintiff-like functions."[190]

B. Supreme Court Themes

Viewed as a whole, the Court's episodic opinions can be said to center on two basic concerns: neutrality and individualization.

182. *Id.* at 250; *see also id.* at 246 ("The fee so charged apparently goes into county funds and from there to the issuing justice as compensation."). At a pretrial hearing in the case, when litigated below, the justice of the peace testified that he served mainly because he was "interested in a livelihood," that he received no salary, and that his compensation was "directly dependent on how many warrants" he issued. *Id.*

183. *Id.* at 250.

184. 446 U.S. 238 (1980).

185. *Id.* at 247–48.

186. *Id.* at 249–50.

187. *Id.* at 250.

188. *Id.* at 250.

189. *Id.* at 251.

190. *Id.* at 239.

Concern over the neutrality of government actors is readily apparent in *Tumey, Ward*, and *Connally*. If a judge could benefit personally from a LFO, that judge cannot make the "neutral decision" that due process requires. Furthermore, some LFOs that benefit a government agency can create structural incentives just as troubling as those that personally benefit judges. If the LFO directly and substantially supports a government unit—for example, by providing a significant portion of the overall budget—it poses a threat to neutrality. Similarly, if the government actor who imposes the LFO also holds responsibility for the overall fiscal health of the agency that receives its benefit, the arrangement creates a neutrality problem.

On the other hand, it is plain that these neutrality principles do not categorically prevent the government from benefiting from an LFO, as *Dugan* and *Marshall* attest. Over time, the Court's failure to object categorically to financial benefit for government bodies has been manifest in other contexts, for instance in its holding that convicted defendants can be required to pay a "surcharge" tied to the posting of bail.[191] The Court has also long tolerated forfeiture actions,[192] despite acknowledging their possibly corrupting influence.[193]

Alongside the traditional due process concern for neutrality, a second theme has emerged. That theme is individualization: an LFO should reflect the nature of the particular offender's crime and the impact payment will have on the offender. The Supreme Court held in *Bearden v. Georgia*, for example, that a defendant who is unable to pay the amount that a court imposes as a probation term cannot be incarcerated for failure to pay.[194] Only after finding that a particular defendant has the financial ability to pay, and willfully disobeys the judicial order to pay, is incarceration permitted.[195] Similarly, an LFO must distinguish between acquitted and convicted defendants. A government cannot allow a jury to impose court costs on an acquitted defendant.[196]

C. State and Lower Federal Courts

These Supreme Court themes surface in the opinions of state courts and lower federal courts that have addressed LFO challenges. Faced with new and varied LFOs, courts have given deeper meaning to the Su-

191. Schilb v. Kuebel, 404 U.S. 357, 370–72 (1971) (upholding Illinois statutory "bail surcharge" of one percent, designed to offset costs of operating bail system).

192. *See, e.g.*, United States v. Ursery, 518 U.S. 267 (1996).

193. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 55–56 (1993) (stating that procedural protections are especially important in forfeiture actions "where the Government has a direct pecuniary interest in the outcome of the proceeding"). *Cf.* United States v. Funds Held ex rel. Wetterer, 210 F.3d 96, 110 (2d Cir. 2000).

194. 461 U.S. 660, 672 (1983).

195. *Id* at 670; *see also* Williams v. Illinois, 399 U.S. 235, 243 (1970) (holding that a convicted defendant cannot be incarcerated beyond the statutory maximum time due to inability to pay court-imposed fines and court costs). As discussed later, however, the *Bearden* standard today is very often violated. *See infra* note 369 and accompanying text.

196. Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966).

preme Court's core themes of neutrality and individualization. State courts and lower federal courts also have developed an additional theme of connectedness. They insist, on occasion, that state and local governments show some connection between the offender's crime and the proposed governmental use for the revenue from the LFO. Such a connection ensures that the defendant's conduct, rather than the budgetary needs of government, drive the decisions about the type and amount of LFOs that an offender must pay.

1. Elaboration of the Neutrality Theme

The neutrality theme makes frequent appearances in state and lower federal court decisions. Courts usually[197] but not always[198] condemn arrangements that provide direct financial benefits to judicial officers, or tempt them with personal wealth. Similarly, courts have invalidated systems when the job description for judges, as in *Ward v. Village of Monroeville*, gives them concomitant executive responsibility over budgets,[199] even when the percentage in question is quite small.[200] On the other hand, courts tend to condone payments when the benefits to the judiciary are deemed speculative or attenuated.[201] Courts are especially likely to view matters this way when funds are directed to the state general revenue fund.[202] One Louisiana court termed "particularly trou-

197. *See e.g.*, DePiero v. City of Macedonia, 180 F.3d 770, 772 (6th Cir. 1999) ("The Supreme Court's test does not call for proof of actual temptation. The mere *possibility* of temptation . . . is all that is required."); Rollo v. Wiggins, 5 So. 2d 458, 463 (Fla. 1942) (invalidating law allowing judge payment of $1, but only in the event of conviction, stating that "[t]he question is not what the effect may be on the conduct of any particular judge, but what the effect may be upon one who may easily yield to the temptation to feather his pocket even with a few extra dollars"); *In re* Dender, 571 S.W.2d 491, 492 (Tenn. 1978) (holding that a non-salaried judge who received a $3 fee for the issuance of a warrant does not satisfy the requirement for a "neutral and detached magistrate"); *see also* Brown v. Vance, 637 F.2d 272, 274–76 (5th Cir. 1981) (finding that a Mississippi law violated due process when local judges were paid a fee per case, and their compensation would increase depending on the number of cases filed in their court); Doss v. Long, 629 F. Supp. 127, 130 (N.D. Ga. 1985) (holding same with respect to similar Georgia system).

198. In *Allen v. State*, for instance, the Georgia Supreme Court held that the possibility that a judge might receive additional compensation by holding a committal hearing did not render the system unconstitutional because "the disposition of the case ha[d] no relationship to the fee." 242 S.E.2d 61, 63 (Ga. 1978); *see also, e.g.,* Bailey v. City of Broadview Heights, 674 F.3d 499, 504 (6th Cir. 2012) ("A mayor presiding over a Mayor's court does not violate due process when he acts in a purely ministerial capacity.").

199. *See, e.g.*, Rose v. Village of Peninsula, 875 F. Supp. 442, 452–53 (N.D. Ohio 1995).

200. *See, e.g.*, *DePiero*, 160 F.3d at 777–82 (invalidating on due process grounds a system in which a judge-mayor presided over cases and imposed fines and money generated amounted to less than ten percent of government budget); *Rose*, 875 F. Supp. at 448, 452 (holding that a mayor who "wears two hats" as the executive responsible for the village's finances and the judge of contested traffic tickets lacks impartiality when revenues were "substantial"); Augustus v. Roemer, 771 F. Supp. 1458, 1473 (E.D. La. 1991) (invalidating, under *Ward*, statute that vested judges with complete control over revenue generated by two percent bail bond fee).

201. *See, e.g.*, Northern Mariana Islands v. Kaipat, 94 F.3d 574, 582 (9th Cir. 1996) (rejecting due process challenge to law earmarking fines to support construction of new courthouse on the rationale that judiciary's interest was too speculative given its sole responsibility was to adjudicate cases and fines went to general treasury, itself controlled by Governor).

202. *See, e.g.*, Allen v. Cuomo, 100 F.3d 253, 260 (2d Cir. 1996) (holding that an inmate disciplinary surcharge did not violate due process because it was allocated to state's general revenue fund). For examples of state statutes specifying allocation to general revenue funds, see ALA. CODE § 12-19-

bling" a state law that directed fines and forfeitures to the city treasury, yet allowed the trial court and district attorney to channel the funds back to the Criminal Court Fund.[203]

Nonetheless, courts often (too often, in our minds) take comfort in a nominal separation between the enforcer of an LFO and the beneficiary of the revenue. Such formalism controls, for instance, when judges allow private entities to benefit from LFOs when public agencies could not. In *Jadeja v. Redflex Traffic Systems, Inc.*,[204] a federal court rebuffed a claim against private companies that provided red-light enforcement cameras in various California towns. The plaintiff, who had received a $346 fine for running a red light caught on the defendants' camera, claimed that the local governments' contracts with the companies violated his freedom from "incentivized prosecution."[205] In particular, the plaintiff alleged that the contracts contained a "cost neutral" provision leading the companies to produce a sufficiently high volume of infractions to cover their operating costs.[206] Refusing to recognize the plaintiff's "alleged interest in freedom from incentivized prosecution," the court rejected any analogy to *Tumey*, finding that the private firm sending the plaintiff the ticket did not act as a "prosecutor for the state," and that there was no allegation of partiality on the part of any judge or prosecutor.[207]

When the recipient of money is a governmental actor other than a judge, courts often take comfort in the judiciary's role as a hedge against government self-dealing. For example, in *Brown v. Edwards*,[208] the Fifth Circuit was not troubled by the fact that local police received a $10 payment for each arrest resulting in conviction.[209] To the court, what mattered was that any arrest was supported by probable cause, not the "officer's motives in making the arrest."[210] Similarly, the Mississippi Supreme Court has held that court clerks can be paid more for cases resulting in conviction than an acquittal, reasoning that clerks played no direct role in the resolution of cases.[211] Confidence in structural separation also

152 (2014); GA. CODE ANN. § 42-8-34(d)(1)-(2) (West 2014). In North Carolina, the state constitution requires that "penalties" and "fines" shall "belong to and remain in the several counties, and shall be faithfully appropriated and used for maintaining free public schools." N.C. CONST. art IX, § 7 (West 2014).

203. State v. Rideau, 943 So. 2d 559, 576, 577 (La. Ct. App. 2006).

204. 764 F. Supp. 2d 1192 (N.D. Cal. 2011).

205. *Id.* at 1196.

206. *Id.* at 1194-95; *see also id.* at 1194 (quoting complaint: "if the fixed monthly fees charged by Defendants were to exceed the total revenue brought in by the cameras, Defendants would refund, credit, or otherwise repay the [government] for the difference").

207. *Id.* at 1196. For a similar judicial treatment of the issue in the automated red light camera context, involving a third-party, non-governmental contractor, see Agomo v. Fenty, 916 A.2d 181, 196–97 (D.C. 2007).

208. 721 F.2d 1442 (5th Cir. 1984).

209. *Id.* at 1455–56.

210. *Id.* at 1452–53.

211. Nicholson *ex rel.* Gollott v. State, 672 So. 2d 744, 751 (Miss. 1996). *Cf.* Buritica v. United States, 8 F. Supp. 2d 1188, 1994–95 (N.D. Cal. 1998); State *ex rel.* Cnty. of Cumberland v. One 1990 Ford Thunderbird, 852 A.2d 1114, 1124–25 (N.J. Super. Ct. App. Div. 2004), *cert. denied*, 899 A.2d 305 (N.J. 2006).

drove the outcome in *Broussard v. Parish of Orleans*,[212] where the Fifth Circuit approved a Louisiana law allowing sheriffs to collect a two percent fee on all bail amounts, reasoning that the sheriffs, unlike the officials in *Ward* and *Tumey,* did not exercise a judicial function.[213]

In short, case law on enforcer neutrality is framed expansively and applied inconsistently. At times, judges intervene to insist on impartiality, especially when the LFO enforcer is also the recipient of revenue. Yet, as we have seen, courts can often remain indifferent to indirect and systemic conflicts of interest. Placing weight on the designation of an enforcer as "judicial" or "non-judicial," however, may not reflect practical realities on the ground. In the local courthouse culture of "working groups," the full-time professionals are aware of what their co-workers need, even if they carry different titles and perform different phases of the work. Such an environment creates powerful reasons for one set of officials (say, judges) to make choices that protect the entire courthouse staff.[214]

2. Elaboration of the Individualization Theme

Another major decisional seam in the case law asks whether the LFO is sufficiently tied to the individual circumstances of the case or the offender. The precise doctrinal framing of the question differs, depending on whether the courts treat a given LFO as a fine, a cost, or a fee. A fine can serve as a mandatory part of the punishment for a conviction, and is usually tied to the nature of conviction.[215] On the other hand, a cost is meant to compensate government for expenses incurred during investigation, prosecution, conviction, and punishment,[216] and a fee is tied to the expense of providing a specific program or service.[217] Fines, in

212. 318 F.3d 644 (5th Cir. 2003).

213. *Id.* at 662.

214. *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012) (discussing historical trends that entrench interests of courthouse professionals); JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977) (developing theory of criminal courts working groups, based on field observations).

215. People v. Jones, 861 N.E.2d 967, 975 (Ill. 2006) ("A 'fine' is a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense . . . . A 'cost' is a charge or fee taxed by a court such as a filing fee, jury fee, courthouse fee, or reporter fee . . . . Unlike a fine, which is punitive in nature, a cost does not punish a defendant in addition to the sentence he received, but instead is a collateral consequence of the defendant's conviction that is *compensatory in nature* . . . . A 'fee' is a charge for labor or services, especially professional services.")

216. People v. Sulton, 916 N.E.2d 642, 646 (Ill. App. Ct. 2009). Therefore, credits to fines for time spent incarcerated did not apply to a $200 DNA analysis LFO, as it was not a fine, but was a fee. People v. Johnson, 959 N.E.2d 1150, 1155 (Ill. 2011); *see also* State v. VanWinkle, 186 P.3d 1258, 1260 (Mont. 2008) (stating that credit for pre-conviction incarceration against a fine is allowed but not allowed against a fee).

217. *See, e.g.*, People v. Pacheco, 115 Cal. Rptr. 3d 220, 227–28 (Cal. Ct. App. 2010) (stating that the purpose of a court security fee is to finance the criminal justice system by funding the courts and is thus not rehabilitative or restitutionary in nature, and so cannot be made a condition of probation); Roehl v. City of Naperville, 857 F. Supp. 2d 707, 713–15 (N.D. Ill. 2012) (discussing the strength of the government's interest in imposing a booking fee on all arrestees, since all arrestees are not similarly situated); *see also* R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIM. JUST. & BEHAV. 242, 253 (2006).

short, are tied to the offender's crime, while costs and fees are linked to the government's expenditures in prosecuting a crime.

The categorization of a LFO can make all the difference in how a court evaluates the payment.[218] Fine amounts, for instance, ostensibly reflect the nature of the defendant's wrongdoing rather than the budgetary needs of criminal justice agencies. Fines imposed as pecuniary punishment are subject to the constitutional safeguards of the Excessive Fines Clause[219] and the right to a jury trial.[220] The Supreme Court invigorated the Excessive Fines Clause jurisprudence in *United States v. Bajakajian*,[221] holding for the first time that a civil forfeiture payment was invalid because it amounted to an excessive fine.[222] The relevant question is whether the forfeiture is grossly disproportionate to the defendant's *crime*, without looking to the individual defendant's ability to pay.[223] A few courts, however, also consider whether the forfeiture would destroy the defendant's livelihood.[224]

The Equal Protection Clause of the Fourteenth Amendment serves as another doctrinal basis for testing the ability of a defendant to pay various LFOs. When it comes to fines and restitution, the Supreme Court has determined that the Fourteenth Amendment requires an individualized assessment of an offender, the nature of his crime, and the amount of the fine imposed.[225] State and federal courts have declared that the Equal Protection Clause requires an individualized determination of whether a defendant can afford to pay a fee. The most active area of litigation involves fees for transcripts needed to prepare for a second trial after an initial mistrial, or to file an appeal.[226] Courts also require an individualized finding that each defendant has enough money to pay vari-

218. *See, e.g.*, *VanWinkle*, 186 P.3d at 1260 ("[D]enominating a monetary obligation imposed on a criminal defendant as a fee, rather than a fine, can 'affect the substantial rights of the defendant.'").

219. U.S. CONST. amend. VIII; *see, e.g.*, Hudson v. United States, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines, including forfeitures."); Austin v. United States, 509 U.S. 602, 621 (1993); State v. Izzolena, 609 N.W.2d 541 (Iowa 2000).

220. U.S. CONST. amend. VI; *see* So. Union Co. v. United States, 132 S. Ct. 2344 (2012) (extending the *Apprendi* rule to the imposition of criminal fines).

221. 524 U.S. 321 (1998).

222. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 834 (2013).

223. *See, e.g.*, United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999) ("[E]xcessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender."); United States v. Dubose, 146 F.3d 1141, 1146 (9th Cir. 1998) ("[A]n Eighth Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender."); *see also* United States v. Smith, 656 F.3d 821, 828–29 (8th Cir. 2011); United States v. Castello, 611 F.3d 116, 120 (2d Cir. 2010).

224. *See* United States v. Levesque, 546 F.3d 78, 83–85 (1st Cir. 2008); United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007).

225. *See* Bearden v. Georgia, 461 U.S. 660, 670 (1983); Tate v. Short, 401 U.S. 395, 397–99 (1971); *see also, e.g.*, People v. Pacheco, 115 Cal. Rptr. 3d 220, 223–28 (Cal. Ct. App. 2010) (applying California statute which expressly states that the imposition of fines and fees are subject to the defendant's ability to pay); Del Valle v. State, 80 So. 3d 999, 1015 (Fla. 2011) ("[B]efore a probationer can be imprisoned for failure to pay a monetary obligation such as restitution, the trial court must inquire into a probationer's ability to pay and make an explicit finding of willfulness based on the greater weight of the evidence.").

226. *See, e.g.*, Trinkle v. Hand, 337 P.2d 665 (Kan. 1959); State v. Gill, 342 A.2d 256 (R.I. 1975); State v. England, 363 S.E.2d 725 (W. Va. 1987).

ous fees for pre-trial and pre-sentence programs to avoid a jail or prison term.[227] Nevertheless, courts sometimes declare that it is not necessary for a judge to ask whether a defendant is able to pay if there is no viable alternative that meets the state's penological interests.[228] Furthermore, appellate courts are normally willing to defer to the trial judge's individual determination of an offender's ability to pay.[229]

3. A Third Concern: Connectedness

Faced with myriad forms of LFOs, imposed in many contexts, state and lower federal courts have also insisted upon connectedness: they look for an appropriate connection between an offender's crime and the government's planned use for the revenue a LFO generates. If the government spends the money on a program that is not closely enough connected to the defendant's conduct, some courts will block operation of the LFO, either as a matter of constitutional doctrine or statutory interpretation.

The connectedness consideration is less at issue in the context of fines than fees and costs. For instance, in *People v. Graves*, the Illinois Supreme Court upheld a $15 LFO used to fund mental health and youth diversion courts that the judiciary imposed on a defendant convicted of possession of a stolen motor vehicle.[230] The authorizing statute denominated the payment as a "fee," but the *Graves* court characterized the LFO as a "fine" because it was punitive in nature, imposed after conviction, and the proceeds were not used to compensate the state for expenses related to the defendant's crime.[231] As a result of this categorization, the government was not required to demonstrate any specific connection between the details of the crime and the purpose of the LFO.[232] The court put it this way: "the fact that the proceeds of the fine are earmarked for a specific purpose, unrelated to the offense upon which defendant was convicted, is irrelevant to their constitutionality . . . ."[233]

Other states adopt a similarly relaxed approach, granting broad latitude for the use of funds generated by fines. Florida, for example, au-

227. *See, e.g.*, People v. Trask, 191 Cal. App. 4th 387 (Cal. Ct. App. 2010) (deferred entry of judgment fee); Mueller v. State, 837 N.E.2d 198 (Ind. 2005) (pretrial diversion program fee); Moody v. State, 716 So. 2d 562 (Miss. 1998) (fee to drop prosecution); Guy v. City of Okla. City, 760 P.2d 1312 (Okla. 1988) (fee for continuance of sentence by court); Gray v. State, 650 P.2d 880 (Okla. Crim. App. 1982) (donation to Community Relations Fund as precondition to consideration for plea bargain); State v. Anderson, 677 P.2d 39 (Or. Ct. App. 1983) (pre-trial rehabilitation program fee); State *ex rel.* Hawkins v. Luttrell, 424 S.W.2d 189 (Tenn. 1968) (jail fees while awaiting trial); State v. Shelton, 512 S.E.2d 568 (W. Va. 1998) (home confinement fee).

228. *See, e.g.*, State v. Bulu, 560 A.2d 1250 (N.J. Super. Ct. App. Div. 1989) (entry and lab fees for pre-trial intervention in drug cases); State v. Jimenez, 810 P.2d 801 (N.M. 1991) (restitution as part of pretrial diversion program); People v. Brown, 481 N.Y.S.2d 771 (N.Y. App. Div. 1984) (controlled substance surcharge).

229. *See, e.g.*, United States v. Johnson, 347 F.3d 412 (2d Cir. 2003).

230. 919 N.E.2d 906, 911 (Ill. 2009).

231. *Id.* at 910–11.

232. *Id.* at 910.

233. *Id.*

thorizes the use of proceeds from fines to fund legal aid programs, public law libraries, and teen courts.[234] In Arizona, a ten percent surcharge collected on all fines is directed to a "clean elections" fund in an effort to diminish the influence of "special-interest money" in political campaigns.[235] Illinois requires payment of a five dollar fine by defendants convicted of drug possession, payable to the state "Spinal Cord Injury Paralysis Cure Research Fund."[236] In Virginia, fine proceeds are directed to the state "Literary Fund."[237]

While fines typically survive constitutional challenges based on their weak connection to the purposes that the state hopes to pursue with the revenue, statutory challenges offer courts more of a basis to intervene. Fines are a creature of statute. Courts that impose fines without explicit statutory authority, no matter how commendable the beneficiary, are subject to reversal.[238]

Courts treat the imposition of costs and fees differently than fines.[239] As noted by the First Circuit, the "American legal tradition does not, absent specific statutory authority, require defendants to reimburse the government for the costs of their criminal investigations or their criminal prosecutions."[240] When reviewing challenged costs and fees, courts usually require some logical connection between a particular prosecution and its cost to the government.[241]

When it is clear that costs or fees being charged are reasonably related to the investigation or prosecution of a certain defendant, courts will uphold them as a valid reimbursement of the government's expenses. In *State v. Claborn*, the Oklahoma Court of Criminal Appeals validated statutes that mandated assessments for a law enforcement training program as well as a victims' compensation fund.[242] In doing so, the court reasoned that the "various assessments are reasonably related to the costs of administering the criminal justice system . . . ."[243]

Even under this relaxed standard, courts have invalidated various costs and fees when the connection between the assessment and its par-

234. FLA. STAT. ANN. § 939.185(1)(a) (West 2014).

235. ARIZ. REV. STAT. ANN. §§ 16-940(A), 16-954(A) (2014).

236. 730 ILL. COMP. STAT. ANN. 5/5-9-1.1(c) (2014); *see, e.g.*, People v. Jones, 861 N.E.2d 967, 987-89 (Ill. 2006) (construing LFO as a fine and upholding its imposition).

237. VA. CONST. art. VIII, § 8; VA. CODE ANN. § 19.2-353 (West 2014).

238. *See, e.g.,* State v. Harwell, 515 N.W.2d 105, 110 (Minn. Ct. App. 1994) (invalidating trial court decision to impose $14 monthly fine payable to a "Missing Children's Fund"); State v. Cooper, 760 N.E.2d 34, 38 (Ohio Ct. App. 2001) (invalidating trial court decision to direct fines to American Cancer Society because the statute required payment to the county treasury); Camacho v. Samaniego, 831 S.W.2d 804, 815 (Tex. 1992) (finding that bond approval fees imposed on bondsmen are not authorized by statute). *Cf.* MINN. STAT. ANN. § 574.34(1) (West 2014) ("Fines and forfeitures not specially granted or appropriated by law shall be paid into the treasury of the county where they are incurred . . . .").

239. *See* United States v. Bevilacqua, 447 F.3d 124, 127 (1st Cir. 2006).

240. *Id.*

241. *See, e.g.*, Broyles v. State, 688 S.W.2d 290, 291–92 (Ark. 1985); State v. Young, 238 So. 2d 589, 590 (Fla. 1970); State v. Ballard, 868 P.2d 738, 741 (Okla. Crim. App. 1994); State v. Claborn, 870 P.2d 169, 174 (Okla. Crim. App. 1994); Carter v. City of Norfolk, 147 S.E.2d 139, 144 (Va. 1966).

242. *Claborn*, 870 P.2d at 174.

243. *Id.* at 171.

ticular use is too attenuated. In *Ex Parte Carson*, the Texas Court of Criminal Appeals disapproved of the use of court costs to fund the creation and maintenance of a law library.[244] Likewise, at least for some courts, charging a defendant for a pro rata share of system "overhead"—that is, costs imposed to maintain basic institutions of the justice system—does not pass muster.[245] Courts, for instance, have disallowed costs tied to the number of hours prosecutors worked on a defendant's case.[246] The Oregon Court of Appeals recently rebuffed a government effort to recover overtime payments associated with guarding a defendant in a hospital, saying that the public "either must make an expenditure in order to maintain and operate a government agency, or not."[247]

On the whole, challengers lose more often than they win because courts defer to legislative judgments in enacting statutes that require the payment of specific costs[248] or fees.[249] For example, courts often find costs and fees associated with DNA collection and analysis to be appropriate.[250] Costs may also be assessed to cover prosecution expert witness expenditures.[251] Courts will usually reject challenges to the payment of incarceration-related costs so long as they are based on valid statutory authority.[252] Yet when an assessment is imposed on an individual who does not fall within the express terms of an authorizing statute, appellate courts can be quick to intervene.[253] Courts have also overturned assess-

244. 159 S.W.2d 126, 127 (Tex. Crim. App. 1942). The court reasoned that

> [i]f something so remote as a law library may be properly charged to the litigant on the theory that it better prepares the courts and the attorneys for the performance of their duties . . . [then] we might as logically tax an item of cost for the education of such attorneys and judges and even the endowments of the schools which they attend.

Id.

245. *See, e.g.,* State v. Ayala, 623 P.2d 584, 586 (N.M. Ct. App. 1981) (stating that jury and bailiff costs cannot be imposed); Arnold v. State, 306 P.2d 368, 376 (Wyo. 1957) (stating that expenses paid for bailiff services are not a part of the costs of prosecution).

246. *See, e.g.*, Commonwealth v. Garzone, 34 A.3d 67, 80 (Pa. 2012).

247. State v. Kuehner, 288 P.3d 578, 581 (Or. Ct. App. 2012).

248. *See, e.g.*, State v. Myers, 602 S.E.2d 796, 800-03 (W. Va. 2004) (giving effect to legislative intent to allow assessments for jury costs).

249. *See, e.g.*, State v. VanWinkle, 186 P.3d 1258, 1262 (Mont. 2008) (holding that trial court was not statutorily authorized to impose $85 fee used for a community service program).

250. *See supra* note 212 and accompanying text.

251. *See, e.g.,* United States v. May, 67 F.3d 706, 707–08 (8th Cir. 1995); People v. Brown, 755 N.W.2d 664, 682 (Mich. Ct. App. 2008); Commonwealth v. Hernandez, 917 A.2d 332, 336 (Pa. Super. Ct. 2007). However, some courts have concluded this does not include pre-indictment investigation expenses. *See, e.g.*, United States v. Hiland, 909 F.2d 1114, 1142 (8th Cir. 1990).

252. *See, e.g.,* Slade v. Hampton Roads Reg'l Jail, 407 F.3d 243, 246 (4th Cir. 2005) (upholding a $1 per day housing fee for pre-trial detainee); Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 417–24 (3d Cir. 2000) (discussing a $10 per day inmate housing fee); Christensen v. Clarke, 147 F.3d 655, 657 (8th Cir. 1998) (upholding the deduction of room and board from a prisoner's work release salary); Goad v. Fla. Dep't of Corr., 845 So. 2d 880, 885-86 (Fla. 2003) (upholding a $50 per day inmate housing fee). *But see, e.g.*, Bouza v. Sheriff of Bristol Cnty., 918 N.E.2d 823, 831–34 (Mass. 2010) (stating that the sheriff lacks authority to impose fees for haircuts, GED tests, and medical care).

253. *See, e.g.,* People v. Molidor, 970 N.E.2d 58, 62 (Ill. App. Ct. 2012) (rejecting assessment of DNA analysis fee because the statute authorizes payment of the fee "only where that defendant is not currently registered in the DNA database[]"); State v. Moreno, 294 P.3d 812, 823 (Wash. Ct. App. 2013) (rejecting assessment of a domestic violence fee where assault was not "committed by one family or household member against another" (citation omitted)).

ments after construing statutes as disallowing certain costs or fees.[254] Moreover, costs are typically not available in the event of an acquittal or dismissal.[255]

Courts sometimes examine LFOs under the specific provisions of a state constitution, especially regarding separation of powers.[256] In *State v. Lanclos*, for instance, the Louisiana Supreme Court invalidated a statute that mandated that all traffic offenders pay a $5 LFO used to supplement police salaries and equipment expenses.[257] The court found that the assessment violated separation of powers because it amounted to a "'tax' funded through the judiciary."[258] In an earlier decision, the same court invalidated a $3 filing fee that funded domestic violence programs, finding that it violated the Louisiana Constitution's access to courts provision.[259] The Florida Supreme Court ruled that a five percent bond surcharge allocated to the Crimes Compensation Trust Fund infringed the state's constitutional right to reasonable bail because it was unrelated to bail's purpose to assure the accused's attendance at trial and did not benefit the operation of the bonding system.[260]

LFOs also surface with the appointment of defense counsel to indigents. The state is allowed to recoup costs associated with providing an indigent with defense counsel,[261] on the rationale that doing so does not chill exercise of the right to counsel.[262] In addition, some jurisdictions require that individuals qualifying as indigent pay an up-front "application" fee or "co-payment" for appointed counsel.[263] In exceptional cases,

254. *See, e.g.,* United States v. Bevilacqua, 447 F.3d 124, 129 (1st Cir. 2006) (finding that costs of specially appointed prosecutors cannot be charged because they are agents of the United States Attorney and not experts of the court); United States v. Banks-Giombetti, 245 F.3d 949, 953 (7th Cir. 2001) (vacating assessment of jury costs against the defendant where there was no statute or local practice and the defendant was not put on notice); Gooch v. State, 685 N.E.2d 152, 155 (Ind. Ct. App. 1997) (reversing jury costs in absence of statutory authority).

255. *See, e.g.,* United States v. Palmer, 809 F.2d 1504, 1508–09 (11th Cir. 1987); United States v. Troiani, 595 F. Supp. 186, 187 (N.D. Ill. 1984); United States v. Miller, 223 F. 183, 184–85 (S.D. Ga. 1915); People v. Palomo, 272 P.3d 1106, 1112 (Colo. App. 2011); Leyritz v. State, 93 So. 3d 1156, 1158 (Fla. Dist. Ct. App. 2012); State v. Faulkner, 292 P.2d 1045, 1051 (Wyo. 1956).

256. *See, e.g.*, State v. Medeiros, 973 P.2d 736, 742 (Haw. 1999) (invoking state separation of powers and taxing clauses provisions to invalidate costs not used to defray actual expenses).

257. 980 So. 2d 643, 654 (La. 2008).

258. *Id.* at 654 (construing LA. CONST. art. II, § 1). The court also reasoned that "[a]lthough . . . there is some logical connection between a police department and the criminal justice system, . . . police salaries and uniform equipment and maintenance is too far attenuated from the 'administration of justice,' to be considered a legitimate court cost." *Id.*

259. Safety Net for Abused Persons v. Segura, 692 So. 2d 1038, 1042 (La. 1997) (construing LA. CONST. art. I, § 22). The court stated that the court system "should not be made tax collectors . . ., nor should the threshold to our justice system be used as a toll booth to collect money for random programs created by the legislature." *Id.*

260. LaRue v. State, 397 So. 2d 1136, 1138 (Fla. 1981) (construing FLA. CONST. art. I, § 14).

261. *See, e.g.*, OR. REV. STAT. ANN. § 161.665(2) (West 2014).

262. *See* Fuller v. Oregon, 417 U.S. 40, 53 (1974) ("The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel.").

263. *See, e.g.*, KAN. STAT. ANN. § 22-4529 (West 2014); State v. Casady, 210 P.3d 113, 120 (Kan. 2009) (upholding statute requiring application fee for appointed counsel); State v. Albert, 899 P.2d 103, 109, 112–13 (Alaska 1995); Opinion of Justices, 431 A.2d 144, 147 (N.H. 1981); Wicks v. Charlottesville, 208 S.E.2d 752, 757 (Va. 1974); *see generally* Wright & Logan, *Application Fees, supra* note 94 (discussing application fees).

however, courts have limited or wholly invalidated the use of such fees. These courts conclude that the fees unduly restrict the constitutional right to counsel of indigent defendants.[264]

D. Summary

As the preceding discussion suggests, state and lower federal courts, building on Supreme Court precedent, have issued a hodgepodge of rulings on LFOs. On the whole, the courts defer to the legislature and enforce fines, fees, and costs that the legislature has clearly authorized. Such deference is especially evident with fines. With costs and fees, on the other hand, one sees more critical scrutiny. Courts from time to time rely on statutory interpretation to declare that LFOs stray beyond their authorized terms. Less commonly, they use federal or state constitutional doctrine, including separation of powers, to find fault with LFOs.

Ultimately, however, case law is only modestly helpful in lending principled order to the profusion of LFOs. As the Arizona Court of Appeals recently observed when assessing whether a "prosecution fee" imposed by a county was punitive in nature and essentially a fine,[265] LFO categories and the analytic tests employed are not "black and white . . . but, rather, include many shades of gray."[266] Much as courts have unsuccessfully grappled in the constitutional arena with determining whether a sanction is punitive in nature, and hence subject to double jeopardy, *ex post facto*, or other limits,[267] they have failed to draw functionally meaningful distinctions among LFOs.[268]

Caselaw also fails to account for the cumulative effect of LFOs. Challenges typically evaluate LFOs in isolation. As one California judge put it, "[h]owever laudable these charges may be, the patchwork nature of the ever-growing financial penalties in criminal actions has created a system that begins to match the complexity of the federal income tax."[269]

264. *See, e.g.*, Burns v. Ohio, 360 U.S. 252, 258 (1959); Griffin v. Illinois, 351 U.S. 12, 16–19 (1956); State v. Dudley, 766 N.W.2d 606, 617 (Iowa 2009); State v. Tennin, 674 N.W.2d 403, 410–11 (Minn. 2004); State v. Webb, 591 S.E.2d 505, 509–10 (N.C. 2004).

265. *See* State v. Payne, 225 P.3d 1131 (Ariz. Ct. App. 2009).

266. *Id.* at 1141. Emblematic of this ambiguity even restitution can have a surcharge, in New York State, with an additional five percent of the restitution amount going to the collecting agent. NEW YORK BAR RE-ENTRY REPORT, *supra* note 122, at 171. California allows a "restitution fine" to be assessed, which is tied to the seriousness of the offense. CAL. PENAL CODE § 1202.4 (West 2014).

267. *See generally* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261 (1998) (discussing the Supreme Court's *Ex Post Facto* Clause case law).

268. A basis for optimism, and possible light for the path toward much-needed more critical constitutional regulation that could be undertaken, is found in the evolving judicial treatment of restitution, as possibly qualifying as punishment for constitutional purposes under certain circumstances. *See* William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After* Southern Union v. United States?, 64 ALA. L. REV. 803, 822–29 (2013).

269. People v. Castellanos, 98 Cal. Rptr. 3d 1, 8 (Cal. Ct. App. 2009) (Kriegler, J., concurring).

V. GUIDING PRINCIPLES AND AN INSTITUTIONAL RESPONSE

Judicial doctrine starts with the recognition that benefits flow to the government from LFOs.[270] Such benefits present the risk of self-dealing, whether in structuring the payment system or in setting the payments in a particular case. As the Supreme Court put it in *Harmelin v. Michigan*, "it makes sense to scrutinize governmental action more closely when the State stands to benefit."[271]

Given the systemic risk that criminal justice LFOs present, general principles to guide their creation and operation could shield government actors from the suspicion that they are feathering their own nests.[272] As Part IV made clear, however, the available judicial doctrine is not up to the job. Courts have sketched only broad analytic parameters; they talk about neutrality, individualization, and connectedness but apply those values inconsistently. Judicial regulation has not imposed any meaningful order on LFOs or set the sort of credible limits that would be necessary to legitimize this mushrooming practice. This Part shores up the rickety judicial foundation with more complete guiding principles, dividing the task into two components: risk assessment and risk reduction. For each of these two components, we imagine how legislatures, commissions, and other institutions can supplement the incomplete work of the judiciary.

A. Risk Assessment

LFOs operate in a charged environment. Legislators can improve their re-election odds when they "stick it" to criminal offenders and give taxpayers more criminal enforcement for less public expense, while judicial and executive actors (including their agents in the private sector) can restore the finances of their programs through the collection of LFOs. Two rules of thumb, derived from the major themes in the case law surveyed earlier, can help policy makers understand when the risk of distortion through self-dealing is highest.

270. *See, e.g.*, People v. Guerrero, 904 N.E.2d 823, 825 (N.Y. 2009) (quoting legislative memorandum and noting that mandatory surcharges arose out of "a massive revenue-raising bill meant to 'avert the loss of an estimated $100 million in State tax revenues'").

271. 501 U.S. 957, 979 n.9 (1991). For an interesting examination of this recognition in the context of government prosecutions resulting in large financial recoveries, see Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement,* 127 HARV. L. REV. 853 (2014). Like the LFO context, incentives in large recovery actions are strongest when the entity or agency is permitted to retain some or all of the enforcement proceeds. *Id*. at 854. Of course, big dollar public enforcement actions, which do not always attend criminal cases, and which often target monied and high profile individuals or entities, differ in important respects from LFO collections. The latter are staples of the criminal justice system today and are experienced by legions of mostly poor and functionally anonymous individuals. One outgrowth of the difference is that big dollar enforcement actions can be motivated by reputational incentives, for individuals and agencies, at play even when money does not go to the enforcer. *See id.* at 875–86. With LFOs, such a reputational incentive is typically absent.

272. *Cf.* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 170 (2006).

1. How Early Does the Payment Appear in the Process?

The first risk factor is the extent to which actors impose and collect payments early in the process. This risk factor is grounded in the common law insight discussed above, that an LFO deserves more deference when it is individualized for the offender and offense. That individualization takes place most reliably when there is time to gather facts about each case, and time to involve more system actors in the evaluation. A criminal fine, which takes place after an adjudication on the merits and input from prosecution, defense, the judiciary, and theoretically the community, offers the best hope to avoid the systemic risk of inaccurate and non-individualized LFOs.

This risk factor points to a guiding principle: the earlier the payment, the more problematic it is. For instance, pre-adjudication payments of "diversion supervision" fees to prosecutors should prompt serious concern. These LFOs happen without the institutional checks and balances—that is, input from other players—that can make a governmental decision legitimate, reliable, and tailored to the merits of an individual case. There is no judge to convince about the propriety of a diversion fee, and often no defense attorney to counterbalance prosecutorial prerogative.

Consider, for example, the practices of prosecutors in Tallahassee, Florida, where the office collected fees directly from defendants as a condition of entering plea bargains, and then kept the funds for itself.[273] The strategy allowed the office to circumvent a state law requiring the court clerk to collect and distribute payments in accord with legislative priorities.[274]

The absence of checks and balances increases the risk that an LFO will be based on inaccurate facts, self-dealing, and even bias. In this setting, defendants are vulnerable to coercion and unequal justice, with richer suspects better able to "buy" a favorable outcome and avoid the adverse personal consequences of a criminal charge.[275] Booking fees, based solely on a probable cause finding by police, and not a finding of guilt, are similarly problematic.[276] When the government is permitted to generate revenue without investing much in the way of its own resources,

273. DILLER, HIDDEN COSTS, *supra* note 1, at 10.

274. *Id.* at 10–11 (discussing law requiring that clerk assign the first $50 of any fees or costs paid by an indigent person as payment of the public defender application fee, which funds indigent defense). Moreover, when the office was unable to collect the monies at the outset, prosecutors would request that the court order the fee be paid within a specified time "regardless of the defendant's ability to pay." *Id.* at 10.

275. Equal justice concern has led some courts to reject such practices. *See, e.g.*, Moody v. State, 716 So. 2d 562, 565 (Miss. 1998) ("[O]ne who is unable to pay will always be in a position of facing a felony conviction and jail time, while those with adequate resources will not.").

276. To date, due process challenges against local laws permitting the practice have been rebuffed by appellate courts on standing grounds. *See* Markadonatos v. Village of Woodridge, 739 F.3d 984, 991 (7th Cir. 2014); Sickles v. Campbell Cty., Ky., 501 F.3d 726, 732 (6th Cir. 2007). At least one trial court, however, has granted due process relief in a challenge against a booking fee assessed prior to conviction. *See* Allen v. Lei, 213 F. Supp. 2d 819, 834 (S.D. Ohio 2002).

net-widening also becomes a very real concern, as every potential arrestee becomes a potential source of revenue.

Just as LFOs become more suspect when they attach early with less input from other checking institutions, they should prompt concern when they apply automatically without regard to an individual's ability to pay. Judicial doctrine recognizes this problem; judges do intervene in extreme cases. They declare, both on constitutional and statutory grounds, that the LFO schemes must include some safety valve for indigent defendants.[277] Other actors, however, can give life to this expectation, by monitoring the number of waivers and reviewing the work of enforcers when indigency waivers become too scarce in a system dominated by poor defendants. When actors complain that LFO collections are not bringing in enough funds, it is a warning sign that they are not taking seriously the need for individual assessment.

2. How Prominent is Revenue as a Purpose?

Another risk factor turns on the popular phrase, "follow the money."[278] If the money that a LFO yields was an important reason for authorizing it, the risk increases that revenue considerations will distort that LFO in operation. For instance, if a legislature creates or modifies a fee structure at the same time that it reduces the operating budgets for prosecutors or other criminal justice actors, that founding purpose is likely to dominate later applications. This point builds on the neutrality requirement reflected in case law.

One red flag about the importance of revenue in the design of a LFO arises when the same actor or government both imposes the amount and benefits from the revenues. *Tumey* recognized this principle in its most overt form, but the risk also appears in less obvious contexts.[279] In New Orleans, for instance, LFOs go to the Judicial Expense Fund, which is used to pay for courtroom improvements such as carpeting and audio systems.[280] Anecdotal evidence suggests that the city's judges pressured colleagues to collect LFOs and that judges who secured less than their "fair share" were allocated less in operating funds.[281] Along these same lines, it is often the case that court clerks—typically a

277. *See, e.g., Moody,* 716 So. 2d at 565 (holding that the system of extracting a $500 fee to avoid prosecution was "both procedurally and constitutionally flawed").

278. While public collectors might act strictly to further their reputations in some contexts, such as big-dollar civil and criminal enforcement actions, in the high-volume, low-dollar world of LFOs it is all about the money. *See* Lemos & Minzer, *supra* note 271, at 875–86.

279. This is the view of ABA and various advocacy groups. *See, e.g.,* BANNON ET AL., CRIMINAL JUSTICE DEBT, *supra* note 3, at 30; Frances Kahn Zemans, *Court Funding* 7 (2003), *available at* http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/courtfunding.authcheck.dam.pdf. But courts have tended to require direct and unqualified pecuniary interest. *See supra* notes 197–214 and accompanying text.

280. ACLU, IN FOR A PENNY, *supra* note 4, at 25.

281. *Id.* at 9.

potent political force in local government—stand to benefit from court cost payments.[282]

The behavior pattern is predictable from a public choice perspective.[283] Oklahoma's "DA Supervision" program shows the power of economic incentives playing out over time. In 2007, the legislature increased the length of deferred prosecution agreements from two to three years.[284] Coupled with the then-current $20 per month fee for supervision, this amendment increased the "earning potential" by $240 on each agreement.[285] Then, in 2009, the legislature doubled the "potential" on each agreement by increasing the monthly fee from $20 to $40.[286] As a result, each office could use a deferred prosecution agreement to net an increase of $960 more per contract than what it could have before the amendment.[287]

The distorted incentives are so predictable and pervasive that we encourage system actors to apply this rule of thumb: all LFO revenue should go into the general treasury. Earmarked payments are suspect. While criminal justice programs might receive through the appropriations process an amount consistent with LFO receipts, any such decision should be revisited each year and should not rest in the hands of the LFO collectors.

Risk also spikes when private vendors get involved. Governments, for instance, sometimes contract with private parties to operate halfway houses and other community-based treatment programs for offenders.[288] When those contractors are politically connected, or when the delegations of the state's power to punish happen without adequate contractual standards and monitoring, it is worrisome.[289] Contractors have also

282. *See, e.g.,* FLA. STAT. § 938.06(2) (2014) (stating that the clerk shall retain $3 out of $20 assessed on all convictions and allocated to "crime stoppers programs"); FLA. STAT. § 938.19(4)(b) (2014) (stating that the clerk shall withhold five percent of all assessments imposed for "teen court" as "fee income" for the office).

283. As the American Probation and Parole Association notes, "[o]f all factors affecting collections, the degree of access to fee payments is the most significant. Organizations which are able to keep part or all of the supervision fees collected, collect more." AM. PROBATION AND PAROLE ASS'N, *Issue Paper: Supervision Fees* (Jan. 2001), *available at* http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_IssuePaper&wps_key=bbe810ce-4464-4519-a1d7-4993574a8d61.

284. OKLA. STAT. tit. 22 § 305.1 (2014).

285. *Id.* § 991d(B).

286. *Id.* The program generated $15.3 million for District Attorney's offices in 2012. Alison Harris, *Inside Oklahoma's Probation System*, FOX TEXOMA (Feb. 21, 2013, 10:33 PM), http://www.kxii.com/fox/home/headlines/Inside-Oklahomas-Probation-System-192418691.html.

287. *See* OKLA. STAT. tit. 22 § 991d(A) (2014).

288. *See, e.g.,* Sam Dolnick, *A Volatile Mix Fuels a Murder*, N.Y. TIMES, June 18 2012, http://www.nytimes.com/2012/06/19/nyregion/at-a-new-jersey-halfway-house-a-volatile-mix-fuels-a-murder.html?_r=0 (noting security concern over privately run New Jersey halfway house, used as "dumping ground," housing violent and non-violent offenders, with close political ties to governor and county executive); Sam Dolnick, *As Escapees Stream Out, A Penal Business Thrives*, N.Y. TIMES, (June 16, 2012), http://www.nytimes.com/2012/06/17/nyregion/in-new-jersey-halfway-houses-escapees-stream-out-as-a-penal-business-thrives.html?pagewanted=all.

289. *See, e.g.*, Sam Dolnick, *Halfway Houses Prove Lucrative to Those at Top*, N.Y. TIMES, Dec. 29, 2012, http://www.nytimes.com/2012/12/30/nyregion/operator-of-new-jersey-halfway-houses-paid-millions-to-founder.html?gwh=DFFC8BAF0BD69476F0FC0E96D505FEF6&gwt=pay [hereinafter Dolnick, *Prove Lucrative*] (discussing lax oversight of politically influential, ostensibly non-profit entities operating halfway houses in New Jersey, which secured over half a billion dollars from the

prompted concern in the context of probation services.[290] In Georgia, three dozen for-profit companies are authorized to operate, tacking on "enrollment" and other surcharges that can together exceed the fines and costs imposed on defendants.[291] When more time on probation brings more revenue for the contractors, an obvious moral hazard threat arises, one borne out in the practice of one provider requesting that defendants serve their sentences consecutively, not concurrently.[292] The incentive system is reinforced when firms tie their evaluation of individual officer performance to the amount of money secured from probationers,[293] not to the officer's provision of service or the behavior of probationers.[294]

Private enterprise has also become a force in the debt collection business, with over three hundred prosecutors' offices now allowing private companies to use their letterhead to contact debtors, demanding payment on bounced checks.[295] The companies collect the debt, which goes to the creditor, along with LFOs (including payments for a "financial accountability" class), some of which is funneled back to the prosecutors' offices.[296]

Just as there are some indicators of high risk, there are also some contexts that suggest lower risk. In some settings, the entity that authorizes an LFO and its amount has nothing to do with the decision to assess LFOs in individual cases. It is often the case, for instance, that statutory terms will predetermine the amount of costs that courts can assess.[297]

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state over the past decade, and two entities in particular that now control eighty-five percent of the business); Susan Taylor Martin, *Felons, Drug Dealers Run Halfway Houses for Addicts*, TAMPA BAY TIMES, Nov. 18, 2012, http://www.tampabay.com/news/publicsafety/felons-drug-dealers-run-halfway-houses-for-addicts/1261881 (detailing activities of "parasitic" private firms run amok in halfway house industry, with no regulatory oversight). On the issue of lax regulatory oversight in the privatization context more generally, see Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010).

290. *See, e.g.*, S. CTR. FOR HUMAN RIGHTS, PROFITING FROM THE POOR: A REPORT ON PREDATORY PROBATION COMPANIES IN GEORGIA 2 (2008), http://www.inthepublicinterest.org/sites/default/files/Profiting%20from%20the%20Poor.pdf; Bronner, *supra* note 129 (discussing "money-starved towns across the country and the for-profit businesses that administer the system"). The use of global positioning systems for monitoring offenders, a "techno-corrections" strategy that governments often favor as a cheaper alternative to brick-and-mortar incapacitation, is also a major money-maker for private companies. *See* Ian Herbert, *Where We Are with Location Tracking: A Look at the Current Technology and the Implications on Fourth Amendment Jurisprudence*, 16 BERKELEY J. CRIM. L. 442 (2011).

291. Bronner, *supra* note 129.

292. ACLU, IN FOR A PENNY, *supra* note 4, at 60.

293. *Id.* at 61.

294. *Id.* at 63. Adding to concern over the role of private companies is that fact that they are often exempt from the disclosure requirements imposed on public entities. The lack of routine reporting makes it difficult to determine whether outsourcing, such as for probation supervision, actually yields cost savings. *Id. See also* Sara Dolisca Bellacicco, Note, *Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System*, 48 GA. L. REV. 227, 242–43 (2013) (discussing lack of public disclosure).

295. Jessica Silver-Greenberg, *In Prosecutors, Debt Collectors Find a Partner*, N.Y. TIMES (Sept. 15, 2012), http://www.nytimes.com/2012/09/16/business/in-prosecutors-debt-collectors-find-a-partner.html?pagewanted=all.

296. *Id.* In Florida, private debt collection companies can add a forty percent surcharge to unpaid LFO debt. DILLER, HIDDEN COSTS, *supra* note 1, at 2.

297. *See, e.g.*, ALASKA STAT. ANN. § 12.55.039 (West 2014); CONN. GEN. STAT. ANN. § 52-143 (West 2014); N.J. STAT. ANN. § 22A:3-4 (West 2014); N.M. STAT. ANN. § 31-12-6 (West 2014); N.C.

Such role differentiation, however, does not make the risk disappear completely. While LFO collectors might prove overly zealous when collecting funds that sustain their own operations, they might care too little if collection adds to their own workload and the benefits flow to some other entity.[298]

The importance of financial motivation as a risk factor changes over time; it is especially pronounced in times of budgetary stress. When government budgets shrink, criminal justice actors predictably look for revenue sources to fill the gap. As the Supreme Court recognized from the beginning in *Tumey*, when revenue from LFOs constitutes a significant portion of the total budget for a criminal justice program, the risk of self-dealing is high.[299] Similarly, caution is warranted when revenue consistently exceeds the marginal costs of running a program.

B. Risk Reduction from Commissions

Many of the risk factors we have discussed become salient only to those who understand the criminal justice system as a whole. A person or group benefitting from an LFO, for instance, might not know or care about its negative effects. As a result, the people or institutions assigned to reduce the risks of LFOs should have a system-wide perspective, with the ability to appreciate how different pieces of the system interact. This takes us beyond the capacity of judges deciding individual challenges to the imposition of a particular LFO. The constitutional and common law principles surveyed in Part IV help to identify high-risk areas, but, as suggested, they fall short of a full, nuanced response to those risks.

For these reasons, we recommend creation of an independent commission. The commission should comprehensively review existing LFOs, approve newly proposed LFOs, and collect and publish data relevant to their legal and policy desirability. Sentencing commissions already operate in almost half of the states to develop, monitor, and improve sentencing laws and practices.[300] In those jurisdictions, the management of LFOs should become part of the portfolio for the sentencing commission.

In jurisdictions without a sentencing commission in place, a specialized commission should handle the job. Louisiana, for instance, operates

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GEN. STAT. ANN. § 7A-304 (West 2014); R.I. GEN. LAWS. ANN. § 12-18.1-3 (West 2014); VA. CODE ANN. § 17.1-275 (West 2014); W. VA. CODE ANN. § 50-3-2 (2014). For states with judicial authority over LFO amounts, see, e.g., ME. REV. STAT. ANN. tit. 15, § 1901 (2014); N.D. CENT. CODE ANN. § 27-01-10 (West 2014); OHIO REV. CODE ANN. § 2947.23 (West 2014).

298. For example, in Michigan's rural areas, fines go to a state library fund, so courts are disinclined to impose them. Court costs and attorney-related LFOs, on the other hand, are set by the local courts, and they receive the money, leading judges to impose them more often. ACLU, IN FOR A PENNY, *supra* note 4, at 38; *see also* REYNOLDS & HALL, *supra* note 99, at 11 (noting "tendency for locally funded courts to prioritize local fees over legislative fees" and expressing concern that a judge could "use the threat of waiving fees to force local entities to conform to practices or fee schedules that the judge thinks are appropriate").

299. *See supra* notes 159–170 and accompanying text.

300. *See generally* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

a "Standing Committee to Evaluate Requests for Courts Costs and Fees," which works under the auspices of the Judicial Council of Louisiana.[301] The thirteen-member committee evaluates all LFO proposals by Louisiana state agencies and local governments and makes a recommendation to grant or deny each LFO proposal. The Standing Committee forwards its report to the Judicial Committee and ultimately to the legislature for final approval.[302]

Whether the work ultimately stays in the hands of a pre-existing unit of government or goes to a new specialized body, the entity should reflect the lessons learned in the sentencing commission context. Sentencing commissions operate best when their members come from a broad array of interested groups.[303] Although supporters of commissions often hope for a body insulated from ordinary political pressures,[304] the most effective policy comes from a commission that is well-connected and able to produce politically feasible information and proposals.[305]

Commissions are also most effective when they pursue a portfolio of related objectives. When commissions take on a single hot-button political topic that legislatures are unable to resolve, they usually fail to "take the politics out" of the question; that was the predictable result when the U.S. Sentencing Commission considered whether to address capital punishment.[306] Commissions do better when sustained attention to a group of inter-related questions can reveal connections and tradeoffs that actors might not have seen before, as when state sentencing commissions quantify the long-term fiscal effects of changes to the criminal code.[307]

In the context of LFOs, a Commission could choose wisely if it is aware of the overall budgets available to non-prison corrections programs, along with the challenges that offenders face during the re-entry process. For that reason, the portfolio should include a range of questions relating to re-entry and collateral consequences.

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301. *See* GENERAL GUIDELINES OF THE STANDING COMMITTEE TO EVALUATE REQUESTS FOR COURT COSTS AND FEES 1, *available at* http://www.lasc.org/la_judicial_entities/Judicial_Council/CourtCostGuidelines.pdf [hereinafter STANDING COMMITTEE GUIDELINES]. The Committee's guidelines provide that the Committee is the

> information-gathering and advisory arm of the Judicial Council created to develop and apply guidelines for evaluating requests for new court costs and fees or increases in existing court costs and fees prior to the submission of such requests to the legislature, and to report the Committee's findings and recommendations to the Judicial Council.

*Id.*at 1-2.

302. *Id.* at 4.

303. *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 772 (2005).

304. *Id.* at 813–14.

305. Louisiana's Standing Committee, for instance, is comprised of members of the private bar, judges, court administrators, court clerks, and prosecutors. *See* STANDING COMMITTEE GUIDELINES, *supra* note 301.

306. *See Sentencing Commission Guidelines: Hearing Before the Committee on the Judiciary, United States Senate,* 100th Cong., First Session, on Guidelines Drafted by the U.S. Sentencing Commission, October 22, 1987, Volume 4, at 109, 271; *cf.* Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396 (2005).

307. *See* RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 164 (2013).

As with any regulatory agency, an LFO Commission would face the risk of capture by private for-profit entities[308] and others with a personal stake in outcomes.[309] Administrative law doctrines normally address this risk through transparent procedures, limits imposed on the work of lawyers as they pass through the revolving door from government back into private industry, and other measures.[310] Those same policies would be wise and feasible in the context of an LFO Commission.[311]

1. Commissions—Taking Stock

As an initial matter, the work of the commission would require an inventory of all LFOs authorized or used in a jurisdiction, whether emanating from state or local government. Such an inventory is no trivial task given their large number and dispersion throughout the statutory, regulatory, and ordinance codes.[312] Effective assessment of LFOs also requires the Commission to know how often and when they are used.[313]

With the inventory in place, Commission members, supported by staff, should evaluate each LFO, mindful of the common law principles and risk factors noted earlier. The Commission could either have its own authority to revise current law, or it could recommend changes to the legislature or any other body empowered to change the law. Yet if the Commission were simply to publicize its inventory, it would perform a major service for system actors who currently assess and collect LFOs without understanding the full range of payments that are possible.

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308. Such a concern is especially salient today, a time unlike the past when private business interests pushed back against government revenue generation, such as when businesses successfully curtailed prisoner-related industries that were undercutting their market share. Today, private business interests directly benefit, courtesy of government policy, and thus cannot reasonably be expected to exercise countervailing influence.

309. *See, e.g.*, ACLU, IN FOR A PENNY, *supra* note 4, at 63 (reporting that in 2007 private probation companies pushed a bill that sought to expand their scope of offender coverage and an increase in supervision fees); Dolnick, *Prove Lucrative, supra* note 289 (noting concern over political influence enjoyed by New Jersey halfway house operator).

310. *See* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 409–11 (5th ed. 2009); *see also* Armstrong v. McAlpin, 625 F.2d 433, 443–54 (2d Cir. 1980) (en banc) (discussing screening devices used to control conflicts of interest among former government attorneys in private practice), *vacated on other grounds*, 449 U.S. 1106 (1981).

311. The guidelines for Louisiana's Standing Committee, for instance, expressly require recusal of any member with a "personal, family, or financial interest in the new court cost or fee," and impose limits on "[a]dvocacy and [l]obbying." STANDING COMMITTEE GUIDELINES, *supra* note 301, at 3. While advocates or opponents of a proposal can make their position known in writing, they are prohibited from making personal contact with a Committee or Council member and any such contact must be publicly acknowledged by the member. *Id.*

312. *See, e.g.*, CAL. PERFORMANCE REVIEW COMM'N, *Simplify and Consolidate Court-Ordered Fines*, *in* THE PUBLIC PERSPECTIVE 133, 133 (2004), *available at* http://cpr.ca.gov/Commission_Reports/pdf/Public_Perspective_Full_Report.pdf (noting existence of over 3,100 LFO's scattered among twenty-seven different State of California codes); *see also* People v. Gardner, No. H037574, 2012 WL 5507089, at *7 (Cal. Ct. App. 2012) (noting that ascertainment of LFOs "is consuming considerable time and resources at both the trial and appellate levels").

313. A kindred inventory effort is now taking place with collateral consequences, under the auspices of the American Bar Association. *See* AM. BAR ASS'N CRIMINAL JUSTICE SECTION & NAT'L INST. OF JUSTICE, *Choose a Jurisdiction*, http://www.abacollateralconsequences.org/map/ (last visited Feb. 10, 2014).

Consistent with its quasi-legislative design, the Commission's work would unavoidably address questions about basic public values. A major threshold question the Commission might address is whether to repeal all LFOs that are designed to maintain ordinary criminal justice system operations, and insist that government absorb such costs from general tax revenue rather than passing them on to individuals that the system targets. This basic issue, implicating the neutrality norm, is contestable and should be the subject of conscious and transparent deliberation.[314]

A jurisdiction might or might not favor imposing "costs" on offenders. Under one view, doing so is justified because a guilty (or charged) individual caused the government to incur an expense it would not otherwise have incurred.[315] Doing so might also foster a welcome self-responsibility among those swept up in the criminal justice system, much like the payment of restitution.[316] On the other hand, there is the view that the criminal adjudicatory process is irreducibly a government undertaking; the involuntary defendants it targets are not in any sense "users" of government services.[317]

Then there is the question of connectedness. The Commission might ask whether government should be permitted to use criminal justice revenues to fund causes or functions only weakly or entirely unrelated to criminal justice or in excess of cost recovery.[318]

Finally, the Commission (or a legislature in the organic statute creating it) should address the possible relationship between LFOs and over-criminalization. Funds collected from LFOs help criminal justice systems to sustain themselves, and permit policy makers to avoid critical scrutiny of the system, entailing budgetary prioritizations and tradeoffs.[319]

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314. Given the vicissitudes of revenue flowing from LFOs, a government might also prefer a more stable source of revenue. New Orleans, in the wake of Hurricane Katrina, serves as a prime cautionary example. BANNON ET AL., CRIMINAL JUSTICE DEBT, *supra* note 3, at 20 n.220.

315. *See, e.g.*, State v. Young, 238 So. 2d 589, 590 (Fla. 1970) ("It is not unreasonable that one who stands convicted . . . should be made to share in the improvement of the agencies that society has had to employ in defense against the very acts for which he has been convicted.").

316. *See* Pritikin, *supra* note 135, at 351.

317. *See, e.g.*, Beckett & Harris, *supra* note 4, at 511; *see also* ROBERT TOBIN, NAT'L CTR. FOR STATES COURTS, FUNDING THE STATE COURTS: ISSUES AND APPROACHES 50 (1996) ("It is beyond dispute that [the concept of self-supporting courts] is not consistent with judicial ethics or the demands of due process . . . ."); OR. REV. STAT. § 161.665(1) (2014) (excluding from payable costs supporting "expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law"); *cf.* C. Morgan Kinghorn, *User Fees at the Environmental Protection Agency, in* FEDERAL USER FEES: PROCEEDINGS OF A SYMPOSIUM (Thomas D. Hopkins ed., 1988) (commending user fee structures for their ability to allow agencies to be sustaining); Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1978) ("A fee . . . is incident to a voluntary act.").

318. Recent experience in Ohio highlights the decidedly political quality of the issue. The Ohio Judicial Conference, while opposing use of court costs to fund programs "unrelated to the direct operation and maintenance of the courts," in late 2012 recommended demurring on any recommendation to the legislature, noting that "we think it would be difficult to gain the support of the Ohio General Assembly for such an effort, especially given the economic restraints on the state budget." COURT ADMIN. COMM., OHIO JUDICIAL CONFERENCE EXECUTIVE COMMITTEE REPORT (2012), *available at* http://test.ohiojudges.org/_cms/tools/act_Download.cfm?FileID=4204&/2012-09-12%20Court%20Administration.pdf.

319. *See* Baker, *supra* note 8, at 24 (reflecting on practice from pre-colonial times that "[w]ithout income from the prisoners themselves, the Massachusetts colony never would have been able to keep

Smoothing the financial path for the criminal justice system carries its own social costs.[320] LFOs underwrite the growth of criminal justice, which could lead to more enforcement than society might otherwise prefer. Revenue from LFOs might skew a healthy public debate about whether certain social harms are handled better outside the criminal system. The power of a Commission to put all of the various LFOs into a single frame can inform this public debate.

At the same time, Commissions should recall that LFO revenues can be put to constructive use. For instance, requiring a suspect or convict to pay for a GPS tracking device, allowing avoidance of prison or jail, can be a win-win solution for individuals and the public (at once achieving savings and public safety).[321] However, the option creates the risk that wealthier individuals can "buy" their freedom, a possibility that warrants continued data collection and evaluation.

Nor should the involvement of for-profit private companies necessarily lead the Commission to make a categorical objection. Again, such involvement might be good in a particular case: the private provider might deliver a service that government cannot. However, the situation raises obvious concern over undue profit motivation, and the Commission should closely monitor the involvement of such providers to avoid the experience in Georgia recounted earlier.[322] Finally, the fact that payments may be extracted at an early stage of the criminal justice process, a chief risk factor identified earlier, should not be dispositive. Early diversion can be quite beneficial for some individuals, so long as system actors can monitor and check one another early in the process, aware of the particular risks noted earlier.

Ideally, the LFO Commission (or the legislature) would do its work based on specified criteria. In Louisiana, for instance, the Standing Committee's authorizing legislation directs the committee to ask whether proposed LFOs are "reasonably related to the operation of the courts or court system."[323] Committee guidelines specify that the analysis should turn on whether the revenues from the proposed cost or fee will be used:

- to support a court or the court system or help defray the court-related operational costs of other agencies; or
- to support an activity in which there is a reasonable relationship between the fee or court cost imposed and the costs of the administration of justice.[324]

its murderous, jerry-built, witch-hunting machine going for so long. Only a people that pay for its own system of justice can judge the true worth of its laws.").

320. The Supreme Court recognized this concern in its recent decision concerning warrantless use of GPS tracking devices. *See* United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring); *id.* at 963–64 (Alito, J., concurring)

321. *See* Samuel Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344 (2014).

322. *See supra* note 291 and accompanying text.

323. LA. REV. STAT. ANN. § 13:62(B) (2014).

324. *See* STANDING COMMITTEE GUIDELINES, *supra* note 301, at 3. Based on the standard set forth in the text, in 2012 the Committee recommended adoption of seven of eight proposals that came before it (one of the eight was reported without committee action). *See* SUPREME COURT OF

The Commission should also evaluate the effects of a LFO on the criminal suspect, defendant, or offender. Again, imposing costs in some circumstances might have penological or therapeutic value.[325] The Commission, by virtue of its institutional distance,[326] would also be well situated to assess the combined effects of all LFOs operating on a single offender.[327] Numerous studies have chronicled the crushing effect that accumulated LFOs can have on individuals, creating bars to successful reentry[328] and possibly promoting recidivism.[329]

At the same time, the teachings of procedural justice[330] suggest that defendants—and communities—might view such LFOs as opportunistic and "piling on" an already poor and disadvantaged subpopulation.[331] Pre-trial abatement payments, such as the "post and forfeit" regime used in the District of Columbia, and the "prosecution cost" strategy in Minnesota,[332] in particular, might be perceived as government extortion.

LFO collection methods should receive scrutiny for similar reasons. Methods such as revoking drivers' licenses, extending probation, blocking voter registration, and sending non-payers to jail (even though Supreme Court precedent prohibits this latter technique) could well inspire ill-will and be counter-productive from a crime control perspective.[333] When offenders and their communities believe that they have been treated unfairly, re-integration into society becomes more difficult.[334] Sentencing commissions have developed expertise on such questions. They collect and analyze data, both quantitative and qualitative, about

LOUISIANA, REPORT OF THE JUDICIAL COUNCIL TO THE LOUISIANA STATE LEGISLATURE REGARDING REQUESTS FOR COURT COSTS AND FEES 4 (Mar. 12, 2012) [hereinafter STANDING COMMITTEE REPORT, MARCH 2012] (on file with authors).

325. *See supra* notes 316 and accompanying text.

326. *Cf.* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 393 (2007) (noting that criminal courts handling individual cases lack the institutional perspective to address broader systemic problems).

327. Taking account of the cumulative effect of LFOs would not lack precedent, as the Supreme Court has acknowledged the propriety of doing so in the "stacking" of non-prison sanctions in determining whether a jury trial is constitutionally required. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 542–43 (1989); *cf.* United States v. Levesque, 546 F.3d 78, 83–85 (1st Cir. 2008) (engaging in an Eighth Amendment Excessive Fines Clause analysis and assessing not only whether a fine is grossly disproportionate in relation to its associated offense, as required by Supreme Court precedent, but also the defendant's ability to pay).

328. *See supra* notes 2–5.

329. *See, e.g.*, DILLER ET AL., MARYLAND'S PAROLE, *supra* note 2, at 17 (quoting a parole agent to the effect that computer-generated dunning letters "pose a constant threat" that can promote reoffending); *id.* at 18 (quoting a parolee who stated that ex-offenders commit new crimes to get money to pay their incarceration fees); *id.* at 20 ("The financial burden can also give the individual a sense that the system is not interested in having him or her succeed; that punishment just continues in a new form after time in prison has been served.").

330. *See generally* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

331. *See* R. Barry Ruback et al., *Perception and Payment of Economic Sanctions: A Survey of Offenders*, 70 FED. PROBATION 26, 28 (2006) (noting that ex-offenders who had difficulty paying fines were more likely to believe that economic sanctions are a barrier to the successful completion of probation or parole and to ex-offenders being able to provide familial support).

332. *See supra* notes 86–88 and accompanying text.

333. BANNON ET AL., CRIMINAL JUSTICE DEBT, *supra* note 3, at 22–24, 27–29.

334. *See* TYLER & HUO, *supra* note 330, at 25 (arguing that treating offenders fairly promotes crime control).

the impact of criminal punishments on targeted populations.[335] That research and evaluative capacity should transfer readily to LFOs.

The Commission could also answer basic practical questions, such as how much revenue actually flows from existing LFOs. Research suggests that LFOs often suffer from low collection rates and that collection expenses can exceed the revenue they bring in.[336] Perhaps the public benefits of LFOs do not exceed their operating costs.[337] When private for-profit vendors are involved, as in Georgia with probation, providers have strong incentive to rid non-paying defendants from their books, leaving government to spend more than they would have without the companies' involvement.[338] In a jurisdiction that runs these payment systems without assigning anybody to audit the books, it is hard to know.

If the LFO Commission endorses an expansive menu of LFOs, it still should think about ways to set priorities among the different possibilities. Doing so, given the limited financial resources of most defendants, would oblige conscious evaluation of the relative costs and benefits of particular LFOs. Such a policy is exemplied in state laws that favor restitution vis-à-vis other payments such as fines.[339]

2. The Transparency Benefit of a Commission

Once the LFO Commission completes its inventory and evaluation of past practices, it will also need to respond to proposals for new and amended LFOs going forward. Again, it should evaluate every potential new LFO in light of the judicial principles identified earlier, tempered by full awareness of the risks identified in the common law and constitutional insights of the courts.

The Commission's best tool, especially as it resists the gravitational pull of incentives for self-dealing that are built into so many LFOs, will be transparency. Payments are more likely to serve the proprietary interests of government actors—and thus violate the judicial neutrality

335. *See, e.g.*, AMY CRADDOCK ET AL., N. C. SENTENCING & POLICY ADVISORY COMM'N, CORRECTIONAL PROGRAM EVALUATION: OFFENDERS PLACED ON PROBATION OR RELEASED FROM PRISON IN FISCAL YEAR 2008/09 (2012), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/recidivism_2012.pdf.

336. The timing of an LFO may prove important to its revenue effects: research suggests that governments recover less with respect to parole fees but higher amounts (based on higher collection rates) for probation-related LFOs. NEW YORK BAR RE-ENTRY REPORT, *supra* note 122, at 180. The LFO amount could also have some bearing on the success of collection efforts: smaller fees increase chance of collection and removal of reentry barriers will save money in the long-term. Rosenthal & Weissman, *supra* note 2, at 20–21, 34.

337. In 1994, Virginia abolished its parole supervision fee for this reason. DILLER ET AL., MARYLAND PAROLE, *supra* note 2, at 22–23.

338. Bellacicco, *supra* note 294, at 240–42, 259. The commission might also take into account performance effects on front-line actors. Requiring probation and parole officers, for instance, to spend their time collecting LFOs might detract from their primary service mission. *See* American Probation and Parole Association, *supra* note 283 ("[T]he quality and direction of community supervision may be adversely affected, particularly in [LFO] dependent organizations. Direct responsibility for [LFO] collections compromises the primary role of probation and parole officers . . . . [C]ollections can easily become the measure of officer and offender performance.").

339. *See, e.g.*, MINN. STAT. ANN. § 609.10(2)(b) (2014); MO. REV. STAT. § 560.026(1) (2012).

principle—when they are set and collected invisibly.[340] A Commission, with its ongoing duty to monitor and improve the system of LFOs, would routinely collect information about these practices. Importantly, the Commission would publish this information in a format that facilitates comparisons across time and across different units of government. A locality or division of government that appears to use LFOs in a manner out of line with the rest of the state should be subject to closer scrutiny.

The fact that so many LFOs operate at the local level is important when it comes to transparency. The late Professor William Stuntz, in his book, *The Collapse of American Criminal Justice*, extols the localization predominant in earlier era American criminal justice systems for greater democratization, fairness, and lenience.[341] But as one of us has pointed out elsewhere,[342] localization carries with it the risk of parochial excess.[343] The low visibility practices of local officials, sometimes based on murky legal authority and proceeding without regular public scrutiny,[344] make this danger a vivid one for LFOs.[345]

Local actors with the incentive to move aggressively in collecting funds can do so more easily when nobody is watching closely. By way of example, for many years the sheriff of Clinch County, Georgia, charged room and board for jail without any statutory authority to do so.[346] Only judicial intervention ended the practice.[347] Similar excesses occur at the hands of local prosecutors and trial courts,[348] and the strong appeal of added revenue keeps these practices alive.[349] The need to monitor locali-

340. Overtime secured by "over-policing" affords one such example from a related context. *See, e.g.,* HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.YC.L. UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE PERJURY IN NEW YORK CITY 1997-2007, at 19–20 (2008) (evidencing police motivation to execute arrests for low-level, order maintenance crimes to generate easy overtime pay).

341. STUNTZ, *supra* note 11, at 311–12.

342. *See* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1425–28 (2001).

343. *See id.*; *see also* Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425 (2012) (reviewing WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011)).

344. *See, e.g.,* KATHERINE BECKETT ET AL., THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 22–25 (2008), *available at* https://www.google.com/search?q=LFO&rlz=1C1TSNO_enUS468US468&oq=LFO&aqs=chrome..69i57j0l5.1324j0j7&sourceid=chrome&espv=210&es_sm=122&ie=UTF-8#q=LFO+court (noting significant inter-county variation in LFO amounts imposed on similarly situated defendants).

345. Experience in Louisiana again affords an instructive example. As a result of a legislative change in 2011, the Standing Committee was expressly stripped of purview over proposals by "mayor's courts," which the Committee called "essentially revenue generators for local public safety and other municipal operations that may not be associated with the administration of justice…[and therefore] generally not likely to receive a recommendation from the Judicial Council." STANDING COMMITTEE REPORT, MARCH 2012, *supra* note 324, at 2.

346. Rosenthal & Weissman, *supra* note 2, at 26.

347. *See id*. In Massachusetts, a county sheriff, functioning as jailer, charged inmates for haircuts at a rate far above the state-set amount and imposed other statutorily unauthorized costs for services such as GED testing. Bouza v. Sheriff of Bristol County, 918 N.E.2d 823, 831–34 (Mass. 2010).

348. Olson & Ramker, *supra* note 124; Peterson, *supra* note 9, at 40.

349. Experience in New York State highlights this strong pull. There, in the 1990s after the state allowed localities to impose and keep an administrative fee of $30 a month on each DWI probationer, localities enacted laws of their own allowing for fees to be collected from non-DWI probationers. NEW YORK BAR RE-ENTRY REPORT, *supra* note 122, at 167. In 2003, an Opinion by the State Attor-

zation will become even more important if other states follow the lead of California's "realignment" policy,[350] which would usher more of a state's criminal offenders into local jails.

The Louisiana Standing Committee, mentioned earlier, offers a sobering case study in the power of government revenue incentives. Under its original guidelines, the Committee often rejected proposals because the financial information of the applicant failed to demonstrate "the need for revenues generated by the imposition of any proposed cost or fee."[351] Indeed, in its 2010 report, the Committee rejected five of seven requests because the unit of government making the request had not explained the connection between anticipated LFO proceeds and the government's averred need for revenue.[352] After the legislature amended the standards to exclude consideration of the match between the government's stated revenue needs and the likely monetary benefit of a proposed LFO, Committee approval became more routine and its scrutiny less vigorous.[353]

Finally, by collecting and rationalizing LFOs, a Commission could help improve plea-bargaining, by far the most common mechanism used to resolve criminal cases today.[354] The Supreme Court, with *Padilla v.*

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ney General concluded that the local initiatives were unlawful, as they were preempted by state law; nevertheless, the local practices continued, along with the revenue stream afforded. *Id.* at 167–68. For examples of similarly aggressive behaviors by localities see Gibeaut, *supra* note 2, at 54; BANNON ET AL., CRIMINAL JUSTICE DEBT, *supra* note 3, at 10, 36 n.26; REYNOLDS & HALL, *supra* note 99, at 10–11; NEW YORK BAR RE-ENTRY REPORT, *supra* note 122, at 87–89; Ruback & Clark, *supra* note 136, at 755.

350. *See* Heather Gilligan, *Effects of Change in California Criminal Justice System Difficult to Discern*, SACRAMENTO BEE, Oct. 22, 2012, http://www.sacbee.com/2012/10/22/4927963/effects-of-change-in-california.html. On the issue of realignment, it is worth noting that the political shift itself suggests an awareness of local government incentives. State legislators, cognizant of the moral hazard presented by local authorities convicting individuals and dispatching them to state-run prisons, with the state (not local) government picking up the tab, required that counties absorb more offenders. *See* John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1106 (2013).

351. STANDING COMMITTEE REPORT, March, 2012, *supra* note 324, at 3.

352. *See, e.g.*, SUPREME COURT OF LOUISIANA, REPORT OF THE JUDICIAL COUNCIL TO THE LOUISIANA STATE LEGISLATURE REGARDING REQUESTS FOR COURT COSTS AND FEES 1 (Mar. 29, 2010) (rejecting five of seven requests on this basis) (on file with authors). The Committee denied requests when it had record evidence of improved government budgetary circumstances; projected revenue generated would far exceed costs being sought to be recovered; explicit need was not established, such as to secure new office space or a raise for a government official; and when costs were sought to cover a government's general operating expenditures. *Id.* at 3, 4, 6, 11.

In 2011, the Committee rejected a proposal from a state representative seeking increased criminal court costs, by a maximum amount of $5, to fund the state's Witness Protection Services Board, which the proposal suggested would eliminate the need for an annual supporting appropriation from the legislature. In recommending against approval, the Committee noted that the Board in 2010-2011 had used only a small fraction of its $140,000 appropriation and that the new cost would yield approximately $4.1 million in the coming fiscal year. *See* SUPREME COURT OF LOUISIANA, REPORT OF THE JUDICIAL COUNCIL TO THE LOUISIANA STATE LEGISLATURE REGARDING REQUESTS FOR COURT COSTS AND FEES 4 (Apr. 12, 2011) (on file with authors).

353. Despite the best efforts of the authors, it remains unclear how and why the 2011 legislative amendment came about; the Committee's restricted scrutiny over government's financial needs and justifications of proposed costs and fees, however, has had palpable effect. With the more hands-off review, the success rate of proposals has significantly improved.

354. *See* STUNTZ, *supra* note 11, at 7 (noting that over ninety-five percent of all criminal cases today are resolved by pleas).

Kentucky[355] and *Missouri v. Frye*,[356] has begun to specify the duties of defense lawyers to give their clients adequate advice about sentencing and other consequences of a conviction during plea negotiations.[357] While an attorney's full and open discussion of LFOs will not likely become a Sixth Amendment requirement any time soon,[358] providing defendants a forthright explanation of the nature and extent of LFOs aligns with the ethical duty of defense counsel to ensure that clients fully understand plea consequences.[359] Greater transparency is also consistent with the ethical duties of prosecutors.[360] As Robert Johnson, former head of the National District Attorneys Association said with respect to collateral consequences, when prosecutors fail to disclose the full consequences of a brokered conviction they could "suffer the disrespect and lose the confidence of the very society [they] seek to protect."[361]

With LFO information on the table, so to speak, the parties will be better positioned to negotiate efficient outcomes based on what *Padilla* called "informed consideration" of the nature and scope of the consequences of conviction.[362] Fuller awareness of the actual consequences of conviction could shift the balance of negotiating power,[363] and possibly change the nature and number of charges resulting in negotiated conviction.[364]

355. 130 S. Ct. 1473, 1486 (2010) (holding that defense counsel's failure to inform client of likely deportation consequence of conviction constituted ineffective assistance of counsel); *see also* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1147 (2011) (noting that *Padilla* requires courts to focus on "the importance of particular consequences rather than their criminal or civil labels"); *id.* ("The Sixth Amendment test should be not whether a consequence is labeled civil or collateral, but whether it is severe enough and certain enough to be a significant factor in criminal defendants' bargaining calculus.").

356. 132 S. Ct. 1399, 1408 (2012) (holding that defense counsel's failure to inform a client of a favorable plea offer constituted ineffective assistance of counsel).

357. Lower courts, addressing the Sixth Amendment duties of defense counsel to advise their clients about collateral consequences, are now extending *Padilla*'s logic beyond the immigration/deportation context in which it arose. *See* Margaret Colgate Love, *Collateral Consequences after* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS UNIV. PUB. L. REV. 87, 105–11 (2011).

358. LFOs, however, certainly when statutorily required, have a "close connection to the criminal process," as required by *Padilla*. *See Padilla*, 130 S. Ct. at 1482.

359. *See, e.g.*, Libretti v. United States, 516 U.S. 29, 50 (1995) ("[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement . . . .").

360. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010) (stating that prosecutors have "specific obligations to see that the defendant is accorded procedural justice"); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION 3-1.2(c) (1993), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf.

361. Robert M.A. Johnson, *Collateral Consequences*, 16 CRIM. JUST. 32, 33 (2001); *cf.* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) (arguing that aligning criminal liability with community's shared sense of fairness and proportionality affords consequentialist benefits).

362. *See Padilla*, 130 S. Ct. at 1486.

363. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–77 (2004) (discussing the effect of information asymmetries on bargaining positions of parties); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1240–41 (2008).

364. *See* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1103–05 (2013).

Greater judicial awareness of the cumulative effects of LFOs could also affect judges' conduct during guilty plea hearings. While judges play a decidedly secondary role in the plea-bargaining process,[365] plea colloquies can reinforce to defendants the true consequences of a guilty plea.[366] Such judicial involvement[367] is especially important with indigent defendants charged with minor offenses,[368] who typically lack the input of counsel because they do not face actual imprisonment.[369]

A Commission, serving as the institutional gatekeeper of LFOs, could protect against local excesses.[370] State policy positions will result from evidence-based conscious choices, not haphazard reactions to uncoordinated funding requests from system actors under political and financial pressure.[371] While judicial challenges to LFOs still can play a role

365. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 39 (2002).

366. At least in one jurisdiction, however, the scale of LFOs has become so burdensome that judges who formerly specified each LFO in court now only indicate the total aggregated amount owed by defendants. *See* Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555, 559 n.7 (2011).

367. *See supra* notes 360, 362.

368. In Florida, for instance, one study found that seventy percent of minor offense defendants pled guilty or no contest at arraignment and that most of those entering pleas at arraignment were in custody. ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011), *available at* http://www.nacdl.org/flmisdemeanor/. On average, the arraignment proceedings took less than three minutes. *Id.* For more on the issue, see Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

369. *See* Alabama v. Shelton, 535 U.S. 654, 662 (2002) (reaffirming the "actual imprisonment" standard for entitlement of publicly paid counsel under the Sixth Amendment); *see also* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 2 (2013) (describing deprivations of counsel in lower courts); *cf.* Justin Marceau & Nathan Rudolph, *The Colorado Counsel Conundrum: Plea Bargaining, Misdemeanors, and the Right to Counsel*, 89 DENV. U. L. REV. 327 (2012) (describing Colorado rules and practice allowing for "pre-counsel" pleas in misdemeanor cases).

Such transparency assumes even greater importance given the increasing practical irrelevance of *Bearden v. Georgia*, which held that a criminal justice debtor can be imprisoned only upon a finding of "willful" failure to pay. 461 U.S. 660, 668 (1983). Today, the case is often construed narrowly or disregarded altogether. *See* Ann K. Wagner, *The Conflict over* Bearden v. Georgia *in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. CHI. LEGAL F. 383, 391–96 (noting tendency of courts to not apply *Bearden* in instances of plea bargains); Harris et al., *Drawing Blood, supra* note 4, at 1784 (surveying instances in which the *Bearden* rule is ignored altogether); ACLU, IN FOR A PENNY, *supra* note 4, at 34–35, 47–52; DILLER, HIDDEN COSTS, supra note 1, at 20. Worse yet, it is not unusual for jurisdictions to also charge for the rearrest and reincarceration resulting from failure to pay. *See* Harris et al., *Drawing Blood, supra* note 4, at 1784; ACLU, IN FOR A PENNY, *supra* note 4, at 43.

370. The commission could also identify the variations in burdens (and services) that flow from fragmented enforcement, judicial, and corrections systems. *See* REYNOLDS & HALL, *supra* note 99, at 10 ("Local financing contributes to a fragmented court system where 'services vary dramatically according to the locality's ability to pay.'") (quoting A.B.A., STANDARDS RELATING TO COURT ORGANIZATION 99 (1974)).

371. *See* NEW YORK BAR RE-ENTRY REPORT, *supra* note 122, at 169 ("The creation and increase of fees, surcharges, or other financial penalties [occurs] in a vacuum. They are seldom, if ever, seen by the legislature in the context of the sum of all penalties. Each increased financial penalty viewed in isolation appears to be a good idea for revenue production."); Koppel, *supra* note 82 (noting that the head of local Oklahoma "DA Probation Supervision" was "slow to implement the program because he was worried that some could raise conflict concerns. But budgetary pressures prompted him to launch the program . . . .").

to keep matters in check,[372] a Commission with a systemic view would carry a major share of the load.

VI. CONCLUSION

Pecuniary benefits for enforcers have always figured in criminal justice. In the 1920s, the Supreme Court saw the need to discipline a system of incentivized criminal justice.[373] Today, we see an unprecedented profusion of techniques that create less direct monetary benefit for system actors[374] but which create conditions ripe for unchecked growth: high-volume outcomes reached by many different actors, operating in low-visibility contexts, each one unaware or uncaring of the work of the others.

While our current LFO-dominated criminal justice system seems like a throwback to earlier centuries, when incentives for private and institutional gain were commonplace, the nation now seemingly finds itself on the verge of something new in criminal justice. Having at last awakened to the adverse human and fiscal consequences of mass incarceration, criminal justice policy makers are showing greater willingness to pursue alternative approaches at less expense to taxpayers.[375] In the midst of this shift, however, revenue from LFOs will continue to have strong appeal, especially in the face of budgetary difficulties.

Use of a LFO Commission, along the lines suggested here, would allow criminal justice systems to handle this pressure. LFOs are neither necessarily good nor bad in themselves. A Commission will facilitate the line-drawing enterprise, offering a system-wide vantage point and a mechanism for ongoing evaluation, based on explicitly identified norms, seasoned by consciousness of the predictable institutional risks. Ultimately, we hope to see a check on the mercenary tendency of American criminal justice, helping to ensure that we "hold the balance nice, clear, and true" between governments and the individuals they seek to convict and punish.[376]

372. *See, e.g.*, State v. Payne, 225 P.3d 1131, 1145 (Ariz. Ct. App. 2009) (invalidating on preemption grounds county "prosecution fee" not authorized by state statute). For examples from an earlier era, evincing concern for disparate intra-state applications, see, e.g., State v. Gregori, 2 S.W.2d 747, 750 (Mo. 1928) (en banc) (invalidating $1 assessment in criminal cases only in counties having eight or more district courts); *Ex Parte* Ferguson, 132 S.W.2d 408, 410 (Tex. Crim. App. 1939) (invalidating on equal protection grounds a statute that assessed a varying fee upon defendants based on county population).

373. Tumey v. Ohio, 273 U.S. 510, 531 (1927).

374. Brazen and quite troubling instances of direct personal benefits to system actors still arise, as in Pennsylvania, where juvenile court judges accepted millions of dollars in kickbacks from a private juvenile detention facility in exchange for sending children as young as 11 to jail, provide a notable exception on this count. *See* WILLIAM ECENBARGER, KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A $2.8 MILLION KICKBACK SCHEME 106–07 (2012).

375. See, e.g., Mary D. Fan, Beyond Budget-Cut Criminal Justice: The Future of Penal Law, 90 N.C. L. REV. 581, 583–84, 620–39 (2012); Jan Moller, *Prison Sentence Reform Efforts Face Tough Opposition in the Legislature*, TIMES-PICAYUNE (New Orleans) (May 16, 2012), http://www.nola.com/crime/index.ssf/2012/05/prison_sentence_reform_efforts.html.

376. Tumey v. Ohio, 273 U.S. 510, 532 (1927).