

December 2021

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Recommended Citation

Madison Miller, *The High Price of Poverty in Arkansas's Courts: Rethinking the Utility of Municipal Fines and Fees*, 74 Ark. L. Rev. 547 (2021).

Available at: <https://scholarworks.uark.edu/alr/vol74/iss3/6>

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THE HIGH PRICE OF POVERTY IN ARKANSAS’S COURTS: RETHINKING THE UTILITY OF MUNICIPAL FINES AND FEES

Madison Miller*

I. INTRODUCTION

The opposite of poverty is not wealth. It is justice.
— Bryan Stevenson, *Esq.*¹

Beginning in the 1980s, a “trail of tax cuts” led to budget shortfalls and revenue gaps throughout the United States.² These budgetary problems resulted in many cities and towns shifting their burden of funding courts and the justice system at large “to the ‘users’ of the courts, including those least equipped to pay.”³ Although “jailing an indigent person for a fine-only, low-level offense is unconstitutional,” it is still an ongoing practice in many states, including Arkansas.⁴ In 1995, Arkansas passed new legislation to govern its circuit courts’ collection and enforcement of fines and fees.⁵ One subsection of this chapter explicitly provides that the “court *shall* inquire into the defendant’s ability to pay and *shall* make a determination of the defendant’s financial

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1. PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA xix (2017) (emphasis added).

2. *Id.* at xv.

3. *Id.*

4. *Id.* at 4.

5. *See* ARK. CODE ANN. §§ 16-13-701 to 712 (1995).

ability to pay the fine.”⁶ Although this procedural safety net is embedded in the statute, it has not served its intended purpose for several reasons.

A large part of the problem stems from courts’ partial or, in many cases, *complete* neglect of this mandated analysis.⁷ One contributing factor is that “the statute does not enumerate types of information to be considered before making an ability to pay determination.”⁸ Therefore, many judges fail to conduct a truly meaningful analysis when determining an individual’s realistic ability to pay. In Arkansas, the law mandates an inquiry into whether the person can show that his or her failure to pay was not “purposeful” or a result of a lack of “good-faith effort” before imposing jail time.⁹ However, in practice, “the entire inquiry [may] rest[] on a judge’s observations of whether defendants possess random items, such as cigarettes, smart phones, or brand name clothing.”¹⁰ There are endless examples of people whose struggles illuminate the real-world effects of these arbitrary determinations.

Kimberly Snodgrass, a named plaintiff in *Mahoney v. Derrick*,¹¹ was convicted for failure to pay ten separate times over four years because she could not afford the monthly payments the judge imposed.¹² However, the presiding judge did not conduct the requisite evaluation of Kimberly’s ability to pay, as is required by Arkansas law,¹³ even though “[a]ll but one of her jail records indicate[d] she was unemployed at the time of arrest.”¹⁴ Upon each conviction, she endured up to thirty days in jail, as well as

6. ARK. CODE ANN. § 16-13-702(5)(A) (emphasis added).

7. MYESHA BRADEN ET AL., LAWS.’ COMM. FOR CIV. RTS UNDER L., TOO POOR TO PAY: HOW ARKANSAS’S OFFENDER-FUNDED JUSTICE SYSTEM DRIVES POVERTY & MASS INCARCERATION 9 (2019), [<https://perma.cc/AU7R-C2E9>].

8. *Id.* at 10.

9. *See* ARK. CODE ANN. § 16-13-703.

10. BRADEN ET AL., *supra* note 7, at 16.

11. *See generally* Complaint—Class Action Demand for Jury Trial at 2, 12-13, *Mahoney v. Derrick*, No. 60CV-18-5616 (Aug. 9, 2018). *Mahoney v. Derrick* is a class action lawsuit that was filed against a White County District Court Judge in an effort to put an end to his unlawful behavior in his assessment of fines and fees. *See infra* text accompanying notes 82-89.

12. BRADEN ET AL., *supra* note 7, at 16.

13. *See* ARK. CODE ANN. § 16-13-702(5)(A) (1995).

14. Complaint—Class Action Demand for Jury Trial, *supra* note 11, at 28.

additional charges between \$450.00 and \$670.00 tacked onto her existing outstanding debt.¹⁵ Aside from added charges, each payment made towards an outstanding debt's principal balance has a portion deducted as an administrative interest fee.¹⁶ As a result of her repeated incarceration and mounting debt, Kimberly "lost two jobs, her driver's license has been suspended multiple times, and she has lost housing four times; each time losing much of what she and her children owned."¹⁷

Tragically, Kimberly's story is not unique. Tina Phares, then a forty-seven-year-old mother and former accounts manager with an associate degree, had a similarly disastrous experience with the Arkansas courts.¹⁸ Tina's story began when she turned to drugs after a series of personal tragedies, including the deaths of her father and toddler son, an accident that left her husband "hospitalized [and] in an induced coma for a year," and a tumultuous divorce.¹⁹ Over the subsequent years, before entering a treatment program in 2017, she was "convicted of failure to pay nine times and sentenced to 30 days in jail seven times."²⁰ At one point, the judge issued an arrest warrant for failure to pay "less than [a] month after she was released on two *consecutive* 30-day[] sentences for convictions of failure to pay[,]"²¹ allowing her almost no time to get back on her feet and earn an income.

While Tina has made personal strides, such as becoming drug-free and, in 2018, "bringing home her first paycheck since her son died[.]" her life and personal progress remain stagnated by the over \$15,000 in debt she owes to the court.²² Like in Kimberly's case, there was no inquiry conducted to determine Tina's ability to pay the fines and fees levied against her.²³ Had

15. BRADEN ET AL., *supra* note 7, at 16 (explaining that, on average, Kimberly has spent "one of every three days in the White County Detention Center" since the time of her first arrest in September 2014).

16. See ARK. CODE ANN. § 16-13-704(b)(1)(A) (2017).

17. BRADEN ET AL., *supra* note 7, at 16.

18. *Personal Narrative: Tina Marie*, FINES & FEES JUST. CTR. (Aug. 9, 2018), [<https://perma.cc/2TRR-HWXS>].

19. *Id.*

20. *Id.*

21. Complaint—Class Action Demand for Jury Trial, *supra* note 11, at 20.

22. *Personal Narrative: Tina Marie*, *supra* note 18.

23. *Id.*

the proper examination been performed, the judge likely would have recognized the personal hardships, battle with addiction, and lack of employment and financial resources that impeded Tina's ability to pay. Moreover, Tina might have never spent time in jail, and she certainly would not have been burdened with thousands of dollars in debt (totaling approximately \$15,000 in 2018).²⁴

Because of the unlawful actions of one judge, both Kimberly and Tina were jailed on failure to pay warrants for more than 150 days over a three-to-four-year period, and both have incurred additional debt of "between \$4,000 and \$5,000 in fines and costs for the same charges."²⁵ These two first-hand accounts are drops in the bucket of the endless stories of personal and financial ruin brought on by the courts.²⁶ Thousands of Arkansans remain bogged down by outrageous mounting debt stemming from flagrant disregard for the law and Arkansas's Constitution.²⁷ Many people have spent time in prison, lost jobs, missed opportunities for personal and financial growth, and some have even lost custody of their children because of their inability to afford the debt imposed on them by Arkansas courts.²⁸

While the initial response is oftentimes, "don't do the crime if you can't do the time," the goal of this Comment is to illustrate how the issue is much more complex than a simple form of appropriate retribution or punishment. Many people find themselves in this treacherous cycle due to low-level civil offenses, such as a single traffic ticket or a minor housing code violation.²⁹ These are not felony convictions; many times, these are not even infractions that carry with them more than a fine, much less jail time. The preamble to the United States Constitution expressly references the goals of "establish[ing]

24. Complaint—Class Action Demand for Jury Trial, *supra* note 11, at 10.

25. *Id.* at 28.

26. See generally NEIL SEALY ET AL., ARK. CMTY. INST., CAN'T WIN FOR LOSING: HOW INSTITUTIONS & POLICIES KEEP ARKANSANS IN DEBT 11-12 (2019), [<https://perma.cc/PNA8-YUD7>].

27. See generally *id.*

28. See, e.g., *Personal Narrative: Nikita*, FINES & FEES JUST. CTR. (Aug. 9, 2018), [<https://perma.cc/NS9T-7MH7>].

29. BRADEN ET AL., *supra* note 7, at 6; see also SEALY ET AL., *supra* note 26, at 11-12.

Justice, . . . promot[ing] the general Welfare, and secur[ing] the Blessings of Liberty to ourselves and our Posterity.”³⁰ This Comment will argue that until we remedy these grave injustices, inflicted primarily upon low-income Arkansans, we are not living up to these ideals.

While the issue is complex, the premise is simple. It is wrong to jail poor people or add hundreds of dollars at a time to the principal of their debt solely because they cannot afford to pay, and it should not be happening in the State of Arkansas. The Arkansas statutes and United States Supreme Court cases³¹ that address this issue have not served their intended purpose of safeguarding constitutional rights. Therefore, Arkansas should make a concerted effort to end this unconstitutional practice that is a waste of taxpayer dollars, with the cost of incarceration typically exceeding the amount in dispute.³² The Arkansas Legislature should address this urgent problem by adding specificity to the existing statute in the form of factors a judge must consider when making an ability-to-pay determination.

Additionally, community members and non-profit organizations should continue pushing for reform through litigation. To enact real change, there must be accountability. Given the obstacle of judicial immunity in litigation, plaintiffs, lawyers, and concerned citizens alike should utilize Arkansas’s Judicial Discipline and Disability Commission (“JDDC”) to report repeat-offender judges and ensure that unethical or unlawful behavior does not go unpunished. Arkansas should prioritize this effort and establish a uniform system to guarantee equal protection under the law for its citizens and promote confidence in its courts and the judiciary. Furthermore, many individuals facing unlawful treatment do not have the time, connections, or resources to continue litigating a case for years through proceedings and appeals. While courts *can* serve as an

30. U.S. CONST. pmbl.

31. See *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has”); see also *Bearden v. Georgia*, 461 U.S. 660 (1983); *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

32. MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 5 (2019), [<https://perma.cc/YE9N-AR3E>].

effective mechanism for plaintiffs, we should not accept the notion that the existence of courts as an avenue for recourse somehow negates the serious nature of judges flouting the law.

This Comment will proceed with four main parts. Part II will provide background on the subject matter to furnish a foundational understanding of the issue. Part III will explain how the municipal fines and fees system functions in Arkansas. Part IV will propose possible solutions and practical remedies that, if utilized, could generate more positive outcomes for Arkansas's local and municipal governments and their citizens. Finally, Part V concludes that making meaningful reforms in this area is both morally and economically imperative.

II. BACKGROUND: THE “FINES AND FEES” CONUNDRUM

*For at least two decades, the new criminalization of poverty crept into communities large and small, driven by misbegotten law enforcement politics and the search for revenue, but with little public attention.*³³

“A debtors’ prison is any prison, jail, or other detention facility in which people are incarcerated for their inability, refusal, or failure to pay debt.”³⁴ The federal government outlawed debtors’ prisons in 1833.³⁵ However, it was not until a series of cases between 1970 and 1983 that the Supreme Court established the unconstitutionality of incarcerating people simply because they cannot afford to pay fines and fees that the State has levied upon them.³⁶ The Court’s opinion in *Bearden v. Georgia*

33. EDELMAN, *supra* note 1, at xviii.

34. Eli Hager, *Debtors’ Prisons, Then and Now: FAQ*, THE MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), [<https://perma.cc/X7N3-3KMY>].

35. *Id.*

36. *See Williams*, 399 U.S. at 235, 240-41 (establishing that the Equal Protection Clause is violated when a defendant is imprisoned for an amount of time exceeding the statutory maximum on the basis of an inability to pay a fine or court costs); *Tate*, 401 U.S. at 397 (opining that the Equal Protection Clause is violated when a crime is punishable only by fine for those who can afford to pay it, but by prison for those who cannot); *Bearden*, 461 U.S. at 668 (holding that incarcerating an indigent defendant for failure to pay a fine violates the Equal Protection Clause unless the defendant has the financial means to pay, and thus, nonpayment is willful).

was, and remains, arguably the most consequential case on this issue.³⁷ Although *Bearden* established that courts must conduct an analysis into a defendant's ability to pay and must not imprison him or her for failure to pay unless the failure was willful, the opinion did not give explicit instruction regarding what exactly the Court meant by "willfully refused to pay."³⁸

Because of this lack of clarity, municipal judges frequently ignore state law and the standard set forth by the Supreme Court in *Bearden*.³⁹ One consequence of this initial failure to conduct a meaningful analysis of an individual's ability to pay is that, in many cases, the individual is then placed on a payment plan with the court that he or she may not be able to keep up with. As a result, if an individual defaults on their payment plan and the judge issues a bench warrant for his or her arrest, "*Bearden* becomes irrelevant"⁴⁰ because the individual's failure to pay "constitutes criminal contempt, which allows incarceration as well as further fines and fees."⁴¹ Once a person commits a "crime that allows jailing," such as contempt, "there is no protection for indigence."⁴² In turn, this creates a loophole that results in punishing people for their *inability* to pay.⁴³

The truth is, while they are not referred to as "debtors' prisons" by name, local jails across the country are full of people incarcerated based upon their inability to pay fines and fees.⁴⁴ The American Action Forum estimates that roughly "10 million

37. See generally EDELMAN, *supra* note 1, at 4-5.

38. *Bearden*, 461 U.S. at 668; EDELMAN, *supra* note 1, at 5.

39. EDELMAN, *supra* note 1, at 5.

40. *Id.* at 6.

41. *Id.* at 5.

42. *Id.* at 6.

43. Cf. Cortney E. Lollar, *Eliminating the Criminal Debt Exception for Debtors' Prisons*, 98 N.C. L. REV. 427, 434 (2020) (stating that while "[a] person who is incarcerated because she does not have the ability to pay a [] legal [financial] obligation might well be deterred from engaging in any further criminal activity, but when the failure to pay in and of itself becomes criminal activity justifying further incarceration, the deterrence value is difficult to ascertain").

44. Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), [<https://perma.cc/97HP-MDYF>]; see also Lollar, *supra* note 43, at 434-35 (arguing that "courts and legislators should eliminate incarceration for the nonpayment of" legal financial obligations because "[s]ufficient mechanisms are already in place for those who have assets but choose not to disgorge them[.]" such as property seizure and wage garnishment).

people owe \$50 billion in legal fees, fines, and penalties” in the United States.⁴⁵ Despite their legal obligation to do so, “many courts refuse to consider a person’s financial condition” when imposing fines and fees and “at times[,] reject attempts to explain dire financial circumstances such as homelessness, the needs of dependent children, and the like by explicitly stating that [court-imposed] debt must take priority over such concerns.”⁴⁶

While *fines*, imposed at the time of conviction, are intended to serve the dual purposes of punishment and deterrence, *fees*, on the contrary, “are intended to raise revenue” and often “bear no relation to the offense committed.”⁴⁷ Arkansas’s Constitution specifically states that “[n]o person shall be imprisoned for debt in any civil action . . . unless in cases of fraud.”⁴⁸ Additionally, if a “defendant claims an inability to pay [a] fine, the court *shall* inquire into the defendant’s ability to pay and *shall* make a determination of the defendant’s financial ability to pay the fine.”⁴⁹ If an individual elects to pay a fine in installments, there is an added fee (essentially an interest charge) deducted from his or her payment each month.⁵⁰ These additional fees prolong the amount of time it takes to pay off the debt, allowing the municipality to rake in extra revenue and profit at the expense of its community’s most vulnerable members.

Further, a missed payment can wreak havoc on a person’s life in endless ways. Some judges in Arkansas will revoke the person’s driver’s license and registration as punishment, despite not having the authority to do so.⁵¹ This unlawful yet pervasive

45. Hayes & Barnhorst, *supra* note 44 (adding that roughly 5,000 people in the United States are incarcerated because they are unable to afford release).

46. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 59 (2018) (detailing the account of one father of four who has had to prioritize paying court debt over paying his electricity bill, buying his child a winter coat, and providing food and shelter for his family, lamenting that “[i]t doesn’t matter what [his] family suffers, so long as the court gets paid”).

47. MENENDEZ ET AL., *supra* note 32, at 6.

48. ARK. CONST. art. II, § 16.

49. ARK. CODE ANN. § 16-13-702(a)(5)(A) (1995) (emphasis added).

50. See ARK. CODE ANN. § 16-13-704(b)(1)(A) (2017).

51. See ARK. CODE ANN. § 27-16-402 (2021) (granting the Department of Finance and Administration’s Office of Driver Services complete authority over administering laws pertaining to suspension and revocation of driver’s licenses); BRADEN ET AL., *supra* note 7, at 2.

practice is counterproductive, as many people, particularly those in rural areas of Arkansas, do not have adequate access to public transportation.⁵² The lack of access to transportation coupled with a suspended license may cause a person to lose their job, further hindering their ability to pay off their debt.⁵³

While non-profits like the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the American Civil Liberties Union ("ACLU") have made litigating these "fines and fees" cases a priority, another available avenue of recourse is reporting repeat-offender judges to the Judicial Discipline and Disability Commission in Arkansas ("JDDC").⁵⁴ Arkansas adopted a constitutional amendment establishing this commission in November 1988,⁵⁵ which "investigates and may take disciplinary action or, in the most serious cases, recommend to the Arkansas Supreme Court that it impose discipline upon a judge whose actions are found to be a violation of the Code of Judicial Conduct."⁵⁶

There are several possible disciplinary remedies that the Commission may recommend. However, in the most serious cases, "the [Arkansas] Supreme Court has the power to suspend, remove or involuntarily retire or censure judges based on the Commission's recommendation."⁵⁷ In less serious cases, the Commission acts independently to mandate professional counseling and issue public admonishments, reprimands, or censures to judges who have violated the Code of Judicial Conduct.⁵⁸ This process is worthwhile because it puts the judge on notice of his or her misconduct. Additionally, as public record,

52. Rayla Bellis, *More Than One Million Households Without a Car in Rural America Need Better Transit*, T4AMERICA BLOG (May 15, 2020), [<https://perma.cc/X33T-KNF3>]; BRADEN ET AL., *supra* note 7, at 2.

53. See BRADEN ET AL., *supra* note 7, at 2.

54. See Press Release, Judicial Discipline & Disability Comm'n, Letter of Admonishment (Mar. 21, 2014), [<https://perma.cc/SX78-MJ3F>] (publicly admonishing District Court Judge Keith Blackman of Craighead County for his practice of exacting illegal fees on certain defendants "for changing a plea from 'not guilty' to 'guilty[,]'" and formally putting Judge Blackman on notice that this practice was unlawful).

55. See ARK. CONST. amend. 66.

56. *About the Commission*, JUD. DISCIPLINE & DISABILITY COMM'N, [<https://perma.cc/3G3Q-7WAH>] (last visited Jan. 23, 2021).

57. *Id.*

58. *Id.*

it may deter other judges from similar actions, resulting in increased judicial accountability and incentivizing judges to adhere to Arkansas's laws and Constitution.

Making these reforms would most certainly benefit indigent Arkansans, but the State's population as a whole would reap positive benefits as well. A 2020 study conducted by the Center for American Progress found that 16.2% of Arkansans live in poverty, with African Americans accounting for the largest percentage of that group at 27.1%.⁵⁹ This indicator ranks Arkansas at 47th out of the 50 states and the District of Columbia in overall poverty.⁶⁰

The criminal justice system greatly depletes Arkansans' tax dollars. Arkansas has seventy-five counties, each with a county jail.⁶¹ In 2018, Arkansas's incarceration rate was 589 per 100,000 residents, far surpassing 2018's *national* average of 374 per 100,000 residents.⁶² Over the last forty years, Arkansas's prison population has continued to increase steadily, skyrocketing from 2,911 in 1980, to 11,851 in 2000, to 17,713 in 2019.⁶³ These numbers do not even include the jail population in Arkansas's county jails, totaling 8,610 in 2013.⁶⁴ Sebastian County, the fourth largest county in Arkansas, proposed a county budget for the year 2020 with the jail budget listed at \$6,774,888, "a 5.8% increase from the total jail budget from 2019[.]" consuming a quarter of the proposed general fund budget, "making the jail the highest-funded department in the general fund."⁶⁵

According to the Brennan Center for Justice, "almost every state has increased criminal and civil court fees or added new

59. *Arkansas 2020*, CTR. FOR AM. PROGRESS, [https://perma.cc/C2UC-EX85] (last visited Apr. 6, 2021).

60. *Overall Poverty 2020*, CTR. FOR AM. PROGRESS, [https://perma.cc/Z57Z-9WJG] (last visited Apr. 6, 2021).

61. *Arkansas 2018*, NAT'L INST. OF CORR., [https://perma.cc/GXU2-J9P6] (last visited Apr. 6, 2021).

62. *Id.*; *2018 National Averages*, NAT'L INST. OF CORR., [https://perma.cc/38QJ-B6UF] (last visited Sept. 10, 2021).

63. *State-by-State Data: Prison Population Over Time*, SENT'G PROJECT, [https://perma.cc/8D2J-YRV3] (last visited Jan. 29, 2021).

64. *Id.*

65. Thomas Saccente, *Proposed '20 budget for Arkansas Jail Grows*, ARK. ONLINE (Oct. 20, 2019), [https://perma.cc/PJJ3-6JB9].

ones” since 2008 as a way to increase revenue.⁶⁶ However, the Brennan Center’s report explains in detail just how inefficient this practice is. For instance, the report points out that not only does jailing people who are unable to pay the fines and fees imposed on them fail to generate revenue, but it also comes at a high cost, “sometimes as much as 115 percent” more than the outstanding amount.⁶⁷ The imposition of fines and court costs provides more than 20% of the revenue for “nearly half of local governments.”⁶⁸ Every state in the nation is squandering money it could invest in infrastructure, better public schools, and improved public health.⁶⁹ Instead, it is invested in jailing individuals for low-level offenses, including failure to pay court fines and fees.⁷⁰ Worse yet, jailing an individual only further handicaps their ability to pay their legal financial obligations, and therefore, is a lose-lose situation for all parties involved.

III. THE CRIMINALIZATION OF POVERTY IN ARKANSAS

*There are a variety of scenarios around the country, but they all add up to the same thing: prosecuting people for low-level offenses, squeezing them for money, and jailing them if they miss payments, in a cruel game of “pay or stay.”*⁷¹

Because the United States Supreme Court has ruled that jailing an indigent individual for failure to pay is

66. MENENDEZ ET AL., *supra* note 32, at 6.

67. *Id.* at 5 (additionally, the report points out that the actual costs are even higher than the estimated amounts because many of the costs associated with the debt collection are unascertainable).

68. Hayes & Barnhorst, *supra* note 44.

69. See MENENDEZ ET AL., *supra* note 32, at 5, 9; Christopher Ingram, *The States That Spend More Money on Prisoners Than College Students*, WASH. POST (July 7, 2016), [<https://perma.cc/99CD-M7KX>].

70. See *supra* note 29 and accompanying text; EDELMAN, *supra* note 1, at 9; see also Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), [<https://perma.cc/KD5K-QB96>]; see generally Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sept. 15, 2020), [<https://perma.cc/7N2R-NBT3>].

71. EDELMAN, *supra* note 1, at 9.

unconstitutional,⁷² upholding this ruling should be relatively simple. However, *Bearden*'s language that a failure to pay must be "willful" for incarceration to be an appropriate remedy⁷³ has left lower courts with too much discretion in determining what exactly "willful" means. In 2009, the Arkansas Court of Appeals clearly stated that when a defendant violates the terms of their sentence in the form of a failure to pay, "the State has the burden of proving that the failure to pay restitution was inexcusable."⁷⁴ However, once the State presents that evidence, "the defendant has the burden of presenting some reasonable excuse for his failure to pay."⁷⁵

In *Jordan v. State*, the Supreme Court of Arkansas stated that "[a] defendant's failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment."⁷⁶ While seeking employment seems reasonable, the suggestion that someone may go to jail because they have not made "bona fide efforts" to borrow money from people in their life is not reasonable and is entirely too subjective. Additionally, borrowing money would place the person in the same position of owing money to someone or something—keeping them indebted.

Arkansas law mandates that in determining the method of payment of restitution, the court take into account:

- (A) The financial resources of the defendant and the burden that payment of restitution will impose with regard to another obligation of the defendant;
- (B) The ability of the defendant to pay restitution on an installment basis or on another condition to be fixed by the court; and
- (C) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.⁷⁷

While this may sound like "the bases are covered," what is happening in practice is an entirely different story.

72. *Bearden v. Georgia*, 461 U.S. 660, 667-68 (1983).

73. *Id.* at 668.

74. *Beebe v. State*, 2009 Ark. App. 113, at 2, 303 S.W.3d 89, 90.

75. *Id.*

76. 327 Ark. 117, 122, 939 S.W.2d 255, 257 (1997).

77. ARK. CODE ANN. § 5-4-205(e)(2)(A)-(C) (2015).

One would be hard-pressed to find a better example of this statute's inefficacy than the courtroom of one White County District Judge.⁷⁸ During his 2016 campaign, the judge was quoted in the Searcy *Daily Citizen* admitting, "I know my fines are a lot higher [than other judges] . . . I have a policy: Stay out of trouble for four years . . . Make your monthly payments . . . If they can do that for four years, they can do it for the rest of their lives."⁷⁹ Further, he proceeds by saying, "I try to hammer them at the front end and make them want to change, then I give them incentive."⁸⁰ One of the many issues with this approach is that his self-proclaimed "zero tolerance" policy⁸¹ is outside of his purview as a judge.

Court filings in *Mahoney v. Derrick*—the class action lawsuit brought against the judge—further outline his behavior, asserting that the judge "routinely sentences individuals convicted of failure to pay to *twice* the length of jail time as those convicted of the most serious misdemeanors under State law. He does not credit the jail time against their debt; instead, the jail time is in addition to new debt imposed."⁸² The Complaint goes on to allege not only that "[t]housands of individuals currently owe debt in [the judge's] courts[.]" but also that he has "jailed some [individuals] while they live[d] in tents or shelters."⁸³

The judge confirmed in a deposition that he issues arrest warrants and jails individuals who miss a single payment with no pre-arrest determination of "whether that person failed to make their fine payments knowingly and willfully."⁸⁴ Further, he concedes to his failure to act in accordance with the Arkansas Fines Collection Law, stating that he does not consider an individual's ability to pay at sentencing, and does not consider

78. See Alan Pyke, *A Judge in Arkansas Makes \$147,000 a Year for Turning Poor People into Indentured Servants*, THINKPROGRESS (Aug. 9, 2018, 3:27 PM), [<https://perma.cc/6BB6-ZJZN>].

79. *Id.*

80. *Id.* (it is unclear what exactly this "incentive" is).

81. Max Brantley, *New LawsUIT on 'Debtor Prison' Practices in White County UPDATE*, ARK. TIMES (Aug. 9, 2018), [<https://perma.cc/4JBP-6TKZ>].

82. *Id.*

83. *Id.*

84. Brief in Support of Plaintiffs' Motion for Partial Summary Judgment at 3, *Mahoney v. Derrick*, No. 73CV-18-874 (Aug. 3, 2020).

“whether the \$100 per month payment plan he imposes causes a severe and undue hardship on that person or his or her dependents.”⁸⁵

Because of the position of trust and authority that judges occupy in our society, the very least the public should expect them to do is follow and uphold the law. One might think that when such disregard for the law is exposed, the thousands of people who have faced financial ruin as a result of the injustice would have their debts forgiven, or at least receive some sort of compensation. However, that is not the case. The Circuit Court of White County granted summary judgment for the defendant judge in *Mahoney* based on his entitlement to “absolute judicial immunity.”⁸⁶ The plaintiffs got nothing.⁸⁷ However, even if the court had ruled in their favor, the tens of thousands of dollars in debt that they collectively owe to the judge’s courts would have remained unsettled, and they would not have received any compensation.⁸⁸ Because the plaintiffs only sought declaratory relief, a court order would have simply mandated that the judge modify his actions to accord with Arkansas’s laws when imposing and enforcing the collection of fines and fees.⁸⁹

Such an outcome is a crushing blow to indigent people’s quest for justice in Arkansas and across the country. When a judge acknowledges under oath that he engages in practices that violate state law, as well as numerous rulings set forth by the United States Supreme Court with impunity, that should be concerning. The egregious and ongoing nature of the judge’s practices met with the outcome of this case leaves only one conclusion: there must be a new route to recourse for indigent Arkansans.

85. *Id.*

86. Order and Judgment at 4, *Mahoney v. Derrick*, No. 73CV-18-874 (Dec. 30, 2020).

87. *Id.*

88. This is because the plaintiffs were seeking declaratory relief, which “refers to a court’s judgment stating the rights of parties without ordering any specific action or listing awards for damages.” *Declaratory Relief*, CORNELL L. SCH. (June 2020), [<https://perma.cc/Y9KQ-T8TV>].

89. *See id.*

In its 1998 opinion in *Robinson v. Langdon*,⁹⁰ the Arkansas Supreme Court adopted the United States Supreme Court's test for judicial immunity articulated in *Cleavinger v. Saxner*.⁹¹ This test articulates six factors for consideration:

- (1) the need to assure that the individual can perform his functions without harassment or intimidation;
- (2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;
- (3) insulation from political influence;
- (4) the importance of precedent;
- (5) the adversary nature of the process; and
- (6) the correctability of error on appeal.⁹²

The Trial Handbook for Arkansas Lawyers further elaborates on this concept, noting that “[t]his immunity applies even when a judge is accused of acting maliciously and corruptly[.]” and that “[t]he rationale . . . is not to protect or benefit malicious or corrupt judges, but to benefit the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.”⁹³

While some of these justifications sound sensible when assessed at face value, the rationale that failing to punish judicial wrongdoing is somehow to the community's benefit is an argument that holds little weight when looking at an example like the *Mahoney* case. First, a judge's “errors” are not always errors which an appeal could remedy.⁹⁴ Second, when a judge is not exactly “perform[ing] his functions”⁹⁵ in an ethical way, instead of protecting *him* as the hypothetical target of harassment or intimidation, the courts should prioritize the public's best interest. Courts should not ignore the ways in which the judge violated his

90. 333 Ark. 662, 670, 970 S.W.2d 292, 296 (1998).

91. 474 U.S. 193, 202 (1985).

92. *Robinson*, 333 Ark. at 670, 970 S.W.2d at 296.

93. 3 JOHN WESLEY HALL, JR., TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 9:21 (2020-2021 ed.).

94. See *supra* text accompanying notes 86-89; see also *Declaratory Relief*, *supra* note 88.

95. *Robinson*, 333 Ark. at 670, 970 S.W.2d at 296.

oath of office and ultimately ensured members of his community stayed entrenched in poverty for years.⁹⁶

What started as a “zero-tolerance” policy ultimately resulted in a pattern of unconstitutional failures to conduct inquiries into individuals’ ability to pay, incarcerating many of those individuals when they could not pay, and continuing to levy additional fines and fees upon them for years.⁹⁷ Many Arkansans will never financially or emotionally recover from their entanglement in this system, and granting the judge absolute judicial immunity does not protect the interests of Arkansas’s citizens.

Additionally, the plaintiffs in *Mahoney* were not seeking monetary damages.⁹⁸ Therefore, allowing the doctrine of judicial immunity to bar the imposition of declaratory relief to stop unlawful behavior—with no monetary damages at stake as a possible remedy—seems rather ludicrous. While the argument that the judicial immunity doctrine furthers the public interest because “judges should be at liberty to exercise their functions with independence and without fear of consequences”⁹⁹ certainly makes sense in some situations, this doctrine must be narrowed, clarified, and reformed for its stated policy objectives to function as intended.

Judicial immunity should not serve as a complete barrier to justice for individuals treated in an antithetical way to that which most Arkansans would deem ethical, appropriate, or deserving of a position of power and respect. Furthermore, a doctrine created to alleviate judges from “fear of consequences” might not serve the public’s best interest.¹⁰⁰ Instead, establishing a doctrine that provides judges with reasonable protection from suit while still preserving a strong mechanism for accountability and the imposition of appropriate consequences would be more suitable. Judges swear an oath to uphold our state laws and constitution,

96. See *supra* text accompanying notes 78-90.

97. See Matthew Martinez, *Arkansas judge throws defendants ‘too poor to pay’ in ‘debtors’ prison,’ lawsuit says*, Fort Worth Star Telegram (Aug. 10, 2018, 10:10 AM), [<https://perma.cc/9UWC-673Y>].

98. Complaint—Class Action Demand for Jury Trial, *supra* note 11, at 1.

99. 3 HALL, JR., *supra* note 93, § 9:21.

100. See *id.*

and it is in the best interest of the public to ensure judges uphold these oaths.

However, in November 2017, the ACLU of Arkansas and the Lawyers' Committee were successful in settling a lawsuit in which the city of Sherwood, Pulaski County, and the district court judge were the named defendants.¹⁰¹ This settlement mandated that “Sherwood’s ‘hot check’ court [would] no longer jail people who can’t afford to pay court fines and fees imposed for bouncing a check . . . [and] requires the court to evaluate each defendant’s ability to pay before determining the person’s sentence.”¹⁰² Several factors could point to why this outcome was so different. The fact that the city and county were themselves named defendants, and thus, were not entitled to judicial immunity, may have provided a greater incentive to settle. Maybe it was because this case was litigated in federal court as opposed to state court.¹⁰³ However, the fact that the settlement had to include a mandate to evaluate each individual’s ability to pay, which the law already requires, further demonstrates the shirking of the law that is occurring in some of Arkansas’s courtrooms.

IV. THE PATH TOWARD A MORE EQUITABLE SYSTEM IN ARKANSAS

Ferguson was a spark that turned isolated instances of activism into a national conversation and produced numerous

101. *Dade v. City of Sherwood*, AM. CIV. LIBERTIES UNION OF ARK., [https://perma.cc/Q9AN-JMQE] (last visited Oct. 27, 2020).

102. *Id.*; see also Linda Satter, *Under Deal, 1 Arkansas Court to Back Off Jailing Over Hot Checks*, ARK. DEMOCRAT GAZETTE (Nov. 15, 2017, 4:30 AM), [https://perma.cc/8WBR-747M] (One plaintiff in the case “wrote a single bad check for \$28.93 in 2011 that, by the time the suit was filed [in 2016], had resulted in her being arrested at least seven times, paying nearly \$3,300 in fines, fees and court costs, and spending 25 days in jail . . . [T]he lead plaintiff, Charles Dade, spent more than 100 days in jail and was assessed about \$4,000 in fines, fees and court costs because of six bounced checks totaling \$360 that he wrote in 2009.”).

103. See Complaint—Class Action at 6, *Dade v. City of Sherwood*, No. 4:16-CV-00602-JM (E.D. Ark. Aug. 23, 2016), [https://perma.cc/68TN-WKLV] (bringing “civil rights action arising under 42 U.S.C. §§ 1983 and 1988, 28 U.S.C. § 2201 *et seq.*, and the Sixth and Fourteenth Amendments to the United States Constitution”).

*examples of partnerships between advocates and decision-makers.*¹⁰⁴

In 2015, the U.S. Department of Justice (“DOJ”) released the findings from its investigation of the Police Department in Ferguson, Missouri, highlighting the fact that “Ferguson law enforcement efforts are focused on generating revenue.”¹⁰⁵ As a result, many states and localities began to face pressure to reevaluate the use of fines and fees to generate revenue.¹⁰⁶ While there are many meritorious ideas regarding the most effective ways to achieve reform, this section will focus on three practical suggestions to make strides towards a more just and equitable system in Arkansas.

A. Utilizing the Arkansas JDDC to Punish Judicial Misconduct

The American Bar Association’s (“ABA”) Standing Committee on Ethics and Professional Responsibility issued a formal opinion regarding the “[e]thical obligations of judges in collecting legal financial obligations and other debts,”¹⁰⁷ following the DOJ’s groundbreaking report detailing law enforcement’s unlawful practices in Ferguson, Missouri.¹⁰⁸ The nexus between the ABA’s opinion and the DOJ’s report is that they both address unlawful practices of government and law enforcement officials in their focus on generating revenue.

The ABA opinion asserts that to comply with the Model Code of Judicial Conduct, judges must “undertake a meaningful inquiry into a litigant’s ability to pay court fines, fees, restitution,

104. EDELMAN, *supra* note 1, at 10.

105. U.S. DEP’T OF JUST. CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9 (2015) (quote in all capitals in the original).

106. See *Investigation of the Ferguson Police Department*, FINES & FEES JUST. CTR. (Mar. 1, 2015), [<https://perma.cc/K9HM-PJ4Y>] (asserting that “[t]he publication of the Ferguson report is widely viewed as the start of the movement to reform fines and fees in the U.S.”).

107. ABA Comm. on Ethics & Pro. Resp., Formal Op. 490 (2020) (quote in all capitals in the original) (discussing the Model Code of Judicial Conduct’s clear mandate for meaningful inquiry into a defendant’s ability to pay before incarcerating a defendant for failing to pay).

108. See *id.* at 2.

other charges, bail, or civil debt before using incarceration as punishment for failure to pay, as inducement to pay or appear, or as a method of purging a financial obligation whenever state or federal law so provides.”¹⁰⁹ According to the ABA, Rules 1.1, 1.2, 2.2, 2.5, and 2.6 of the Model Code of Judicial Conduct all require meaningful inquiry as “a fundamental element of procedural justice necessary to maintain the integrity, impartiality, and fairness of the administration of justice and the public’s faith in it.”¹¹⁰

The opinion clearly states that “[a]s long as a defendant’s failure to pay is due to genuine financial incapacity, alternatives to incarceration must be explored.”¹¹¹ Furthermore, it emphasizes the necessity for consistently followed and “carefully prescribed procedures” to promote uniformity—opining that failing to adopt and adhere to such policies in failure to pay proceedings that could result in incarceration “strikes at the very roots of the fair and impartial administration of justice and poses a direct threat to public faith in the legitimacy of the judicial process.”¹¹²

While some judges have been able to evade legal accountability through the judicial immunity doctrine, this doctrine does not shield them from ethical consequences. In *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders*, the D.C. Circuit explained that “the constitutional measures meant to protect judicial independence were not intended to insulate individual judges from accountability to ‘the world as a whole (including the judicial branch itself),’ but ‘to safeguard the branch’s independence from its two competitors.’”¹¹³ There is a fine line between judicial misconduct and simple legal error.¹¹⁴ While the “mere legal

109. *Id.* at 1.

110. *Id.*

111. *Id.* at 3.

112. ABA Formal Op. 490, *supra* note 107 (quoting the Georgia Supreme Court’s opinion in a judicial disciplinary case in which it recognized that for many litigants, “trial judges ‘are the judicial system’”).

113. Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1248 (2004) (citing *McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords.*, 264 F.3d 52, 65 (D.C. Cir. 2001)).

114. *See generally id.*

error” rule typically shields judges from disciplinary action based on one erroneous decision, “most cases in which judicial error [is] elevated to the level of judicial misconduct involve[] more than one example of legal error, and a pattern is one of the identified exceptions to the ‘mere legal error’ rule.”¹¹⁵ Additionally, “[a]n intentional failure to follow the law, even with a benign motive, constitutes bad faith and consequently judicial misconduct.”¹¹⁶

While recognizing the importance of balancing the interest of judicial independence with the need for accountability in cases of judicial misconduct, New York’s highest court rationally articulated that “the judiciary, the Bar, and the public are better served when an established course of misconduct is appropriately redressed and an unfit incumbent is removed from the Bench.”¹¹⁷ Judges need not concern themselves that a “mere oversight[] or misreading[] of the law” will result in sanction for legal error.¹¹⁸ Instead, judges must simply “comply with clear due process requirements and avoid bullying and patently unfair conduct.”¹¹⁹ The interests of judicial independence are sufficiently safeguarded by the “mere legal error” rule, while the rule’s exceptions make it possible “to hold judges accountable for decisions that are clearly contrary to law, that were reached without following the procedures that confer legitimacy and credence upon judicial actions, that represent an exercise of discretion motivated by bad faith, or that reflect repeated legal error that cannot be attributed to an honest mistake.”¹²⁰

One under-utilized avenue for recourse is filing a complaint with Arkansas’s JDDC. While the Commission can choose to open an investigation and issue punishment against any judge in Arkansas on its own,¹²¹ the Commission’s members typically have full-time jobs, and they cannot know what is going on in

115. *Id.* at 1263.

116. *Id.* at 1268.

117. *In re Duckman*, 699 N.E.2d 872, 881 (N.Y. 1998).

118. Gray, *supra* note 113, at 1280 (adding that judicial independence is not threatened simply because “the possibility of discipline for legal error may induce . . . second thoughts before judicial decision-making”).

119. *Id.*

120. *Id.*

121. ARK. JUD. DISCIPLINE AND DISABILITY COMM’N r. 8(A) (2013).

every courtroom in Arkansas if they are not made aware. Because a judge who has immunity has not been held liable in a court of law, the ethical complaint process is a way of putting a judge “on notice,” so to speak, for his or her bad behavior.¹²²

In 2014, the Commission admonished a district court judge in Craighead County for instituting an illegal fee of \$35.00 that was levied “against certain defendants, for changing a plea from ‘not guilty’ to ‘guilty.’”¹²³ While the Letter of Admonishment put the judge on notice, the voters had the final word when he subsequently lost reelection in 2016.¹²⁴ Complaints may be made to the Commission anonymously or with the complainant’s name attached,¹²⁵ so attorneys, prosecutors, and public defenders who witness unlawful behavior in the courtroom can make a report without fear of retaliation. While anyone can make a complaint, the average citizen is likely not aware of this avenue for recourse. Therefore, attorneys should more frequently utilize this remedial measure to put judges on notice, so if their behavior continues, the punishment will further escalate.

B. Enumerating Specific Factors for Consideration in Arkansas’s Statute

Arkansas’s applicable statute, as it stands, requires that a judge must consider:

- (A) The financial resources of the defendant and the burden that payment of restitution will impose with regard to another obligation of the defendant;
- (B) The ability of the defendant to pay restitution on an installment basis or on another condition to be fixed by the court; and
- (C) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.¹²⁶

122. *See id.* at 8(D).

123. Press Release, *supra* note 54, at 1.

124. *Keith Blackman*, BALLOTPEdia, [<https://perma.cc/RFQ6-GUYA>] (last visited Jan. 29, 2021).

125. ARK. JUD. DISCIPLINE AND DISABILITY COMM’N r. 8(A).

126. ARK. CODE ANN. § 5-4-205(e)(2)(A)-(C) (2015).

Currently, the statute—on its face—seems adequate. However, as stated above, the statute’s lack of specificity leaves too much ambiguity and room for interpretation as to what exactly is required.¹²⁷ Implementation is the issue.

The statute should instead require *specific* inquiries. These requirements need not even go beyond what questions a person would generally ask to determine someone’s net worth. The court should first determine the individual’s anticipated monthly income. Next, the court should establish whether the individual has any dependents relying on their monthly income. On a similar note, the court should ascertain the individual’s monthly living expenses (i.e., monthly housing cost, the average cost of utilities per month, groceries, etc.). An individual should not have to miss a rent payment or forego running water for themselves and their families to prioritize, for example, a speeding ticket. Additionally, the court may inquire into whether an individual possesses any liquid assets.

If the statute were to enumerate specific factors for review, there would be significantly less grey area when analyzing a person’s realistic ability to pay and on what schedule. Because there are so many small local courts across the state of Arkansas, it can be difficult to ensure each court is adhering to the same set of legal procedures and upholding society’s expectation of ethics in the judiciary. In reducing statutory ambiguity, the legislature could positively effect change in a concrete and cognizable way.

C. Improving Record-Keeping, Transparency, and Accountability

Another obstacle for justice—particularly in rural communities—is the lack of adequate record-keeping.¹²⁸ This is a problem because many times, defendants “have no way to track the total debt owed or ensure their payments are properly applied to their outstanding debt[s].”¹²⁹ And while community service is

127. See *supra* text accompanying notes 5-10.

128. BRADEN ET AL., *supra* note 7, at 3.

129. *Id.*

typically a stated alternative to paying fines and fees,¹³⁰ poor record-keeping creates a possible scenario in which a person completes their community service time, frequently taking time away from work or other obligations to do so, only to learn later that there is no such record of their completion of community service, forcing them to start over.

Furthermore, community service is not a legitimate alternative in many cases. For example, according to court filings in *Mahoney*:

individuals must make arrangements with the local police or other authorities in the town where the conviction occurred . . . [and t]hey may be denied the opportunity to work at the discretion of other municipal officials for any reason, including that there is no work available that day, not enough work available, or that no one is available to administer it.¹³¹

One plaintiff tried three times to no avail to complete community service, and because the judge suspended his license, he had to walk “to the police station in below-freezing weather only to be told that it was too cold to work that day.”¹³² Unfortunately, community service is not always a reliable alternative to payment.

Additionally, the *Mahoney* plaintiffs alleged numerous instances in which they corresponded with the clerk of court to make a partial payment, obtain an extension, or explain their inability to pay, but were nonetheless arrested for failure to pay.¹³³ When a sloppy administrative error on the part of the State can result in jail time, an issue clearly exists. For example, the “Beebe Department [in White County] serves a community of just 8,000 people[,]” yet over a span of two years, the judge issued “more than 4,000 warrants for failure to pay fines . . . in the Beebe Department alone.”¹³⁴ To promote uniformity and give people the confidence that record-keeping accurately reflects agreed-upon extensions, community service, and any other relevant

130. CTR. FOR CT. INNOVATION, A BETTER ALTERNATIVE TO FINES AND FEES? COMMUNITY SERVICE MANDATES IN THE UNITED STATES 1 (2019), [<https://perma.cc/G8NE-A728>].

131. Complaint—Class Action Demand for Jury Trial, *supra* note 11, at 17-18.

132. *Id.* at 18.

133. *Id.* at 19-20.

134. *Id.* at 20.

information, there must be an updated system to promote accountability and transparency within the courts. An online system in which individuals can check their outstanding balances, make required payments, confirm payment due dates, track their community service, and upload relevant financial information would be considerably more practical than record-keeping by hand at the courthouse.

V. HOW THE SYSTEM STAGNATES ARKANSAS'S ECONOMY

*The anti-tax lobby told voters they would get something for nothing—the state or municipality would tighten its belt a little, it would collect big money from low-level offenders, and everything would be fine. This hurt not only the poor. In state after state the dismantling of the tax base crippled public education and damaged the futures of children across lines of income, hurting many more children than just those who live in poverty.*¹³⁵

A system in which people are cyclically jailed because of their inability to pay fines and fees is doomed to result in a net-negative economic outcome.¹³⁶ While government officials often perceive fines and fees as an attractive alternative to raising taxes, they are less profitable than they may initially appear.

A. Cost of Arkansas's County Jails

Pulaski County, the most populous county in the state with nearly 400,000 residents,¹³⁷ spent a staggering \$27,123,125.68 on its county jail in 2017.¹³⁸ Calhoun County, the least populated county in the state with 4,739 residents,¹³⁹ spent \$417,986.22 on

135. EDELMAN, *supra* note 1, at xvi.

136. See Carl Takei, *WTF? Our Tax Dollars Are Being Spent to Jail a Vet for Being Poor*, AM. CIV. LIBERTIES UNION (May 28, 2014), [<https://perma.cc/J9GN-8L9X>].

137. *Arkansas Counties by Population*, ARK. DEMOGRAPHICS BY CUBIT, [<https://perma.cc/GRT7-PB8F>] (last visited Oct. 1, 2021).

138. ASS'N OF ARK. CTYS., LOCAL GOVERNMENT INMATE COST REPORT (2017), [<https://perma.cc/A98Z-EUTD>].

139. *Arkansas Counties by Population*, *supra* note 137.

a county jail that only holds twenty-two inmates.¹⁴⁰ Washington County, the state's third most populous county,¹⁴¹ spends over \$19 million on its county jail,¹⁴² with smaller counties like Poinsett (population 22,965)¹⁴³ spending almost \$1.5 million on its county jail.¹⁴⁴ Craighead County (population 111,231)¹⁴⁵ spent nearly \$9 million on its county jail in 2017.¹⁴⁶ According to the Association of Arkansas Counties' report, the average verified cost-per-day across the state to house one inmate is \$71.48.¹⁴⁷

The amount of money Arkansas's counties are expending on jails has steadily risen over the last twenty years, with the Sebastian County jail budget increasing by 53%, over \$3 million, from 2006 to 2019.¹⁴⁸ When viewing these numbers, one should consider the context that, nationally, Arkansas ranks 48th in Public Health, 41st in Education, 43rd in Infrastructure, 48th in Crime and Corrections, and 47th in Public Safety.¹⁴⁹ Clearly, the increased spending on jails is not leading to an increase in public safety. In a 2020 report authored by Human Rights Watch, the recommendations of how to effectively improve public safety included investing in education to advance the quality of schools, "stop[ping] enforcing laws in ways that effectively criminalize people for their poverty[,]” investing in initiatives that provide training and employment, providing “sufficient and adequate health care,” and “[v]astly reduc[ing] pretrial incarceration so that only those accused of serious crimes and found to pose a specific danger to others can be held in custody.”¹⁵⁰

Arkansas's ranking in these indicators should be a wake-up call that the State's current investments are not productive. From

140. ASS'N OF ARK. CTYS., *supra* note 138.

141. *Arkansas Counties by Population*, *supra* note 137.

142. ASS'N OF ARK. CTYS., *supra* note 138.

143. *Arkansas Counties by Population*, *supra* note 137.

144. ASS'N OF ARK. CTYS., *supra* note 138.

145. *Arkansas Counties by Population*, *supra* note 137.

146. ASS'N OF ARK. CTYS., *supra* note 138.

147. *Id.*

148. Saccente, *supra* note 65.

149. *Arkansas: #44 in Overall Rankings*, U.S. NEWS & WORLD REP., [<https://perma.cc/5LZ6-LV2J>] (last visited Oct. 1, 2021).

150. *A Roadmap for Re-imagining Public Safety in the United States*, HUM. RTS. WATCH (Aug. 12, 2020, 8:00 AM), [<https://perma.cc/WW2X-63CR>].

the personal narratives in this Comment, one can deduce that this cycle of never-ending, court-imposed fines and fees only contributes to the larger problem. The Brennan Center for Justice has rightfully pointed out that because “the burden of fees and fines falls largely on the poor” it is “much like a regressive tax” with “mounting balances [that] underscore [their] finding that fees and fines are an unreliable source of government revenue.”¹⁵¹ The report further notes that, “[j]ailing those unable to pay fees and fines is especially costly—sometimes as much as 115 percent of the amount collected—and generates no revenue[.]” pointing out that this “practice is not just unconstitutional but also irrational.”¹⁵²

B. Fines and Fees as a Revenue Generator

Across the country, states and localities use fines and fees to generate revenue.¹⁵³ While revenue generation might sound good in theory, an accurate cost-benefit analysis typically reveals that fines and fees are not so profitable in reality. An in-depth study of “the costs for state and local governments to enforce and collect fees and fines” revealed massive waste, illustrating that “[t]he net gain might be far less than [states] have imagined, [and] the losses far more damaging.”¹⁵⁴ New Mexico’s Bernalillo County is the perfect example as it is “operat[ing] at a loss in this regard, spending more than \$1.17 per dollar it raises in revenue from fees and fines.”¹⁵⁵ However, the actual loss is impossible to calculate as the study did not “take into account many of the counties’ investments in this work, like the time and staffing spent on

151. MENENDEZ ET AL., *supra* note 32, at 5.

152. *Id.*

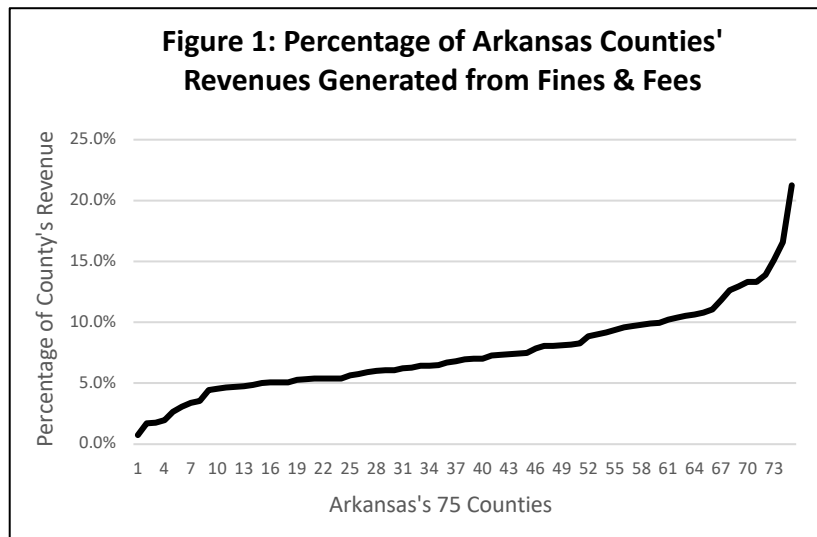
153. RON DEUTSCH & CARA LONG CORRA, FISCAL POLICY INST., FINES AND FEES: RAISING REVENUE AT THE COMMUNITY’S EXPENSE 1 (2020), [<https://perma.cc/K5Z8-RX6W>].

154. Lauren-Brooke Eisen & Matthew Menendez, *Fees, Fines and Ability to Pay*, HILL (Feb. 10, 2020, 1:30 PM), [<https://perma.cc/9TU2-CURS>] (explaining how “[t]he IRS spends one-third of a penny for every dollar that it collects in taxes[.]” while in the Texas and New Mexico counties studied, “the governments spend more than 41 cents of every dollar of revenue they raise to collect the fees and fines they impose in jail costs and in-court proceedings alone”).

155. *Id.*

enforcing warrants and suspending driver's licenses for nonpayment of debts."¹⁵⁶

Although I could not account for all the costs associated with collecting fines and fees in Arkansas, I was able to determine what percentage of each county's revenue came from fines and fees in 2019. Using each county's most recent financial audit,¹⁵⁷ I divided the county's annual revenue generated from municipal fines and fees by the county's total annual revenue to determine the percentage of total revenue generated by fines and fees for each county. Below, Figure 1 serves as a visual illustration of my findings.¹⁵⁸ The x-axis lists the counties in order from least to greatest in terms of percentage of total revenue generated through fines and fees in the county.



156. *Id.*

157. County audits for each fiscal year can be accessed on the Arkansas's Legislative Audit website. See *Search Audits*, ARK. LEGIS. AUDIT, [<https://perma.cc/DLB3-GGDC>] (last visited Sept. 26, 2021).

158. In addition to being available by search of the 2019 audits on the Arkansas Audit website, the documents, as well as excel sheets supporting the findings depicted on Figure 1 are on file with the author.

As Figure 1 demonstrates, the rate at which counties are depending on revenue from fines and fees varies. In larger counties, the percentage is lower because of the high rate of property tax revenue. However, when federal aid and state aid are not accounted for as “revenues,” the percentage grows significantly in some counties. Additionally, a conflict of interest arises when counties project an anticipated amount of revenue in this category. When an amount is projected in the county’s budget and is considered unearned revenue, law enforcement officers, prosecutors, and judges alike are put into situations where their interest in accruing that unearned revenue can conflict with an equal and impartial application of the law.¹⁵⁹

Anne Kim, Vice President of Domestic Policy at the Progressive Policy Institute,¹⁶⁰ explains in her piece for *Governing* that “[b]ecause the burden of these penalties falls disproportionately on people who can’t afford to pay, jurisdictions collect far less than expected and waste resources chasing down payments that won’t materialize.”¹⁶¹ Further, “as many as one-fourth of local inmates were in jail for nonpayment of fines and fees” in some jurisdictions, and “[i]n addition to its direct expenses, incarceration—even short stints in jail—can lead to costly outcomes, including unemployment, dependence on public benefits and greater risk of crime.”¹⁶² Because these revenues come at such a high cost both financially and socially,¹⁶³ each county should work to decrease its reliance on this revenue

159. See *Fines, Fees, and Financial Burdens*, CTR. FOR CT. INNOVATION, [https://perma.cc/2E2F-RHHC] (last visited Apr. 3, 2021) (explaining that many places use fines and fees to fund court systems and local governments creating an inherent conflict of interest); see, e.g., Matt Ford, *The Problem With Funding Government Through Fines*, ATLANTIC (Apr. 2, 2015), [https://perma.cc/M2TK-UTQC] (discussing an issue that arose in Nevada when tickets and fines revenue fell short of what the state legislature projected in its two-year budget, resulting in shortfalls of \$700,000 in year one and \$1.4 million in year two).

160. Anne Kim, *Columnist*, GOVERNING, [https://perma.cc/3MBZ-2NEW] (last visited Apr. 20, 2021).

161. Anne Kim, *When Cities Rely on Fines and Fees, Everybody Loses*, GOVERNING (Aug. 22, 2018), [https://perma.cc/K4SD-CCUE].

162. *Id.*

163. See *id.* (referencing “[a] 2014 study of Alabama court costs” which found that “collection rates [were] under 10 percent on average—despite countless hours spent by staff pursuing payment”).

source. In doing so, counties could stop wasting money on fine collection efforts and incarcerating people who cannot afford to pay, allowing the citizens of Arkansas to put their money back into our state's economy instead of dragging around the ball and chain of legal financial obligations for weeks, months, or in many cases, years.

VI. CONCLUSION

*Lawsuits have forced debtors' prisons out of business in increasing numbers, mostly in specific counties and municipalities, but there are more venues to be tackled.*¹⁶⁴

Even though the United States Supreme Court, state legislatures, and the vast majority of legal scholars are in agreement that debtors' prisons are both unethical and unconstitutional, people in Arkansas and across America are still jailed every day simply because they cannot pay the legal financial burdens that they face. Regardless of statutes and case law that seemingly ban this practice, it is clear that these safeguards have fallen far short of ensuring poverty is not criminalized.

Whether or not one may personally empathize with the victims of this system, it is in everyone's best interest to reform it. Not only does jailing poor people have no positive impact on their ability to pay their legal financial obligations, but it also almost always has the opposite effect—frequently leading to unemployment, additional debt, and less money circulating in our economy to support Arkansas's businesses. The State itself would benefit from reforming this system too. As it stands now, the system of fines and fees collections is a drain on taxpayer dollars, does not effectively reduce or deter crime, and stagnates our state's economy.

164. EDELMAN, *supra* note 1, at 28.