

Nonmarket Criminal Justice Fees

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The public finance literature tells us that user fees will introduce market-like efficiency to public good provision. Meanwhile, criminal justice scholars note that criminal justice fees have run amok, causing crippling debt, undermining reentry efforts, and raising civil rights and constitutional concerns. This Article reconciles these seemingly opposed perspectives, arguing that criminal justice fees have become harmful precisely because they deviate from the traditional market-like environment that the public finance literature envisions. This nonmarket structure occurs for two reasons. First, criminal justice agencies are monopolistic providers of mandatory services, and second, criminal defendants cannot or do not consider the fee amount when deciding how to behave. As a result, criminal justice fees operate without meaningful restraint, and instead face upward pressure from monopolistic agencies seeking increased revenue. Adjudicating courts, meanwhile, have diluted judicial fee requirements to accommodate increasingly creative user fee structures. These unbounded, nonmarket fees incentivize misallocation of public resources, heighten the risk of exploitation of powerless groups, cause significant human suffering, and deny payors meaningful protection from exploitative government exactions.

In addition to offering a public-finance-based critique of criminal justice fees, the Article harnesses such reasoning to offer a framework for evaluating other potentially exploitative nonmarket fees. Policymakers and advocates can use this framework to prevent unbounded nonmarket fees before they become entrenched revenue streams. The Article also offers reforms for criminal justice fees, with the goal of meaningfully restraining the fees and correcting perverse agency incentives. Suggested reforms include increasing judicial scrutiny, prohibiting local agencies from keeping the fee revenue they collect, and placing a low per-person cap on total fees.

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INTRODUCTION

Eileen DeNino could not afford to pay the court fees and fines from her children's truancy. While serving a two-day jail sentence for nonpayment of the debt, Eileen died from health complications.¹ Like Eileen, others who cannot afford to pay these criminal justice fees face life-altering punishment—from drivers' license suspension, to disenfranchisement, to imprisonment.²

Distinct from fines (which seek to punish) and restitution (which seeks to make victims whole), criminal justice *fees* seek to raise revenue.³ These fees reimburse government for the cost of running the criminal justice system by offloading expenses onto system users. They begin at arrest and accrue throughout adjudication, incarceration, and supervision, covering costs ranging from prosecutor expenses, to prison room and board, to ankle monitors.⁴ They attach to all manner of transgressions, from parking tickets to felonies,⁵ and become quite substantial as they accumulate, with amounts reported around \$2,000 to \$3,000 per infraction.⁶

1. Alan Pyke, *Impoverished Mother Dies in Jail Cell Over Unpaid Fines for Her Kids Missing School*, THINKPROGRESS (June 12, 2014, 1:25 PM), <https://thinkprogress.org/impoverished-mother-dies-in-jail-cell-over-unpaid-fines-for-her-kids-missing-school-42e61922a8e4/>.

2. News outlets are replete with stories of the collateral consequences of unpaid court costs. *See, e.g.*, Merrit Kennedy, *ACLU Sues Over Florida Law That Requires Felons to Pay Fees, Fines Before Voting*, NPR (July 1, 2019, 5:42 PM), <https://www.npr.org/2019/07/01/737668646/aclu-sues-over-florida-law-that-requires-felons-to-pay-fees-fines-before-voting> (reporting on a Florida law that restricts the voting rights of those who owe criminal court debt); Samantha Melamed, *Why Are Pennsylvania Judges Sentencing People on Probation for Debts They Won't Ever Be Able to Pay?*, PHILA. INQUIRER (Oct. 10, 2019), <https://www.inquirer.com/news/philadelphia-court-judge-genece-brinkley-probation-court-costs-fines-debtors-prison-aclu-20191010.html> (describing Pennsylvania courts' practice of jailing debtors for inability to pay criminal court costs); Wayne K. Roustan, *Florida Suspends Nearly 2 Million Driver's Licenses. Help May Be on Way.*, SUN SENTINEL (Feb. 6, 2018, 5:05 PM), <https://www.sun-sentinel.com/news/transportation/fl-reg-drivers-license-suspensions-2018-02-06-story.html> (explaining that the bulk of driver's licenses suspended in Florida for a non-driving offence were suspended due to nonpayment of child support and court debt); *see also* CARSON WHITELEMONS, ASHLEY THOMAS & SARAH COUTURE, *DRIVING ON EMPTY: FLORIDA'S COUNTERPRODUCTIVE AND COSTLY DRIVER'S LICENSE SUSPENSION PRACTICES* 3 (2019), <https://finesandfeesjusticecenter.org/content/uploads/2019/11/florida-fines-fees-drivers-license-suspension-driving-on-empty.pdf> (reporting that, in 2017, Florida issued 1.1 million driver's license suspension notices for unpaid court debt).

3. R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIM. JUST. & BEHAV. 242, 253 (2006).

4. *See infra* Part I.A.

5. *See infra* Part I.A.

6. Anne Stuhldreher, *Opinion, Charging Ex-Offenders 'Administrative Fees' Means Big Pain for the Poor and Little Gain for Counties*, L.A. TIMES (July 9, 2018, 4:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-stuhldreher-administrative-fees-20180709-story.html> (reporting average fees of \$3,600 among those leaving jail in California); ALICIA BANNON, MITALI NAGRECHA, & REBEKAH DILLER, BRENNAN CTR. FOR JUST., *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 9–10 (2010) (reporting fees of up to \$2,000 or more in various states), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf.

Scholars⁷ and advocates⁸ are well aware of these out-of-control fees and their damaging collateral consequences.⁹ They argue that the fees violate constitutional due process rights and protections against excessive fines, that incarceration for nonpayment amounts to illegal debtors' prison, and that the fees undermine reentry and rehabilitation goals.¹⁰ Indeed, even those who advocate fines and restitution often decry criminal justice *fees* as inappropriate.¹¹

Yet, user fees in other contexts are not so terrible. Indeed, the public finance literature is more sanguine on user-fee financing, noting that user fees can improve public good provision by introducing market-like efficiency¹²—a view largely absent from the scholarship on criminal justice fees.¹³ User fees provide government with both price and usage information, allowing agencies to tailor services to user demand and to reallocate resources to increase public wellbeing.¹⁴ Fees can also reduce wasteful overconsumption of public goods by

7. *E.g.*, Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1487–89 (2016); Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 512–18 (2011); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 286–90 (2014); Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1837–42 (2015); Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOCIO. REV. 339, 354 (2009); ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* 27–46 (2016); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1404–07 (2018); Fred O. Smith, Jr., *Abstinence in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2305–08 (2018); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 498–504 (2016).

8. *See Note, State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1030 (2016) (describing litigation efforts); *The Clearinghouse*, FINES AND FEES JUST. CTR., <https://finesandfeesjusticecenter.org/clearinghouse/?sortByDate=true> (last visited Feb. 4, 2021) (filter “content type” by “litigation”) (listing civil suits and class actions targeting court fees, along with fines, bail costs, and other legal financial obligations).

9. *See, e.g.*, Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

10. *See, e.g.*, *The Clearinghouse*, *supra* note 8 (listing recent court fee litigation).

11. *See R. Barry Ruback, The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1820–28 (2015) (advocating mandatory restitution and occasional fines, but arguing against the imposition of criminal justice user fees); Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1760–66 (2015) (“The Code’s preferred position—that costs, fees, and assessments should be abolished—rests chiefly on the premise that such financial encumbrances do not serve the goals of the sentencing system, but are imposed for the side purpose of revenue generation.”).

12. *E.g.*, RICHARD M. BIRD, *CHARGING FOR PUBLIC SERVICES: A NEW LOOK AT AN OLD IDEA* 33–34, 39 (1976) (“[T]he basic rationale for introducing pricing into the public sector where possible is really the same as that underlying Adam Smith’s famous ‘invisible hand’ doctrine, that is, to achieve an efficient allocation of resources by having each individual choose to consume that amount he wants when offered at a price which reflects the value”); Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 805–22 (1987).

13. *But see* Ruback, *supra* note 11, at 1820–25 (briefly considering the users fees’ efficiency benefits, but dismissing fees as inappropriate in a criminal justice context for other reasons).

14. David G. Duff, *Benefit Taxes and User Fees in Theory and Practice*, 54 U. TORONTO L.J. 391, 398–99 (2004); BIRD, *supra* note 12, at 34. Moreover, user fees connect public service demand with a direct financing mechanism, ensuring that expansion of a sought-after public service has a built-in funding mechanism. Duff, *supra*, at 392 (“[I]t is only through the application of benefit taxes that an appropriate level and structure of government activity can, at least in theory, be determined simultaneously with the means of financing it.” (quoting BIRD, *supra* note 12, at 10)).

forcing users to internalize the costs of their use.¹⁵ In the context of criminal justice services, therefore, charging system users may cause criminal defendants to reduce their use of the services, while also reducing the financial burden on other taxpayers.¹⁶

This Article contributes to the growing scholarship on criminal justice fees by reconciling these two viewpoints, using a public finance lens to uncover a fundamental flaw in criminal justice fees. Specifically, criminal justice fees occur outside of the market-like environment envisioned for traditional user fee financing, making impossible the various allocative benefits that user fees are meant to provide. This nonmarket structure arises for two reasons. First, criminal courts and law enforcement agencies are monopolistic providers of mandatory services. They thus have the power to decide the amount of fee-funded services that users must consume. Moreover, in most cases, levying agencies directly benefit from fee revenue,¹⁷ creating incentives to inflate the services provided. Second, users' demand for criminal justice services is nonresponsive to fee levels—a departure from the standard, downward-sloping demand curve contemplated in the public finance model.¹⁸ Various psychological and structural factors underlie this nonresponsiveness,¹⁹ the result of which is that criminal defendants are unable or unlikely to change their behavior in response to fee levels. Consequently, consumer demand imposes no downward pressure on criminal justice fee levels.²⁰ Together, these two structural deficiencies describe a nonmarket environment, quite distinct from that envisioned by public finance fee models. The result of this structure is that these nonmarket fees are subject to little meaningful restraint, facing no downward pressure and significant upward pressure on fee levels.

Courts, the restrainer of last resort, have mostly abdicated responsibility to rein in criminal court fees in many states. Over the past several decades, as fees have expanded, courts across the country have winnowed the restrictions

15. Gillette & Hopkins, *supra* note 12, at 805–06, 810–11; see *infra* Part I.C.2.

16. Phil Willon, *Riverside County to Make Inmates Pay Jail Costs*, L.A. TIMES (Nov. 20, 2011, 12:00 AM), <https://www.latimes.com/local/la-xpm-2011-nov-20-la-me-inmate-fees-20111120-story.html> (describing a Riverside County policy of charging inmates for incarceration in county jail and quoting county officials who describe the policy as a crime deterrent as well as a reimbursement to taxpayers).

17. See, e.g., Jain, *supra* note 7, at 1406 (explaining that court fees often fund the criminal justice system broadly, or even the salaries of court employees and the daily costs of running the courthouse); Gerald R. Wheeler, Rodney V. Hisson, Morgan P. Slusher & Therese M. Macan, *Economic Sanctions in Criminal Justice: Dilemma for Human Service?*, 14 JUST. SYS. J. 63, 66 (1990) (reporting that fifty percent of the Harris County probation department general budget is derived from probation fees).

18. See *infra* Part I.C.1 & fig.1.

19. For instance, criminal defendants may be antisocial or naturally optimistic, either of which may cause them to ignore various repercussions of criminal behavior. For further discussion of these psychological factors, see *infra* notes 134–138. Regarding structure, because the fee amounts are set after the defendant is already locked into the criminal justice system, those who commit infractions have difficulty considering the fee amount when deciding how to behave. See *infra* notes 143–147 and accompanying text.

20. For an explanation of how user demand might impose downward pressure on fees, see *infra* notes 110–112 and accompanying text.

imposed upon them.²¹ In many states, criminal court fees need only maintain a superficial relationship to the broad category of services being provided.²² Worse, in the context of criminal justice fees, most courts do not question the propriety of the services provided to payors, nor do they meaningfully restrict the fee amounts.²³

Unbounded, nonmarket criminal justice fees are inequitable and inefficient. Unrestrained fees encourage fee-chasing behavior, leading to over-policing of fee-funded crimes and undersupply of other services. Moreover, criminal justice agencies face incentives to target politically powerless groups in order to reduce the risk of political reprisal and protect their unbounded revenue stream. Ballooning fee burdens also inflict significant human cost. Criminal defendants and their families suffer mounting debt, bad credit, wage garnishment, and indefinite monitoring by criminal justice systems.²⁴ Finally, a lack of restraint is per se problematic, denying payors meaningful protection from potentially exploitative government exactions.

In addition to highlighting this fundamental flaw in criminal justice fees, reconciling the public finance and criminal justice fee literatures is useful for at least two reasons. First, this analysis provides a framework for evaluating other potentially exploitative nonmarket fees. In furtherance of that goal, this Article offers a list of user fee characteristics that may erode meaningful constraints. While criminal justice fees stand out as the worst on a continuum of nonmarket fees,²⁵ novel fee structures are continually arising in resource-strapped cities and counties.²⁶ Policymakers and advocates can use the framework provided herein to identify and prevent potentially unbounded, nonmarket fees before they become entrenched revenue streams.

Second, the public finance lens suggests certain judicial and legislative reforms to nonmarket fees. Perhaps most importantly, policymakers should seriously consider whether fee-financing is appropriate where a monopolistic agency provides mandatory services to captive payors. Fees may be patently unsuitable in extreme nonmarket contexts like the criminal justice system. If policymakers decide otherwise, nonmarket fees should be subject to meaningful restraint and should not create perverse incentives for collecting agencies. To

21. See Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 396 (2004) (arguing that courts have provided a "convenient way for local governments to raise general revenues" by weakening fee requirements); *infra* Part II.C.

22. See *infra* notes 161-166 and accompanying text; see, e.g., *Broyles v. State*, 688 S.W.2d 290, 291-92 (Ark. 1985) (holding a \$250 fee levied against a DUI defendant was constitutional, despite being allocated to general programs addressing drunk driving and alcohol and drug abuse rehabilitation).

23. See *infra* notes 156-166.

24. See *infra* notes 197-205 and accompanying text.

25. Other nonmarket fees on this continuum are mandatory fees that attach to real property, see *Rogers v. Oktibbeha County Bd. of Supervisors*, 749 So. 2d 966, 969 (Miss. 1999) (upholding a mandatory garbage collection fee assessed against payors who did not use the service), and fees levied against those involved in accidents, see Christopher Jensen, *A Crash. A Call for Help. Then, a Bill.*, N.Y. TIMES (Sept. 3, 2010), <https://www.nytimes.com/2010/09/05/automobiles/05CRASHTAX.html> (describing fees imposed on accident victims).

26. See Reynolds, *supra* note 21, at 396.

that end, the Article briefly surveys several judicial and legislative reforms, including increasing judicial scrutiny, prohibiting local agencies from keeping the fee revenue they collect, and placing a low per-person cap on total fees.

The Article proceeds in four parts. Part I describes criminal court fees as well as traditional user fees, highlighting the disharmony in the two literatures. It also presents a simple public finance model of how fee levels are theoretically set by government providers. Part II explains the nonmarket nature of criminal justice fees, as well as the erosion of judicial fee doctrine. Part III details the harms caused by unbounded, nonmarket fees. Part IV offers implications of the public finance fee framework, comparing criminal justice fees to other nonmarket fees and suggesting policy reforms.

I. FEES INSIDE AND OUTSIDE THE CRIMINAL JUSTICE SYSTEM

After briefly defining user fees, this Part describes fees levied in the criminal justice system and surveys the literature on them. It then describes user fees as presented in the public finance literature, explaining how fees can harness a market-like structure to improve allocative efficiency.

A. DEFINING FEES

Fees are perhaps best understood in opposition to taxes. At a basic level, a fee is a charge levied by a government agency in exchange for a good or service that it provides.²⁷ In contrast, a tax is a compulsory government levy that need not bear any direct relationship to the government services it finances,²⁸ and is intended primarily to raise revenue.²⁹ Fees are trim, funding just the service provided to the user, while taxes are plump, funding the whole government apparatus.³⁰

Fees can generally be placed into two broad categories: user fees and regulatory fees.³¹ User fees operate similar to a price mechanism for a private

27. Gillette & Hopkins, *supra* note 12, at 800.

28. DAVID N. HYMAN, PUBLIC FINANCE: A CONTEMPORARY APPLICATION OF THEORY TO POLICY 21 (10th ed. 2010), <https://www.uv.mx/personal/clelenda/files/2014/09/Hyman-David-2011-Public-Finance.pdf>.

29. See *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998) (distinguishing taxes from fees, concluding that “[a] ‘tax’ . . . is designed to raise revenue”).

30. Because a tax is compulsory, and because the total amount of government services imposes no limit on any individual tax burden, the distribution of taxes is often scrutinized under diverse fairness criteria. Sagit Leviner, *The Normative Underpinnings of Taxation*, 13 NEV. L.J. 95, 97, 130–33 (2012) (describing several dominant normative theories of fairness in taxation, including natural entitlement, utilitarianism, and Rawlsian maximin). These fairness criteria include ability-to-pay considerations, vertical and horizontal equity, public benefits received, and normative principles justifying fair redistribution of income and wealth. See generally JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN’S GUIDE TO THE GREAT DEBATE OVER TAX REFORM 59–67 (1996) (describing fairness principles underlying distributions of tax burdens); LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 13–30 (2002) (identifying and critiquing various tax fairness principles). In exchange for this broad fairness inquiry, taxes may fund any government service, from individualized services such as schools or sewers, to public goods such as roads or national defense. Taxes may also redistribute income from rich to poor households.

31. BIRD, *supra* note 12, at 17; Reynolds, *supra* note 21, at 397–402.

good or service³²: consumers pay a fee based on their usage of a public good or service.³³ U.S. Postal Service charges, public transportation fees, and utility rates offer examples of such charges, which are also sometimes called “public prices.”³⁴ Regulatory fees, in contrast, are based on the government’s police power to regulate a certain activity, often including licensing or inspection fees.³⁵ Such fees are meant to offset the broad costs of monitoring a regulated activity.³⁶ Both user fees and regulatory fees are levied in proportion to the level of services that the payor utilizes.³⁷

Courts have interpreted these basic principles to require that fees must bear a direct relationship to the good or service that the government provides to the payor.³⁸ This relationship typically entails at least two limits: (1) The fee is imposed only on the specific entity that receives the service or causes the regulatory cost to government, and (2) an individual’s fee amount should not exceed the government’s cost to provide services to that individual.³⁹ These limits are difficult to police in practice.⁴⁰

Simple definitions such as these obscure the complexity involved in classifying government charges, both as a legal and a theoretical matter.⁴¹ Some may share elements of both taxes and fees, falling somewhere in the middle. For example, benefit taxes also seek to charge the beneficiaries of a certain service.⁴²

32. *State v. Medeiros*, 973 P.2d 736, 741 (Haw. 1999); Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 344–45 (2002).

33. BIRD, *supra* note 12, at 17. In certain cases, the government might subsidize the activity to ensure broader access. *Id.*

34. *Id.*

35. *Medeiros*, 973 P.2d at 741 (quoting *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984)).

36. *See, e.g., Merrell v. City of St. Clair Shores*, 96 N.W.2d 144, 148 (Mich. 1959) (“To be sustained, the [automobile licensing fee] we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue.” (quoting *Vernor v. Sec’y of State*, 146 N.W. 338, 341 (Mich. 1914)). The offset costs need not be directly related to government monitoring of the activity. *See, e.g., Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1358 (Cal. 1997) (allowing the imposition of regulatory fees on manufacturers of lead-containing paint, intended to offset costs associating with childhood lead poisoning).

37. Duff, *supra* note 14, at 393 (defining fees).

38. *E.g., Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998) (holding that, among other criteria, “user fees must be proportionate to the necessary costs of the service”); *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 370 (1998) (holding that, under the Export Clause, a levied fee must bear some direct relationship to the payor’s use of the government facilities); JOSEPH HENCHMAN, TAX FOUND., HOW IS THE MONEY USED? FEDERAL AND STATE CASES DISTINGUISHING TAXES AND FEES 5 (2013), <https://files.taxfoundation.org/20190103161206/TaxesandFeesBook.pdf> (“Fees are imposed for the primary purpose of covering the cost of providing a service, with the funds raised directly from those benefiting from a particular provided service.”).

39. Spitzer, *supra* note 32, at 343.

40. *See infra* Part II.C.

41. BIRD, *supra* note 12, at 18.

42. *Id.* It is also worth mentioning special assessments, another financing instrument similar to fees, which fund public capital improvements via mandatory property assessments. *Id.* at 17; Reynolds, *supra* note 21, at 397–402 (describing special assessments and their expanded use and changing nature over time). For example, the cost of new sidewalks might be funded by a special assessment on all properties abutting them. Property owners benefit directly from the improvement via increased property values and must bear a part of the cost of providing it. BIRD, *supra* note 12, at 17–18; Reynolds, *supra* note 21, at 397. Special assessments are explored further below. *See infra* Part IV.A and text accompanying notes 231–238.

Distinct from fees, however, the amount of the tax is independent of the service received.⁴³ For example, while gasoline taxes may fund highway repair, gasoline consumption is merely a proxy for road use, not a direct measure.

It is especially important to distinguish fees from fines.⁴⁴ Although there is some conceptual overlap—fees and fines might both seek to deter bad behavior, for example⁴⁵—fees seek primarily to recoup the cost of government activity while fines seek to punish offenders.⁴⁶ Any deterrent caused by fees should occur mainly via users internalizing the full social cost of their activities, as discussed below. A fine should also bear some proportionate relationship to the severity of the offense—that is, a fine for speeding should not exceed a fine for murder.⁴⁷ The same limitation does not apply to fees.⁴⁸ Because of these differences, fines must be evaluated separately from fees when determining proper fiscal burdens. Considering the propriety of fines is beyond the scope of this Article.

In this Article, “fee” refers to a government charge that bears a direct relationship to a service provided to an identifiable and separable beneficiary.⁴⁹ It includes any criminal justice charge imposed on system users—whether found guilty or not—that seeks to reimburse government for the cost of running the criminal justice system. Such charges may cover the cost of a specific criminal justice service, or the general cost of running the system. Although some fees might bear different labels, such as “costs” or “surcharges,” this Article does not distinguish based on such labels.⁵⁰ Using these terms interchangeably is standard

43. BIRD, *supra* note 12, at 18.

44. Scholarship on the topic often places fines, fees, and restitution into one catch-all category of legal financial obligations (LFOs). See Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 310 (2017).

45. See *infra* Part I.C.2.

46. Ruback & Bergstrom, *supra* note 3, at 249 (explaining that costs and fees “seek reparations for society as a victim (and, in particular, the court system) and require offenders to pay substantial (and increasing) amounts in an effort to hold them accountable for their actions”).

47. See Magna Carta 1225, 9 Hen. 3 c. 14 (Eng.); *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (acknowledging the “fundamental nature” of the right to proportionate fines); CESARE BONESANA DI BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 32 (W.C. Little & Co., 1872) (1764) (“If an equal punishment be ordained for two crimes that injure society in different degrees, there is nothing to deter men from committing the greater, as often as it is attended with greater advantage.”).

48. Indeed, fees for minor offenses very often exceed those for more serious offenses. See Alexis Harris, Heather Evans & Katherine Beckett, *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 115 AM. SOCIO. REV. 234, 253–54 (2011).

49. Importantly, this Article does not take the position that criminal justice fees are actually taxes in disguise. Although the fees are distinct from traditional user fees for their compulsory nature, they are not levied on the general population, nor are they typically intended to raise general revenue. Rather, in most cases criminal justice fees are levied on users of the criminal justice system and bear some relationship, however tenuous, to the general service being provided.

50. In some places, for example, a cost might look backwards to the actual costs of prosecution, while a fee might look forward to future expenses, such as supervision. Ruback, *supra* note 11, at 1804.

practice in many jurisdictions' statutes and ordinances, as well as scholarly articles, advocacy reports, and the Model Penal Code.⁵¹

B. CRIMINAL JUSTICE FEES

Criminal justice fees are intended to reimburse the government for the cost of prosecuting, incarcerating, and monitoring an individual who has been accused and perhaps convicted of a crime.⁵² They began to proliferate in the 1970s and 1980s,⁵³ and since then have exploded in size and scope.⁵⁴ Courts, police departments, and carceral and monitoring agencies have embraced fees in response to budget shortfalls,⁵⁵ particularly in places where increasing taxes is difficult or impossible due to legal and political restraints.⁵⁶

Fees vary widely by state and county.⁵⁷ In the vast majority of instances, judges, police officers, prison officials, and others involved in the criminal justice system decide what services a user will receive and thus the total fee amount borne by each individual.⁵⁸ Such fees might cover, for example, the cost of operating court-diversion programs, prosecution costs, DNA analysis, probation supervision, electronic monitoring devices, juries and witnesses, warrants, and so forth.⁵⁹ Even defendants found innocent may in some cases

51. Ruback & Bergstrom, *supra* note 3, at 253; Ruback, *supra* note 11, at 1803–04 (explaining the difference between the label of cost versus fee, but noting that “the terms are often used interchangeably,” including in the Model Penal Code).

52. See Ruback & Bergstrom, *supra* note 3, at 253; Ruback, *supra* note 11, at 1803–04.

53. See Pat O'Malley, *Politicizing the Case for Fines*, 10 CRIMINOLOGY & PUB. POL'Y 547, 551 (2010); CONF. OF STATE COURT ADM'RS, STANDARDS RELATING TO COURT COSTS: FEES, MISCELLANEOUS CHARGES AND SURCHARGES AND A NATIONAL SURVEY OF PRACTICE 4–7 (1986), <https://ncsc.contentdm.oclc.org/digital/collection/financial/id/81/> (noting an increase in the use of court fees and charges in the 1980s, setting standards for their administration).

54. *E.g.*, Shapiro, *supra* note 9 (finding that forty-eight states had increased civil and criminal court fees between 2010 and 2014).

55. See U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2, 9–15 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; CONF. OF STATE COURT ADM'RS, POSITION PAPER ON STATE JUDICIAL BRANCH BUDGETS IN TIMES OF FISCAL CRISIS 13–14 (2003), https://cosca.ncsc.org/_data/assets/pdf_file/0020/23366/budgetwhitepaper.pdf (encouraging resource-strapped courts to utilize fee revenue under certain circumstances, but cautioning that courts must protect against being seen as a “pay as you go enterprise”).

56. U.S. COMM'N ON C.R., TARGETED FINES AND FEES AGAINST PEOPLE OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 9 (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf (citing Missouri's Hancock Amendment as an example of a tax limiting policy that hamstring municipal governments); CONF. OF STATE COURT ADM'RS, *supra* note 53, at 4 (explaining that courts have come to rely on fee revenue in part because such revenue is exempted from voter approval requirements in state constitutions).

57. HARRIS, *supra* note 7, at 27.

58. *Id.*

59. *Id.*; Ruback, *supra* note 11, at 1804. Some jurisdictions charge up to the full cost of prosecuting a case. *E.g.*, 12 R.I. GEN. LAWS ANN. § 12-21-20(a) (West 2020) (“If, upon any complaint or prosecution before any court, the defendant shall be ordered to pay a fine, enter into a recognizance or suffer any penalty or forfeiture, he or she shall also be ordered to pay all costs of prosecution, unless directed otherwise by law.”); MISS. CODE ANN. § 99-19-77 (West 2019).

continue to be liable for fees.⁶⁰ Moreover, these fees are typically not dischargeable in bankruptcy.⁶¹

The total fee burden for an individual will rise over time as she inhabits a system over which she has little control. Fees begin accruing at arrest and continue throughout the prosecution process. For example, in thirty-six states, defendants must bear fees for public defender services required under federal law.⁶² Defendants may also bear the cost of monitoring or jail time before and during adjudication, with fees in some places exceeding \$100 per day.⁶³ Judges and others involved in the process can tack on additional charges throughout adjudication, varying from a few dollars to hundreds of dollars or more.⁶⁴ One representative criminal court docket from a drug crime adjudication in Pennsylvania lists twenty-six different fees ranging from \$2 to \$345.⁶⁵ The fee balance in that case totaled nearly \$2,500—five times the \$500 fine and seven times the \$345 restitution charge.⁶⁶

Fees continue to accrue after conviction, applying to incarceration and post-incarceration monitoring. A study by the City and County of San Francisco found that California localities could assess up to thirty different fees on an individual exiting the criminal justice system.⁶⁷ Some states allow prisons to levy fixed charges on inmates, for example, of \$50 per day.⁶⁸ Other states allow sentencing judges to charge inmates a variable cost for confinement.⁶⁹ Some also

60. *See, e.g.*, IOWA CODE ANN. § 815.9(6) (West 2020) (providing rules for public defense fees applicable to acquitted defendants); *State v. Haas*, 927 A.2d 1209, 1210 (2007) (stating that “[t]here is nothing illegitimate in the governmental interest in recouping costs expended for public defense whether or not the defendant is convicted,” and citing several jurisdictions that have held the same); Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants into Debt*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/magazine/digital-jail-surveillance.html> (describing fees for pre-trial ankle monitors, which defendants must pay even if found innocent).

61. *See In re Sanders*, 589 B.R. 874, 881 (Bankr. W.D. Wash. 2018) (broadly interpreting 11 U.S.C. § 523(a)(7) to include all costs imposed during criminal proceedings).

62. HARRIS, *supra* note 7, at 28–41 tbl.2.4.

63. *Id.* at 45 (providing that local jails in Washington state are allowed to charge \$100 per day); Willon, *supra* note 16; Kofman, *supra* note 60.

64. BANNON ET AL., *supra* note 6, at 9.

65. *Id.*

66. *Id.*

67. FIN. JUST. PROJECT, OFF. OF TREASURER & TAX COLLECTOR, CITY & CNTY. OF S.F., CRIMINAL JUSTICE ADMINISTRATIVE FEES: HIGH PAIN FOR PEOPLE, LOW GAIN FOR GOVERNMENT 1 (2018), <https://sftreasurer.org/high-pain-low-gain>.

68. HARRIS, *supra* note 7, at 45 (explaining that facilities in Marion County, Florida, and Washington state charge inmates \$50 per day, while Kentucky caps rates at \$40 per day); LAUREN-BROOKE EISEN, BRENNAN CTR. FOR JUST., CHARGING INMATES PERPETUATES MASS INCARCERATION 3 (2015), https://www.brennancenter.org/sites/default/files/blog/Charging_Inmates_Mass_Incarceration.pdf (providing survey data showing that daily jail fees can run as high as \$70 per day). This Article sets aside the issue of filing fees under the Prison Reform Litigation Act. *See* 28 U.S.C. § 1915(b) (denying prisoners the option to file a civil court action in forma pauperis (without fees) and laying out a fee schedule for incarcerated plaintiffs in civil actions). It is worth considering whether filing a civil action to vindicate one’s rights is truly optional, but such consideration is beyond the scope of this Article.

69. HARRIS, *supra* note 7, at 45.

allow jails and prisons—which are often run by private companies⁷⁰—to charge inmates for the cost of room and board, medical services, and clothing.⁷¹ Note that these are in addition to court fees accrued during adjudication.

Probation services operate similarly, charging fees for various court-mandated supervision services, such as ankle-monitors, drug tests, and counseling services.⁷² Monitoring fees can amount to several hundred dollars per month.⁷³ For instance, Alabama law allows monitoring fees up to 25% of a parolee's gross weekly pay.⁷⁴ Moreover, probation supervisors, who are also often privately employed, may tack on their own fees, such as late payment fees.⁷⁵ Where a private company provides such services, government bodies often exert little oversight of fee-setting decisions.⁷⁶

This panoply of fees results in significant financial burdens. Researchers in California found that the three most common criminal justice fees in the state impose an average debt of \$3,600 on those leaving jail.⁷⁷ Studies in Alabama and Texas found fees commonly totaling around \$2,000.⁷⁸ Notably, and distinct from fines, criminal justice fee amounts are independent from the severity of the underlying offense.⁷⁹ Indeed, although fines and fees often go together, fees typically far outstrip fines.⁸⁰ According to one study in Pennsylvania, out of approximately 2,600 different economic sanctions used in the state, nearly 2,400

70. A report from the Office of the Inspector General noted that twelve percent of the Federal Bureau of Prison's inmate population were housed in private facilities in 2015. U.S. DEP'T OF JUST., OFF. OF INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS at i (2016), <https://oig.justice.gov/reports/2016/e1606.pdf>. Federal statistics do not provide information on local or state facilities. As merely one example, the private prison company CoreCivic (formerly Corrections Corporation of America) lists several municipal facilities on its website. *Find a Facility*, CORECIVIC, <http://www.corecivic.com/facilities> (last visited Feb. 4, 2021) (listing all facilities, including many that contract with counties and other municipalities); *see also* Jessica Boehm, *Mesa Will Be the First Arizona City with Private Jail*, AZCENTRAL.COM (May 22, 2017, 9:05 PM), <https://www.azcentral.com/story/news/local/mesa/2017/05/23/mesa-first-arizona-city-private-jail-corecivic/337197001/> (describing Mesa City Council decision to contract for municipal jail services with CoreCivic and highlighting community concerns).

71. *See, e.g., Is Charging Inmates to Stay in Prison Smart Policy?*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <http://www.brennancenter.org/states-pay-stay-charges> (providing pay-to-stay rules by state); HARRIS, *supra* note 7, at 45 (describing variations in incarceration fee statutes).

72. BANNON ET AL., *supra* note 6, at 6–8; Kofman, *supra* note 60.

73. EISEN, *supra* note 68, at 2.

74. HARRIS, *supra* note 7, at 46.

75. HUM. RTS. WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 55–67 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf (detailing the significant discretion granted to private probation companies to decide fees).

76. *Id.* (describing the lack of court or state government oversight mechanisms for private probation services). *See generally* BRIAN HIGHSMITH, NAT'L CONSUMER L. CTR., COMMERCIALIZED (IN)JUSTICE: CONSUMER ABUSES IN THE BAIL AND CORRECTIONS INDUSTRY (2019), <https://www.nclc.org/images/pdf/criminal-justice/report-commercialized-injustice.pdf> (detailing the involvement of private companies throughout bail and corrections programs).

77. Stuhldreher, *supra* note 6 (urging Los Angeles to follow San Francisco's footsteps in reducing criminal justice fee debt).

78. Meredith & Morse, *supra* note 44, at 311; BANNON ET AL., *supra* note 6, at 9.

79. Harris et al., *supra* note 48, at 253–54 (finding that drug offenses in Washington state courts bore higher financial penalties than violent crimes).

80. R. Barry Ruback & Valerie A. Clark, *Reduce Disparity in Economic Sanctions*, in CONTEMPORARY ISSUES IN CRIMINAL JUSTICE POLICY 75, 78 (Natasha Frost, Joshua D. Freilich & Todd R. Clear eds., 2009).

were fees and only about 80 were fines.⁸¹ The Pennsylvania case described above triggered a fee burden that, at \$2,500, was five times the \$500 fine.⁸² In California, fees of \$390 to \$715 may attach to a \$100 traffic fine.⁸³

Some fees may attach to actions that are not typically considered criminal or, if technically criminal, are rather innocuous in nature. These actions might include parking tickets and “fix-it” tickets, loitering citations, or violation of nuisance rules and other civil code ordinances. In one extreme example, residents of Indio and Coachella who committed minor infractions—such as owning chickens or failing to obtain proper building permits—received exorbitant bills for the cost of their prosecution ranging from \$2,700 to \$31,000.⁸⁴ However, while prosecution fees are not uncommon, they rarely attach to such minor infractions that are typically civil in nature.⁸⁵

The “criminalization of poverty” plays a role here as well. The term refers to the illegalization of certain actions that are more likely to be committed by the poor.⁸⁶ Such actions might include truancy of school children (for which parents are held accountable);⁸⁷ driving with an expired license; sleeping, eating, and sitting in public spaces; and late payment of other fees.⁸⁸ As with other criminal prosecution, being charged with any of these infractions will carry associated fees, typically independent of the financial condition of the offender.⁸⁹ Worse, nonpayment can result in incarceration, triggering the spiraling carceral and monitoring fees described above.⁹⁰

81. *Id.*

82. BANNON ET AL., *supra* note 6, at 9.

83. W. CTR. ON L. & POVERTY, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 9–10 (2015), <https://wclp.org/wp-content/uploads/2015/04/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California.pdf>.

84. Brett Kelman, *They Confessed to Minor Crimes. Then City Hall Billed Them \$122K in “Prosecution Fees,”* DESERT SUN, https://www.desertsun.com/story/news/crime_courts/2017/11/15/he-confessed-minor-crime-then-city-hall-billed-him-31-k-his-own-prosecution/846850001/ (Apr. 26, 2018).

85. *Id.* (explaining that nuisance property violations can be civil or criminal in nature). Notably, the prosecution fees in this case were levied by a private law firm, to which the city had outsourced its ordinance prosecution activity. *Id.* Shortly after contracting with the private firm, the cities involved passed ordinances freeing such fees from judge approval in criminal cases. *Id.*

86. See Peter Edelman, Opinion, *How It Became a Crime to Be Poor in America*, GUARDIAN (Nov. 6, 2017, 8:34 AM), <https://www.theguardian.com/commentisfree/2017/nov/06/how-poverty-became-crime-america> (describing the “criminalization of poverty” as a “set of criminal justice strategies that punish poor people for their poverty” by punishing certain behaviors connected with poverty, such as homelessness or calling 911 for domestic abuse, and shifting the cost of their adjudication onto system users, many of whom cannot afford to pay).

87. Children deemed “truant” are often merely late, for example, due to over-crowded public transportation. See Barbara Ehrenreich, Opinion, *Is It Now a Crime to Be Poor?*, N.Y. TIMES (Aug. 8, 2009), <https://www.nytimes.com/2009/08/09/opinion/09ehrenreich.html>.

88. KAREN DOLAN & JODI L. CARR, INST. FOR POL’Y STUD., THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 5 (2015), <https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf>.

89. Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 186–87 (2019) (detailing shortcomings and nonenforcement of ability-to-pay determinations for criminal justice obligations).

90. Pyke, *supra* note 1 (describing one such case related to truancy).

Regardless of the entry point, once involved in the system, users have no control over the amount of fees they will ultimately accrue.⁹¹ Police, courts, prisons, and probation agencies mandate the various services consumed during arrest, adjudication, incarceration, and post-incarceration monitoring. Although in some cases a criminal defendant can choose among alternatives—such as pleading guilty or going to trial⁹²—generally a defendant cannot refuse a required service or choose a different service provider.

Scholars and advocates have noted the out-of-control fees in the criminal justice system and have devoted significant attention to fighting them.⁹³ In fact, there is surprising consensus on the terribleness of criminal justice fees. Even those who support the use of fines and restitution decry criminal justice *fees* as ineffective and inappropriate.⁹⁴ The reasons for this outrage are myriad. Some argue that these financial obligations lead to abusive collection practices, undermine reentry efforts, and strain poor communities.⁹⁵ Others focus on the collateral consequences of nonpayment, such as incarceration, which advocates have labeled debtors' prison.⁹⁶ Yet others argue that these fees violate

91. Moreover, given the realities of incarceration and reentry, such fees are often borne by the incarcerated individuals' family members. EISEN, *supra* note 68, at 4. Thus, if the goal is to ensure that guilty persons bear the cost of their own misdeeds, this may not be happening.

92. Given the well-documented flaws with plea bargaining, the freedom of such a choice is highly suspect. *E.g.*, *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (“[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.” (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992))); *see also* Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> (“This is the age of the plea bargain. Most people adjudicated in the criminal-justice system today waive the right to a trial and the host of protections that go along with one, including the right to appeal. Instead, they plead guilty.”).

93. Scholarship on criminal justice debt tends to lump together fines, fees, and restitution, or LFOs. *See* Meredith & Morse, *supra* note 44, at 312.

94. *See* Ruback, *supra* note 11, at 1820–28 (advocating abolition of criminal justice user fees); Reitz, *supra* note 11, at 1760–66 (describing the Model Penal Code's abolitionist position on criminal justice fees).

95. *See, e.g.*, Beckett & Harris, *supra* note 7, at 519 (arguing that fines and fees are too large, arbitrary, and impede reentry); Goffman, *supra* note 7, at 354 (exploring negative social ramifications of criminal justice fees, among other forms of social control); Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 *AM. J. SOCIO.* 1753, 1777 (2010) (finding that LFOs reduce household income, limit access to opportunities and resources, and increase the likelihood of ongoing criminal justice involvement); Sobol, *supra* note 7, at 511–16 (focusing on abusive debt collection practices). Another line of research examines the factors that may determine LFO burdens. *See, e.g.*, 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, 33–36, 41–43 (2001).

96. *E.g.*, REBEKAH DILLER, BRENNAN CTR. FOR JUST., THE HIDDEN COSTS OF FLORIDA'S CRIMINAL JUSTICE FEES 14 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_The%20Hidden-Costs-Florida%27s-Criminal-Justice-Fees.pdf (documenting problematic criminal justice fees in Florida); Peter Edelman, *The Criminalization of Poverty and the People Who Fight Back*, 26 *GEO. J. ON POVERTY L. & POL'Y* 213, 218–19 (2019) (describing how states profit from criminal justice debt repeatedly imposed on minor infractions); DOUGLAS N. EVANS, RSCH. & EVALUATION CTR., JOHN JAY COLL. OF CRIM. JUST., THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION 9 (2014), <https://jrec.files.wordpress.com/2014/08/debtpenalty.pdf>; Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 *THEORETICAL CRIMINOLOGY* 221, 227–29 (2012) (mapping the many ways a criminal defendant can be incarcerated for failure to pay LFOs); Traci R. Burch, *Fixing the Broken System of Financial Sanctions*, 10 *CRIMINOLOGY & PUB. POL'Y* 539, 555 (2011) (suggesting policy reforms for out-of-control criminal justice debt); *State Bans on Debtors' Prisons*,

constitutional protections, such as due process and equal protection rights.⁹⁷ Closer to the arguments made herein, some scholars highlight the perverse incentives faced by agents of the criminal justice system, exploring how such incentives lead to over-policing and over-punishment.⁹⁸ Litigants have argued the same, implicating constitutional concerns.⁹⁹ For example, the plaintiff in *Bice v. Louisiana Public Defender Board* argued that a \$35 public defender fee levied only on guilty defendants discouraged his counsel from seeking exoneration, violating due process rights under the Sixth and Fourteenth Amendments.¹⁰⁰

This Article contributes to this body of research and advocacy, but it sets aside collateral consequences and constitutional concerns, which are being ably explored elsewhere. Instead, the Article spotlights the fee-setting structure itself, the incentives and nonmarket conditions underlying such a structure, and the inefficiencies and inequities that it creates.

C. FEES IN THE PUBLIC FINANCE LITERATURE

The public finance literature departs drastically from criminal justice scholarship in its stance on user-fee financing, often celebrating fees as convenient fiscal devices. This Subpart explores this public finance perspective, describing how fees are thought to improve allocative efficiency.¹⁰¹

supra note 8, at 1034–43 (describing states’ longstanding bans on debtor’s prisons, and modern enforcement efforts).

97. See, e.g., John D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561, 587–92 (2019) (arguing that LFOs degrade fundamental rights to adequate criminal defense and jury trial); Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 843–44 (2017) (“[E]xcessive fines and fees . . . deprive our fellow Americans of their fundamental rights, and have too often led to a two-tiered system in which the poor are not accorded the equal protection under the laws to which they are entitled under the U.S. Constitution.”).

98. See Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1178 (2014) (highlighting a basic concern with user fees, noted by various courts, that such fees “will corrode the neutrality of government officials and others, who feel the gravitational pull of money as they resolve cases and process offenders”); Smith, *supra* note 7, at 2313–20 (noting that civil rights claimants have argued that court fees incentivize findings of guilt).

99. See, e.g., *Ward v. Village of Monroeville*, 409 U.S. 57, 58 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding that subjecting a defendant to a trial before a local judge and village mayor, with a “direct . . . pecuniary interest in convicting the defendant” violated the Due Process Clause of the Fourteenth Amendment); *Dugan v. Ohio*, 277 U.S. 61, 65 (1928) (holding that mayor with a fixed salary and limited executive authority did not violate Due Process rights when the mayor acted as a judge).

100. *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 714–15 (5th Cir. 2012). The Fifth Circuit dismissed the complaint. *Id.* at 720.

101. Under certain distributive justice paradigms, fees may also improve a system’s fairness. Specifically, fees embody the idea that payors should only bear the cost of a public good or service to the extent they benefit from it, a concept known as the benefit principle. BIRD, *supra* note 12, at 11 (“[T]he benefit principle rests on the commercial principle that it is only fair to pay for what you get.”). User fees may also be considered fair under an entitlement-based theory of distributive justice, such as libertarianism. Indeed, user fees may be the only legitimate government charge under such a normative framework. An entitlement theory of distributive justice rejects any patterned distribution of resources as a violation of individuals’ property rights. Instead, legitimate transfers require the consent of the property holder. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 160–64 (2d ed. 2013). Funding an entire government system via voluntary fee payments would better realize an entitlement system of justice, compared to one financed by compulsory taxes.

1. Market-Like Pricing

Traditional fee structures approximate a private market. Oversimplified, agencies set fees using something akin to a price mechanism, which is based in part on the marginal cost of services provided as well as consumer demand.¹⁰² This quasi-market structure is largely what distinguishes fees from taxes and also what generates the efficiency benefits that fees are thought to provide.¹⁰³ Importantly, if operating as expected, the presence of user demand may exert downward pressure on fee levels.

A (very) brief explanation of market forces helps to lay the foundation for such reasoning. As a definitional matter, an efficient market is one in which scarce resources flow to the party willing to pay the highest price for them.¹⁰⁴ Assuming that willingness-to-pay reflects the value a person derives from a good or service, an efficient system should thus maximize wellbeing.¹⁰⁵ In the context of fees, efficient allocation occurs where the price charged for a public good or service equals its marginal cost of production. Figure 1 illustrates this concept. Of course, it is important to note that government balances many goals alongside efficiency, including preservation of scarce resources, equal access, subsidizing desirable behavior, and so forth.

In Figure 1, p represents the price charged for a public good or service; D represents user demand, which is decreasing as the price (fee) increases; and MC represents the marginal cost of producing one additional unit of the public good or service. The marginal cost curve is flat for the sake of simplicity. At $p = MC$, economic efficiency is achieved.¹⁰⁶ In plain speak, this means that users are consuming the good up to the point where the value they derive from the good is exactly equal to the cost to produce it. If $p < MC$, the cost to produce the good exceeds the price that users are willing to pay. This means that scarce resources are over-allocated to production of the public good, and that efficiency and wellbeing would improve if they were reallocated elsewhere. If $p > MC$, users are willing to pay more than the cost of production, implying that resources should be reallocated to increase production of the public good.

102. Of course, other factors will hugely affect government pricing, including market failures such as negative externalities, policy goals such as a desire to incentivize specific behavior, and other nonmarket factors.

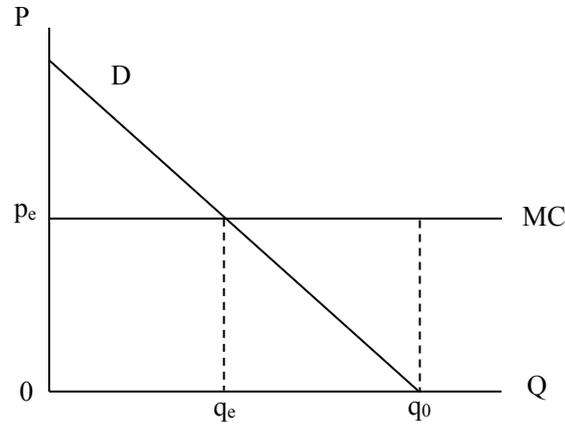
103. Gillette & Hopkins, *supra* note 12, at 805–22; ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., SR-6, LOCAL REVENUE DIVERSIFICATION: USER CHARGES 27–34 (1987), <https://library.unt.edu/gpo/acir/reports/staff/SR-6.pdf>.

104. N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 145–47 (6th ed. 2012) (explaining market efficiency).

105. *Id.* at 136–45 (describing consumer and producer surplus as imperfect measures of market actors’ wellbeing).

106. RICHARD M. BIRD & ENID SLACK, 110TH ANN. CONF. OF THE NAT’L TAX ASS’N, FINANCING INFRASTRUCTURE: WHO SHOULD PAY? 2 (2017), <https://www.ntanet.org/wp-content/uploads/proceedings/2017/NTA2017-378.pdf> (“[W]hen user charges for services fully cover the marginal social cost of providing them, people buy such services only up to the point at which the value they receive from the last unit they consume is just equal to the price they pay, so that resources are more efficiently allocated.”).

FIGURE 1



To see how fees are thought to increase allocative efficiency, consider instead a public good funded by taxes and offered at no charge to users, such as a road. If offered for free, then $p = 0$. In Figure 1, at $p = 0$, the fee is significantly lower than marginal cost, implying that many users are willing to pay far less for the road than the actual cost to provide and maintain it. Allocating this level of resources to road production is inefficient, as resources could be expended on goods and services that users value more. That is, without a price mechanism, users will overconsume and government will overprovide roads.

Fees correct for this inefficiency by harnessing market forces to influence both user demand and government supply.¹⁰⁷ By charging a fee equal to p_e , all users who value a public good less than p_e will forego its use, thereby reducing wasteful overconsumption.¹⁰⁸ This is the demand curve at work. On the supply side, government can respond to price and demand information by reducing or increasing supply accordingly.¹⁰⁹ Moreover, by offering a public good in exchange for a fee, the government can determine demand at specific prices. It can then expand public services only when system users are willing to pay for the cost of expansion.¹¹⁰ Armed with this information, the government can

107. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 933 (2003); Reynolds, *supra* note 21, at 388–89 (listing reasons why local governments might choose to impose a fee).

108. Gillette & Hopkins, *supra* note 12, at 805–06, 810–11.

109. Duff, *supra* note 14, at 398–99. Moreover, user fees connect public service demand with a direct financing mechanism, ensuring that expansion of a sought-after public service has a built-in funding mechanism. *Id.* at 392 (“[I]t is only through the application of benefit taxes that an appropriate level and structure of government activity can, at least in theory, be determined simultaneously with the means of financing it.” (quoting BIRD, *supra* note 12, at 10)).

110. ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., *supra* note 103, at 3; Bird & Slack, *supra* note 106, at 2.

ensure an efficient level and mix of public goods, one that allocates scarce public resources to their most efficient use.

A hypothetical fee example will help to further clarify a key intuition offered by the graph, which is relevant to the argument in Part II. Imagine that a city parks department offers public dog walking services for a fee. Dog owners are willing to pay varying prices for city dog walkers, with the number of willing users increasing as the price drops. This describes a standard downward-sloping demand curve. The city decides to set the hourly fee equal to the marginal cost of the service, say, \$10 per hour. This amount might include the dog walker's time, transportation, supplies, and administrative costs. Everyone who does not value the dog walking at least \$10 per hour will not pay for the service.

Imagine now that the parks department decides to increase the dog-walking fee above marginal cost in order to raise additional revenue—perhaps to make up for declining tax revenue. City dog walking now costs \$20 per hour. In response, dog owners will reduce their use of the service.¹¹¹ If demand falls enough, the city may find that it earns less total revenue after the price increase.¹¹² The parks department may respond by reallocating personnel and supplies to other, higher-valued uses. If it cannot do this—say, for example, it employs a fixed labor force of dog walkers with strong employment protections—the department may be better off reducing the price below \$20, in order to increase demand for dog walking and perhaps raise greater total revenue. It is this basic logic that underlies the argument made in Part II: For traditional fees that operate in a quasi-market environment, users can reduce consumption of the government service in response to fee increases, which may exert *downward price pressure* on fees.

Importantly, users' aggregate ability to reduce quantity consumed will depend on each individual's ability to reduce or stop their use of dog walking services. That is, users must be able to forego the levied service in order to exert restraint on fee levels. Further, in order for the dog walking fee to affect consumers' decisions, users must know the fee amount before deciding whether to use the service. This elementary logic is fundamental to the downward slope of the demand curve, and is assumed in any market-based model.

2. Negative Externalities

Factors other than supply and demand will affect fee levels. Importantly, government may levy fees greater than marginal cost in order to deter bad behavior, by forcing consumers to internalize the cost of negative externalities.¹¹³ A negative externality occurs where an activity causes social

111. See MANKIW, *supra* note 104, at 77–78 (explaining how demand responds to price increases).

112. How much demand drops will depend on the price elasticity of demand. See *infra* notes 116–117 and accompanying text.

113. See Gillette & Hopkins, *supra* note 12, at 803–04 (describing how government intervention can ameliorate inefficiencies caused by externalities); Erin Adele Scharff, *Green Fees: The Challenge of Pricing Externalities Under State Law*, 97 NEB. L. REV. 168, 195–96 (2018) (describing Pigouvian pricing as a

harm above and beyond any benefit or harm that accrues to the individual user. For example, a polluting factory imposes additional costs on society in the form of environmental damage and public health degradation, over and above any costs or benefits accruing to the factory. In deciding whether or not to undertake such an activity, a self-interested actor will not consider these external social costs. In theory, a fee can utilize a price mechanism to ascribe a cost to these activities, such that users will consider them when deciding the level of polluting activity to undertake.¹¹⁴ Pricing such externalities requires setting the fee price above the direct cost to government of providing any associated services.¹¹⁵ Thus, negative externalities impose upward pressure on fee levels, up to the marginal social cost of the user's bad behavior.

A fee's efficacy in reducing unwanted behavior depends on several factors, the most important of which is the payors' price elasticity of demand.¹¹⁶ Elasticity describes how responsive users are to price changes.¹¹⁷ A price increase will more effectively reduce consumption of a good or service if demand is very elastic—that is, highly responsive to price changes. If user demand is entirely inelastic—or, nonresponsive to price changes—increasing the cost of an activity will not change user behavior. Price elasticity, in turn, depends on various factors, one of which is consumers' ability to adjust behavior in response to prices. Again, knowledge of the price prior to consumption is a prerequisite of this decision-making ability.

Bringing together both points, the public finance literature envisions user fees applying in a market-like environment in which the government provides a public good or service in exchange for a fee. A downward-sloping demand curve is a crucial element of the efficiency-improving fee model.¹¹⁸ It represents users' ability to reduce consumption in response to the fee amount. This user ability works to limit the fee amount that a government would reasonably charge. It also enables fees to reduce inefficient overconsumption of public goods.

To briefly summarize, the public finance literature tells us that user fees will introduce market-like efficiency to public good provision. Meanwhile, criminal justice scholars note that criminal justice fees have run amok, resulting in a host of problems implicating civil rights and constitutional concerns. How can we reconcile these two literatures? The next Part argues that it is precisely because

mechanism to impose societal costs of undesirable activities on fee payors). *See generally* MANKIW, *supra* note 104, at 198–99 (explaining negative externalities).

114. Scharff, *supra* note 113, at 195–96.

115. Where a government service carries positive externalities—that is, it engenders social benefits above those conferred on the individual user—a user fee runs the risk of causing inefficient underuse. The government may prefer to subsidize such services.

116. *See* MANKIW, *supra* note 104, at 125–27 (describing how elasticity affects tax incidence); Gillette & Hopkins, *supra* note 12, at 811–12 (exploring the effects of elasticity on user fee efficiency effects, in the case of positive externalities).

117. MANKIW, *supra* note 104, at 125–27.

118. *E.g.*, Duff, *supra* note 14, at 398 n.30 (“The assumption of a decreasing demand for the publicly provided good or service as its price increases . . . is crucial to the efficiency argument for benefit taxes and user fees, since these levies have little or no effect on the quantity of the good or service provided where demand for it is inelastic.”).

they diverge from the traditional market-like structure that criminal justice fees have become so problematic.

II. NONMARKET CRIMINAL FEES

Many traditional fees operate in a quasi-market environment in which users can reduce consumption in response to the fee level. This user agency imposes certain structural limits on fee levels, and in doing so also improves allocative efficiency. In contrast, as this Part will argue, criminal justice fees operate in a nonmarket environment, a fundamental structural flaw that makes traditional fee benefits impossible in the criminal justice system. Moreover, in combination with weakened judicial fee requirements, the nonmarket nature of these fees means that they operate without meaningful restraint.

Two characteristics of criminal court fees cause them to differ structurally from traditional fees and lead to their unbounded nature. First, the government is a monopolistic provider of a mandatory service. Once locked into the system, a user cannot refuse the service provided if the fee is unreasonable or unpayable. This obviates the role of consumer demand and incentivizes government agencies to engage in fee-seeking behavior. Second, for various structural and psychological reasons, users are largely unable to respond to high fees by changing their behavior *ex-ante*. The result of both features is akin to a market with inelastic demand, but notably different because the government provider determines the level of service consumption.¹¹⁹ Together, these two factors create a nonmarket environment in which levying agencies have the power and incentive to increase fee revenue, and which lacks the modulating influence of downward-sloping consumer demand. This Part describes these two factors and also explains how courts have diluted legal requirements to accommodate novel nonmarket fee structures.

A. MANDATORY SERVICES FROM MONOPOLISTIC AGENCIES

Unlike a normal market, the consumption of criminal justice services is primarily decided by the government agency providing the service. This occurs because the administering agencies are monopolistic providers of mandatory services. These agencies, in turn, directly benefit from the collected fee revenue.¹²⁰ They thus have both the power and incentive to pursue increased fee revenue at the expense of system users. The result is upward pressure on criminal justice fees.

119. A perfectly inelastic demand curve is represented by a vertical line in a demand graph, where the quantity consumed is the same regardless of the price. MANKIW, *supra* note 104, at 92–93. However, where the quantity consumed is partly determined by the government supplier, the demand curve might actually be upward sloping. That is, an increase in the price/fee might increase the quantity of services consumed.

120. *See, e.g.*, Jain, *supra* note 7, at 1406 (explaining that court fees often fund the criminal justice system broadly, or even the salaries of court employees and the daily costs of running the courthouse); Wheeler et al., *supra* note 17, at 66 (reporting that fifty percent of the Harris County probation department general budget is derived from probation fees).

While many government agencies are monopoly service providers, the mandatory nature of fee-funded criminal justice services is unique and significant. A criminal defendant cannot choose a different court, prison, or probation supervisor, nor can she opt out. Users are stuck with the services provided, the scope of which is determined by judges, prison officers, probation supervisors, and others involved in the carceral process.¹²¹ The user has little power to reduce consumption of such services, regardless of the fee amount. Of course, this is inevitable in a criminal justice context, since the services make up a punitive criminal sentence.

More difficult to establish is whether criminal justice agency employees actually face incentives to increase agency budgets. Public choice scholarship, in particular the budget-maximizing model developed by William Niskanen, suggests that such incentives do exist.¹²² In influential work on the subject, Niskanen posits that agency employees may face incentives to increase agency budgets in order to increase salaries, job security, professional power, and so forth.¹²³ There is some research supporting this claim for high-level bureaucrats at state and national agencies, finding that such bureaucrats consistently believe that their agency budgets should be expanded.¹²⁴ For local law enforcement agencies, the connection between budgets and employees' personal wellbeing may be even more direct than it is at larger state and federal agencies, suggesting a greater likelihood of budget-increasing incentives.¹²⁵

121. While defendants may have some choice over certain aspects of the adjudicatory process—for example, whether to plead guilty or go to trial—both choices may carry significant fees beyond their control. For example, programs offered as alternatives to trial, such as pre-trial diversionary programs, may accrue significant fees for monitoring services. See Logan & Wright, *supra* note 98, at 1187–88 (describing the various fees that accrue to trial alternatives).

122. See William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 293–303 (1968); WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 54 (1971). But see André Blais & Stéphane Dion, *Are Bureaucrats Budget Maximizers? The Niskanen Model & Its Critics*, 22 POLITY 655 *passim* (1990) (listing critiques of the Niskanen model).

123. See Niskanen, *supra* note 122, at 293–94. Where an agency operates via budget appropriations and has full control over output, increasing output will increase costs and enable the agency to request a larger budget appropriation. *Id.* at 294–96. A properly structured user fee should partly mitigate such government profligacy by introducing market-like constraints. *Id.* at 300–01 (explaining that the model suggests “that a bureau operating in a highly competitive output market would be relatively efficient”).

124. Blais & Dion, *supra* note 122, at 663 (surveying scarce empirical research on Niskanen’s budget-maximizing model, concluding that the few studies available “tend to vindicate the model”); Lance T. LeLoup & William B. Moreland, *Agency Strategies and Executive Review: The Hidden Politics of Budgeting*, 38 PUB. ADMIN. REV. 232, 234 (1978) (finding an average budget increase request of 41% among thirty-six agencies within the U.S. Department of Agriculture); Lee Sigelman, *The Bureaucrat as Budget Maximizer: An Assumption Examined*, 6 PUB. BUDGETING & FIN. 50, 56 (1986) (surveying high-level state administrators from 1964–1978, finding that between 64% and 81% believe in some level of agency expansion).

125. In one example, court fees in Louisiana were deposited into a “judicial expense fund,” over which judges had full control. CRIM. JUST. POL’Y PROGRAM, HARV. L. SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 7 (2016), <https://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-3.pdf>. The fund was used to purchase judges’ supplemental health insurance, two Ford Expeditions, personal vehicle upgrades, and a full-time private chef. *Id.* Many other examples involve private companies that provide probation and other criminal justice services, which are entirely funded by fee revenue. *Id.* at 10–11.

Accepting that a budget-increasing incentive exists to some degree, monopolistic criminal justice agencies have the power to satisfy it by pursuing fee revenue. Indeed, agency employees have more control over fee revenue than over budget appropriations. They can increase fee revenue by directly increasing the fee level or by increasing the quantity of services provided. Increasing quantity may mean increasing aggregate quantity—that is, total citations or arrests¹²⁶—or increasing services imposed on individual defendants—for example, by mandating additional carceral services or increased monitoring.¹²⁷ There is evidence of both, described further below.¹²⁸

We also might expect a revenue-seeking agency to act to reduce the likelihood of political restraint, for example, targeting politically powerless or unpopular groups.¹²⁹ Criminal defendants, disliked and disenfranchised, are an ideal target. Because voters and policymakers may feel that these unpopular groups *ought to* bear a higher cost for using public services, political intervention on behalf of payors is unlikely. The poor are prime targets as well due to their lack of political power. Perhaps unsurprisingly, the past two decades have witnessed increasing fees levied on low-level infractions that are more likely to be committed by the poor.¹³⁰ Many of these infractions are unavoidable for those lacking stable housing, such as sleeping or eating in public.¹³¹ Such targeting supports the existence of revenue-seeking behavior by criminal justice agencies.

Of course, there are limitations to a revenue-seeking agency model. For one, nonpecuniary motivations, such as altruism or public-oriented goals, may drive many government agents.¹³² It is also possible that individual agents receive no direct benefit from increasing agency revenue. Even so, where agency budgets depend partly on fee revenue, agency employees will likely be—indeed, have been¹³³—directed to protect and pursue such revenue. In the aggregate, even minor incentives to pursue increased fee revenue can result in steadily increasing fee burdens for individual defendants and across targeted populations.

126. See, e.g., U.S. DEPT. OF JUST., *supra* note 55.

127. See, e.g., Jain, *supra* note 7, at 1382–85 (arguing that the criminal justice over-punishes in part because government actors generate revenue by capitalizing on criminal justice for their own ends); Logan & Wright, *supra* note 98, at 1187–88 (explaining how Oklahoma legislators increased the length of deferred prosecution supervision in response to budget shortfalls).

128. See *infra* Part III.A–B.

129. *Pay-As-You-Go Government: It'll Cost You*, ECONOMIST (Aug. 27, 2015), <https://www.economist.com/leaders/2015/08/27/itll-cost-you>.

130. DOLAN & CARR, *supra* note 88, at 5, 10–11; NAT'L L. CTR. ON HOMELESSNESS & POVERTY & NAT'L COAL. FOR THE HOMELESS, HOMES NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2009), http://www.nationalhomeless.org/publications/crimreport/crimreport_2009.pdf (finding that laws criminalizing poverty and homelessness have increased since 2006).

131. See DOLAN & CARR, *supra* note 88, at 5.

132. See Blais & Dion, *supra* note 122, at 656 (summarizing critiques of Niskanen's model).

133. See U.S. DEPT. OF JUST., *supra* note 55, at 10–15; CRIM. JUST. POL'Y PROGRAM, *supra* note 125, at 7–9.

B. USERS' RESPONSE TO FEES

Criminal justice fees apply to behavior that is unlikely to change in response to fee levels. Although a criminal defendant can avoid fees by avoiding criminal behavior, they are unlikely to do so specifically in response to fee levels. This disconnect between fees and behavior occurs for various reasons including psychological factors that undermine fees' deterrent effect, the marginal nature of fee burdens in relation to other punishment, and the opacity of fees ex-ante. The lack of demand responsiveness means that user demand will have little effect on fees, and that fees will have little effect on user demand. That is, there is no downward-sloping demand curve to exert some meaningful limit on fees, as envisioned in the market model.

As an initial matter, it is not clear to what extent sanctions deter criminal behavior generally. Some argue that criminals are inherently antisocial or otherwise defective, such that their behavior will not change no matter the punishment.¹³⁴ This belief suggests that criminals will ignore fees, as well as fines and other punishment, when deciding how to behave. However, even those who believe in deterrence may doubt a straightforward cost-benefit accounting by those who commit crimes.¹³⁵ For example, Cesare Beccaria, the progenitor of deterrence theory, argued in the eighteenth century that peoples' natural optimism will cause them to discount uncertain punishment.¹³⁶ That is, it is the *certainty* of punishment, rather than its severity, that prevents crime.¹³⁷ Thus, criminals are unlikely to pay much attention to fees when deciding how to behave, both because they may not get caught, and because, if they are caught, the amount of fees is uncertain. Unfortunately, empirical evidence on the

134. E.g., Jackson Toby, *Is Punishment Necessary?*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 332, 333–34 (1964) (arguing that only the unsocialized will commit crimes, and that punishment is unlikely to deter such individuals); James B. Appel & Neil J. Peterson, *What's Wrong with Punishment?*, 56 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 450, 453 (1965) (concluding that punishment is ineffective deterrence); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 774 (2010) (describing scholarship rejecting deterrence theory).

135. Gary S. Becker first applied modern economic analysis to criminal deterrence. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968) (explaining that his model “assumes that a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities”); see also Michael Edmund O’Neill, *Irrationality and the Criminal Sanction*, 12 SUP. CT. ECON. REV. 139, 155 (2004) (explaining that, under standard deterrence theory, “the rational calculus of the pain of legal punishment offsets the motivation for the crime (presumed to be roughly constant across offenders but not across offenses), thereby deterring criminal activity”). O’Neill himself rejects such reasoning, arguing that criminals behave irrationally in part due to various “cognitive defects and neurological malfunctioning.” *Id.* at 177; *id.* at 168–77 (exploring various neurological and cognitive conditions that may be correlated with violent and antisocial behavior).

136. BONESANA DI BECCARIA, *supra* note 47, at 94 (“The certainty of a small punishment will make a stronger impression, than the fear of one more severe, if attended with the hopes of escaping; for it is the nature of mankind to be terrified at the approach of the smallest inevitable evil, whilst hope, the best gift of Heaven, hath the power of dispelling the apprehension of a greater; especially if supported by examples of impunity, which weakness or avarice too frequently afford.”).

137. *Id.*; see also Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 215 (2013) (reviewing experimental and quasi-experimental studies on deterrence theory, concluding, among other things, “that certainty of apprehension is a more effective deterrent than the severity of the ensuing legal consequences”).

deterrent effect of criminal justice fees is extremely scarce, leaving this discussion speculative.¹³⁸

Perhaps fees have a marginal effect on criminal decision-making, such that an actor on the margin may take them into consideration.¹³⁹ He may not know the total fee burden, but perhaps simply knowing that he will face some fees is enough to keep him on the straight and narrow. Although such reasoning makes good sense, several things likely hamper fees' marginal deterrent effect. For one, punitive costs are already quite high,¹⁴⁰ such that additional fees will likely have limited behavioral influence. To the extent that criminal defendants compare benefits and costs, they likely do so in the aggregate, cumulating the total cost of fines and restitution, and perhaps even incarceration, monitoring, social sanctioning, and so forth. An additional several hundred or thousand dollars in fees may not bear heavily on such a decision, deleterious effects notwithstanding. And, because fee levels do not correlate with the severity of the offense, a straightforward accounting is difficult.¹⁴¹ Moreover, because fee debts are often actually paid by users' family members, rather than defendants directly, their dampening effect on criminal activity is even less likely.¹⁴²

Additionally, fee levels are difficult to predict *ex ante*. Because judges and others decide the total fee burden after an individual is already locked into the system, the user does not have pricing information to inform her decision before committing the offense. The ultimate fee burden depends on many different factors, including the specific charge, the defendant's race and gender, and even the political and demographic makeup of the charging jurisdiction.¹⁴³ The total fee burden is not imposed until conviction, sentencing, or even later.¹⁴⁴ Being unable to predict the fee beforehand makes it difficult for a criminal defendant

138. *E.g.*, Wheeler et al., *supra* note 17, at 73 (not directly measuring fees' effect, but finding no evidence that supervision fees deterred bad behavior). Evidence on the deterrent effect of fines, or lack thereof, is also relatively scarce, although it does exist. *See, e.g.*, Don Weatherburn & Steve Moffatt, *The Specific Deterrent Effect of Higher Fines on Drink-Driving Offenders*, 51 BRIT. J. CRIMINOLOGY 789, 790 (2011) (commenting on the scarcity of evidence regarding the deterrent effect of fines); *Id.* at 798 (finding no significant effect of fines on recommitting a drunk-driving offense).

139. This is likely particularly true for financial crimes, where bad actors are more likely to do some version of cost-benefit analysis. Ruback, *supra* note 11, at 1816.

140. Punitive costs might include fines and restitution, but also nonfiscal costs such as incarceration and social sanctioning. For a holistic consideration of the economic harms of criminal punishment, including financial obligations as well as limited employment opportunities and reduced earnings of those convicted of crimes, see Harris et al., *supra* note 48; HARRY J. HOLZER, STEVEN RAPHAEL & MICHAEL A. STOLL, URB. INST., EMPLOYMENT BARRIERS FACING EX-OFFENDERS 10–11 (2003), <https://www.urban.org/sites/default/files/publication/59416/410855-Employment-Barriers-Facing-Ex-Offenders.PDF> (citing survey data showing that most employers are unwilling to hire ex-offenders).

141. Lesser offenses often carry higher fee burdens. *See* Harris et al., *supra* note 48, at 253–54. Because fees can move in the opposite direction from other forms of punishment, the two may effectively offset each other. Although, such calculus is only relevant to those comparing the possible consequences of different crimes, as opposed to those deciding whether or not to commit a specific crime.

142. *See* EISEN, *supra* note 68, at 4–5.

143. *See* Harris et al., *supra* note 48, at 253–54 (examining determinants of criminal fines and fees).

144. BANNON ET AL., *supra* note 6, at 7.

to take such costs into consideration.¹⁴⁵ Additionally, while defendants may have some choice over certain aspects of the adjudicatory process—for example, whether to plead guilty or go to trial—all choices may carry significant fees beyond their control.¹⁴⁶ For example, programs offered as alternatives to trial, such as pre-trial diversionary programs, may accrue significant fees for monitoring services.¹⁴⁷

The upshot of these various psychological and structural factors is that demand for criminal justice services is largely nonresponsive to fee levels. That is, criminal justice services do not face a traditional downward-sloping demand curve. If user demand is nonresponsive to price increases, it means both that user demand will have no effect on fees, and that fees will have no effect on user demand. The result is that there is no market structure to provide fee-setting principles subject to reasonable limits.

Externality Pricing. Of course, even in a market environment, we should not expect law enforcement agencies to reduce fee levels in response to criminal behavior, because doing so would encourage crime. Instead, the more apposite pricing model here is that of negative externalities. An externality model suggests that law enforcement agencies should set fees to include social costs, to force users to internalize the cost of their bad behavior.¹⁴⁸ In a market-like environment with downward sloping demand, such a pricing scheme may work. The criminal justice context, however, is not a true market where price and consumption interact, for all the reasons explained above. Instead, because users are unlikely to respond to fees, externality pricing will be ineffective.

Perhaps counterintuitively, the inefficacy of externality pricing may also erode meaningful limits on criminal fee levels. An extreme counterfactual example demonstrates why. Imagine a law enforcement agency that seeks to deter bad behavior via fees through externality pricing. This hypothetical agency can measure the social costs of crime with extreme accuracy. Additionally, assume that criminals in this hypothetical town are hyper-rational actors who compare the personal costs and benefits of their crimes and will forego the crime

145. Note that the same reasoning likely does not apply to businesses that face regulatory fees that seek to account for negative externalities of bad business behavior. Imagine, for example, a “clean-up” fee imposed on a company that dumps toxic waste. Like criminal justice fees, such a fee is mandatory for those subject to the regulation and also determined after the levied act. However, unlike individual criminal defendants, businesses are likely savvy enough to understand how such fees are set, and thus better able to consider such costs before undertaking a sanctioned activity. Further, if such fees are prohibitively high, they may prevent market entry entirely, reducing the quantity of services consumed in the long run. Such a concern might drive agencies to keep fees within reasonable bounds. Lastly, businesses have the political power to lobby for reduced regulation, exerting nonmarket downward pressure on such fees.

146. See Logan & Wright, *supra* note 98, at 1187–88 (describing the various fees that accrue to trial alternatives).

147. See *id.*

148. See *supra* notes 113–117 and accompanying text.

where costs exceed benefits.¹⁴⁹ Knowing this, the agency sets fees to include the total marginal cost of each specific criminal act, including social cost.¹⁵⁰

Crime levels would fall in response to these fees, as criminals weigh the costs and benefits of their crimes and find a negative result. The only crimes that would occur now are those in which the benefit to the criminal exceeds the total social cost. (Perhaps certain drug crimes fit into this category.) The law enforcement agency would not increase fees above this level, as doing so would cause a net loss of wellbeing to society. Further, at a certain point the law enforcement agency would begin to lose revenue by raising fees too much, due to the reduced demand for criminal justice services. Thus, even if fees are set to reduce negative externalities, downward-sloping demand still imposes some meaningful limit on fee levels.

In the nonmarket environment of the actual criminal justice system, this reasoning does not hold. Agencies may as well inflate fees high above actual social cost, since doing so will have no negative effect on wellbeing or revenue—partly because demand is nonresponsive and partly because agencies can control service consumption as described above.¹⁵¹ Moreover, and as discussed below, the concept of social cost is sufficiently expansive as to impose little meaningful restraint on fee levels.¹⁵² Thus, in the context of nonmarket criminal justice fees, externality pricing fails to provide an effective limiting principle.

Together, these two features—agency power and users' failures to respond to fee levels—describe a nonmarket environment quite distinct from that envisioned by public finance models. These nonmarket fees are subject to no meaningful restraint, facing little downward limit and only upward pressure on fee levels. The lack of restraint has several negative consequences, described below. First, however, the next Subpart explains why existing legal guardrails do little to rein in unbounded criminal justice fees.

C. INEFFECTIVE JUDICIAL OVERSIGHT

Criminal justice fees are also protected from effective legal attack in many states. Rather than limiting fees to actual expenditures, a fee's propriety in many states is based largely on whether the charged amount bears a superficial relationship to the criminal justice system broadly.¹⁵³ Although a fee must be

149. Such an assumption of rationality underlies economic models of criminal behavior. *See* Becker, *supra* note 135, at 176; O'Neill, *supra* note 135, at 155 (describing such reasoning).

150. This theoretical example is unrealistic, among other reasons, because social cost is difficult, even impossible, to define and measure.

151. *See supra* Part II.A.

152. For further discussion of this point, see *infra* text accompanying notes 164–166.

153. *See, e.g.,* Peraza v. State, 467 S.W.3d 508, 518–21 (Tex. Crim. App. 2015) (upholding a DNA record fee, part of which supported the state highway fund, despite no direct connection to the costs associated with the defendant's case); Machado v. State, No. 02-15-00365-CR, 2016 WL 3962731, at *4 (Tex. App. July 21, 2016) (upholding *Peraza v. State*, which the court described as “reject[ing] the ‘necessary or incidental’ standard as governing the constitutionality of court costs”); State v. Young, 238 So. 2d 589, 589 (Fla. 1970) (upholding a state statute permitting a \$1 fee deposited into state general revenue funds, imposed on those convicted of

“reasonable,”¹⁵⁴ various line-drawing problems render amorphous a reasonableness inquiry with regard to fee levels. Perhaps most important, the amount of services imposed on an individual payor goes unquestioned, leaving agencies free to increase fee revenue by increasing the amount of services provided to criminal defendants. The result is that fee levels can increase indefinitely, with judicial doctrine imposing only limited restraint.

Even in its strongest form, the judicial doctrine governing user fee requirements typically fails to interrogate the propriety or level of the services that agencies provide to payors. In most states, courts traditionally have imposed three user fee requirements: (1) The payor must directly benefit from the service being provided or the regulatory program being implemented; (2) the fee must be related to the cost of the government activity, rather than raising general revenue funds; and (3) the fee must be voluntary.¹⁵⁵ Note that none of the three prongs would allow a court to invalidate a fee on the grounds that the government overprovided unnecessary services to inflate fee revenue. Thus, although courts certainly can, and in some cases do, inquire as to whether the fee level is commensurate with the services provided, the incentives of the agency to inflate those services tend to go largely unquestioned.¹⁵⁶

Additionally, courts have gradually weakened each prong of the test as they seek to strike a balance between enforcing fiscal restrictions and enabling local governments to raise needed revenue.¹⁵⁷ The voluntariness requirement has suffered particular damage. In the mid-1990s, courts in many states began to hold that voluntariness was no longer a required element of user fees.¹⁵⁸ In other

violating state or local laws); *State v. Claborn*, 870 P.2d 169, 171 (Okla. Crim. App. 1994) (holding that a fee “reasonably related to the costs of administering the criminal justice system” does not violate the separation of powers doctrine).

154. *See Silva v. City of Attleboro*, 908 N.E.2d 722, 726 (Mass. 2009) (“Although a municipality has no independent power of taxation, it may assess, levy, and collect fees when the Legislature has authorized it to do so, provided that those fees are reasonable and proportional.”); *State v. Medeiros*, 973 P.2d 736, 741–42 (Haw. 1999) (declining to require that user fees be voluntary, instead requiring that they be “reasonably proportionate to the benefit received”); *Rizzo v. City of Philadelphia*, 668 A.2d 236, 238 (Pa. Commw. Ct. 1995) (finding that fees charged for emergency medical services “are proper if they are reasonably proportional to the costs of the regulation or the services performed”).

155. *See, e.g., Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984).

156. Courts have, however, considered incentives faced by criminal courts and public defenders to seek criminal convictions in order to increase fee revenue, to the detriment of due process rights. *See, e.g., Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 714–15 (5th Cir. 2012) (considering whether fees paid upon conviction to plaintiff’s criminal attorney created a disincentive for attorneys to pursue the client’s exoneration); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding that subjecting a defendant to a trial before a local judge and village mayor, with a “direct ... pecuniary interest in convicting the defendant” violated the Due Process Clause of the Fourteenth Amendment); *Ward v. City of Monroeville*, 409 U.S. 57, 60–62 (1972) (holding the same); *Dugan v. Ohio*, 277 U.S. 61, 65 (1928) (holding that due process rights were not violated when a mayor with a fixed salary and limited executive authority acted as a judge).

157. *Reynolds*, *supra* note 21, at 396 (“[B]y categorizing charges that bear increasing similarity to taxes as fees or other non-tax charges, courts provide a convenient way for local governments to raise general revenues without having to worry about anti-tax strictures.”).

158. *Medeiros*, 973 P.2d at 741–42 (summarizing the declining reliance on voluntariness in determining the validity of fees); *Bloom v. City of Fort Collins*, 784 P.2d 304, 310–11, 311 n.8 (Colo. 1989) (declining to “engraft a ‘voluntariness’ factor onto the tax-fee distinction” in resolving the case).

states, courts simply prioritize other factors or fail to consider voluntariness directly when assessing the validity of fees.¹⁵⁹ Only thirteen states continue to uphold voluntariness as a central factor in adjudicating user fee litigation.¹⁶⁰ The abandonment of the voluntariness requirement is notable because the lack of user agency has contributed to criminal justice fees' nonmarket nature.

Importantly, although there is diversity among states in this regard, courts often hold that the relationship between the fee and the cost to provide the service need not be mathematically accurate or closely monitored.¹⁶¹ A "reasonable" link between the fee and the general service will suffice.¹⁶² In a criminal context, courts have held that charges levied against criminal defendants need only be "reasonably related to the costs of administering the criminal justice system," rather than the specific cost of administering the court case.¹⁶³ The problem then lies in determining what is reasonable.¹⁶⁴ A brief

159. The Massachusetts Supreme Court, ten years after holding otherwise in a widely cited opinion, *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984), stated that "the element of choice is not a compelling consideration which can be used to invalidate an otherwise legitimate charge." *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd.*, 656 N.E.2d 563, 570 (1995) (upholding as valid a mandatory fee levied against a producer of radioactive waste); *see also* HENCHMAN, *supra* note 38, at 12–13; *Medeiros*, 973 P.2d at 741–42.

160. HENCHMAN, *supra* note 38, at 12–13, tbl.3; *see, e.g.*, *Bolt v. City of Lansing*, 587 N.W.2d 264, 270 (Mich. 1998) (holding voluntariness to be an important factor in determining the validity of a city's storm water service charge). In states where voluntariness remains a relevant criterion, the boundaries of voluntariness are often stretched to accommodate novel categories of user fees. *See Reynolds*, *supra* note 21, at 412 (arguing that courts stretch the definition of voluntary by concluding that the charge is voluntary because the payor can cease engaging in the levied activity, stating that "[b]y that reasoning, many taxes are likewise voluntary—to avoid income taxes, a taxpayer need only stop earning income") (citing *Kern Cnty. Farm Bureau v. Cnty. of Kern*, 23 Cal. Rptr. 2d 910, 916 (Ct. App. 1993)). In addition to criminal court fees, other fees cover police and fire protection and mandatory recycling and garbage collection. *Doe v. Sex Offender Registry Bd.*, 947 N.E.2d 9, 22–23 (Mass. 2011) (holding that a \$110 fee for DNA collection, payable by all individuals convicted of a crime that was punishable by imprisonment, was a valid regulatory fee); *City of Clarksburg v. Grandeotto, Inc.*, 513 S.E.2d 177, 182 (W. Va. 1998); *Hochstedler v. St. Joseph Cnty. Solid Waste Mgmt. Dist.*, 770 N.E.2d 910, 916 (Ind. Ct. App. 2002); *Rogers v. Oktibbeha Cnty. Bd. of Supervisors*, 749 So. 2d 966, 969 (Miss. 1999) (upholding a mandatory garbage collection fee assessed against payors who did not use the service). *But see Dawson v. Sec'y of State*, 739 N.W.2d 339, 356 (Mich. Ct. App. 2007) (holding a "driver responsibility fee" invalid in part because it was "automatic upon the conviction of relevant offenses" and therefore not voluntary).

161. *See, e.g.*, *Kent Cnty. Water Auth. v. State Dep't of Health*, 723 A.2d 1132, 1136 (R.I. 1999) (upholding a fee despite the fact that it did not exactly match costs and a portion of fee revenue was deposited into general funds); *see also Mountain View Ltd. P'ship v. City of Clifton Forge*, 504 S.E.2d 371, 376 (Va. 1998) (deferring to the city's fee calculation methodology and requiring only that there be a "reasonable correlation" between a cost and benefit; holding a fee to be valid despite the existence of a surplus).

162. *Mountain View Ltd. P'ship*, 504 S.E.2d at 376.

163. *State v. Claborn*, 870 P.2d 169, 171 (Okla. Crim. App. 1994); *see also Broyles v. State*, 688 S.W.2d 290, 291–93 (Ark. 1985) (holding a \$250 fee levied against a DUI defendant was constitutional, despite being allocated to general programs addressing drunk driving and alcohol and drug abuse rehabilitation); *Peraza v. State*, 467 S.W.3d 508, 518–21 (Tex. Crim. App. 2015) (holding constitutional a "DNA record fee" imposed on a criminal court defendant, a portion of which went to a criminal justice planning account, and a portion to the state highway fund). *But see Safety Net for Abused Persons v. Segura*, 692 So. 2d 1038, 1044 (La. 1997) (holding unconstitutional a fee imposed on all convicted criminal defendants that funded domestic violence education and counseling).

164. For example, courts must decide whether to include capital expenditures, and to what extent. Darien Shanske, *Interpreting State Fiscal Constitutions: A Modest Proposal*, 69 RUTGERS U. L. REV. 1331, 1340 (2017) (terming this a problem of "allocating capital costs").

consideration of this problem evinces its intractable nature. For example, should court fees include past or future expenses, such as the cost of constructing or updating the courthouse building?¹⁶⁵

Where a fee might include negative externalities, a court must also assess what constitutes reasonable social cost. Doing so is exceedingly complex, perhaps even impossible. Should such fees encompass harm to friends and family only? Immediate neighbors? Anyone who could potentially have been harmed? The circle of potential harm is seemingly endless. Thus, with reasonable linkage as the only true constraint, judicial doctrine provides little meaningful limit on the fees described above.¹⁶⁶

In many states, revenue recovery is now the sole criterion by which user fees are judged. That is, agencies cannot levy criminal justice fees to raise general revenue or revenue for services fully outside of the criminal justice system.¹⁶⁷ Of course, defining the boundaries of the funded system raises all the line-drawing issues just enumerated—does the criminal justice system include counseling services for victims? Or educational programs?¹⁶⁸ What about highways on which police officers drive?¹⁶⁹ The practical effect of these judicial rules is merely to prevent agencies from transferring fee revenue to general coffers. Because money is fungible, agencies can use fees to increase budgets by offsetting what would otherwise be paid by tax revenue. Further, it is worth reiterating that establishing a reasonable link does little to prevent agencies from providing unwanted or inflated services to payors.

This brief summary has outlined a general trend among state courts toward lax enforcement of user fee doctrine. One upshot of this review is that litigating fees' validity will be challenging. However, the necessary brevity of this Subpart minimizes the diverse approaches to fee doctrine throughout the country. Courts in some states, such as Michigan, continue to strictly enforce user fee requirements, including voluntariness.¹⁷⁰ In such places, litigating user fees as invalid charges may offer one route to rein in their growth. Although developing

165. The Supreme Court of Florida has answered this question in the affirmative. *See State v. Young*, 238 So. 2d 589, 590 (Fla. 1970) (“[Criminal defendants] 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.”).

166. Reitz, *supra* note 11, at 1762 (“There are reports of agencies collecting fees in excess of their actual expenditures on particular offenders—and protections against such practices are virtually nonexistent.”).

167. *See State v. Lanclos*, 980 So. 2d 643, 654 (La. 2008) (holding that criminal court fees levied to fund the Greater New Orleans Expressway Commission were “too far attenuated from the ‘administration of justice,’ to be considered a legitimate court cost”); *Salinas v. State*, 523 S.W.3d 103, 108 (Tex. Crim. App. 2017) (holding that a criminal court fee paid to the Health and Human Services Commission failed to serve a valid criminal justice purpose); HENCHMAN, *supra* note 38, at 5–6.

168. *Broyles*, 688 S.W.2d at 291, 293 (upholding a fee that funded drunk driving and alcohol and drug abuse rehabilitation).

169. *Peraza v. State*, 467 S.W.3d 508, 518–21 (Tex. Crim. App. 2015) (upholding a fee paid to the state highway fund).

170. *See, e.g., Bolt v. City of Lansing*, 587 N.W.2d 264, 272–73 (Mich. 1998) (striking down a local stormwater remediation fee under strict interpretation of the judicial fee doctrine). *See infra* notes 259–265 and accompanying text for further analysis of the enforcement of fee doctrine in the context of criminal justice fees in Michigan.

such a litigation strategy is not this Article's primary goal, the question is briefly introduced below.¹⁷¹

III. HARMS OF NONMARKET FEES

A. FEE-CHASING BEHAVIOR

Unbounded criminal justice fees create incentives for agencies to overprovide fee-funded services.¹⁷² In the context of the criminal justice system, overprovision means over-policing, over-incarceration, lengthened probation monitoring, and so forth. Given scarce resources, overprovision of one government service also means under-provision of other desirable government services—that is, less attention devoted to important, but nonremunerative, public safety needs.¹⁷³ Thus, these nonmarket fees obviate the allocative efficiency improvement that user fees are intended to provide.¹⁷⁴ Public wellbeing suffers as a result.

As explained above,¹⁷⁵ criminal justice agencies should respond to fee incentives and monopoly power by seeking increased fee revenue from criminal defendants. These incentives operate separately from public-safety needs. Government may pursue fee revenue by increasing the fee level or by increasing provision of fee-funded services. There is evidence of agencies pursuing both activities.¹⁷⁶ For example, legislators in Oklahoma responded to prosecutor office budget shortfalls by increasing the monthly fee level as well as the mandatory length of deferred prosecution supervision.¹⁷⁷ In Ferguson, Missouri, police supervisors instructed officers to pursue fee-generating ticketing and citations to generate revenue for the department, regardless of public safety needs.¹⁷⁸ Researchers in Massachusetts have found evidence that police in municipalities that rely on nontax revenue are more likely to issue fee-funded

171. See *infra* Part IV.B.2.

172. Niskanen made a similar argument in 1968, positing that government bureaucrats subject to budget appropriations operate to maximize their budgets, resulting in overproduction. Niskanen, *supra* note 122, at 296, 303 (concluding that the government would overprovide public services). Although the agency in his model does not rely on fee revenue, *id.* at 294, the same result should hold for an agency that collects fee revenue, as collecting greater fee revenue would increase the agency budget just as an increased budget appropriation would.

173. See, e.g., BANNON ET AL., *supra* note 6, at 31 (arguing that requiring probation officers to collect probation fees diverts them from other important duties; describing that Louisiana eliminated such fees due to these concerns).

174. Duff, *supra* note 14, at 398–99; see *supra* Part I.C.

175. See *supra* Part II.A.

176. See, e.g., Jain, *supra* note 7, at 1385 (arguing that the criminal justice overpunishes in part because government actors generate revenue by capitalizing on criminal justice for their own ends); Logan & Wright, *supra* note 98, at 1188 & n.83 (explaining how Oklahoma legislators increased the length of deferred prosecution supervision in response to budget shortfalls).

177. Logan & Wright, *supra* note 98, at 1188 & n.83.

178. U.S. DEP'T OF JUST., *supra* note 55, at 9–15 (“City and police leadership pressure officers to write citations, independent of any public safety need, and rely on citation productivity to fund the City budget.”); see also *id.* at 14 (describing the process of setting revenue targets for municipal courts).

traffic citations.¹⁷⁹ It is also common practice for probation agencies to continue criminal monitoring of parolees purely to collect unpaid fee revenue—thereby increasing the monitoring fees owed.¹⁸⁰

This evidence suggests that public officials have responded rationally to the incentives presented to them. They have the power to increase fee revenue, and they have done so. Importantly, they have responded to these revenue incentives, at least in part, independent of public safety needs. This suggests likely overallocation of resources to fee-funded criminal justice services, which may contravene public wellbeing.

Given scarce resources, we should also expect agencies to underprovide non-fee-funded services, and indeed do find some evidence of this. For example, researchers have found that police departments that are more reliant on fee revenue solve violent crimes at a significantly lower rate.¹⁸¹ The U.S. Commission on Civil Rights raised such a concern in their report on criminal justice fines and fees, arguing that overreliance on court fees “conflict[s] with judicial independence, and divert[s] attention from courts’ essential functions.”¹⁸² Where the overlooked activities are welfare enhancing, public wellbeing will be harmed.

B. EXPLOITATION OF THE POLITICALLY POWERLESS

A lack of meaningful fee restraints coupled with agency revenue incentives may lead to exploitation of the powerless. By targeting politically powerless groups, criminal justice agencies reduce the risk of political reprisal. As a result of such exploitation, low-income households, people of color, and other marginalized populations bear the brunt of funding public services from which everyone benefits.

Evidence of exploitation and disparate impact in the criminal justice system is abundant.¹⁸³ People of color are more likely to be incarcerated than white people,¹⁸⁴ which means that a disproportionate share of prison budgets is likely funded by communities of color—including not just incarcerated individuals but their families as well. A significant body of research also finds that police officers are more likely to pull over and issue traffic citations to people of color.¹⁸⁵ Researchers in Las Vegas, Nevada, found that nearly two-thirds of

179. *E.g.*, Michael D. Makowsky & Thomas Stratmann, *Political Economy at Any Speed: What Determines Traffic Citations?*, 99 AM. ECON. REV. 509, 526 (2009) (finding that traffic fines are correlated with a greater budget need for nontax revenue, and that nonresidents are more likely to receive fines).

180. Reitz, *supra* note 11, at 1762.

181. Rebecca Goldstein, Michael W. Sances, & Hye Young You, *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, 56 URB. AFFS. REV. 5, 8 (2020).

182. U.S. COMM’N ON C.R., *supra* note 56, at 2.

183. As just one example, see *id.* at 34–35.

184. *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Feb. 4, 2021).

185. *E.g.*, E. BAY CMTY. L. CTR., STOPPED, FINED, AND ARRESTED: RACIAL BIAS IN POLICING AND TRAFFIC COURTS IN CALIFORNIA 5 (2016), http://www.lccr.com/wp-content/uploads/Stopped_Fined_Arrested_BOTRCA.pdf (citing statistics showing that Black and Latinx drivers are pulled over at rates highly disproportionate to their share in the population); *Findings*, STANFORD OPEN POLICING PROJECT,

traffic citations in 2015 came from residents of the seven poorest zip codes, which were predominantly populated by African-American and Latinx residents.¹⁸⁶ Other research finds that police officers are more likely to issue tickets to out-of-town drivers, who, although perhaps not marginalized, also lack political power.¹⁸⁷

The criminalization of poverty plays an important role here as well. According to several accounts, the mid-2000s witnessed an increase in fines and fees levied on low-level infractions that are more likely to be committed by the poor.¹⁸⁸ Not only do the poor lack political power, but such targeting heightens the regressive effect of fee-funding. The U.S. Commission on Civil Rights has noted such exploitation, stating in its report on criminal fines and fees:

The best available data reflects [sic] that municipal fee targeting tends to aggregate in communities of color and, to a lesser degree, in low-income communities. Targeting means these municipalities exploit their poorest citizens by, among other means, using law enforcement as ticketing and collections agencies to increase municipal revenues as distinct from focusing on public safety and civil compliance.¹⁸⁹

Criminal justice agencies lessen the likelihood of political reprisal by targeting politically powerless and unpopular groups.¹⁹⁰ Criminal defendants (as well as nonresidents) are especially appealing targets because they often lack the right to vote.¹⁹¹ As of 2016, over half of U.S. states circumscribed the voting rights of those who owe criminal justice debt, which includes fees.¹⁹² Thus, those most exploited by criminal debt have little power to fight back against unbounded fees. Moreover, residents and policymakers may feel that these

<https://openpolicing.stanford.edu/findings/> (last visited Feb. 4, 2021) (finding that when pulled over for speeding, Black drivers are 20% more likely to get a ticket—rather than a warning—than white drivers, and Hispanic drivers are 30% more likely to be ticketed than white drivers); Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, STAN. COMPUTATIONAL POL'Y LAB, Mar. 13, 2019, at 1, 5, <http://web.stanford.edu/~csimoiu/doc/traffic-stops.pdf#:~:text=A%20largescale%20analysis%20of%20racial%20disparities%20in%20police,Computational%20Policy%20Lab%20March%2013%2C%202019%20EXECUTIVE%20SUMMARY> (finding that Black and Hispanic drivers were searched during 3.8% and 3.6% of stops, respectively, compared to 1.6% for stopped white drivers).

186. U.S. COMM'N ON C.R., *supra* note 56, at 30; James DeHaven, *Las Vegas' Low-Income Areas Hit Harder by Parking Tickets, Analysis Shows*, LAS VEGAS REV.-J. (Jan. 17, 2015, 4:50 PM), <https://www.reviewjournal.com/local/local-las-vegas/las-vegas-low-income-areas-hit-harder-by-parking-tickets-analysis-shows/>.

187. See Makowsky & Stratmann, *supra* note 179, at 516–17.

188. DOLAN & CARR, *supra* note 88, at 5; NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 130, at 10–11 (finding that laws criminalizing poverty and homelessness have increased since 2006).

189. U.S. COMM. ON C.R., *supra* note 56, at 72.

190. *Pay-As-You-Go Government*, *supra* note 129.

191. HARRIS, *supra* note 7, at 49.

192. See *id.* Florida state legislators added a voting restriction on criminal justice debtors in 2019. See Patricia Mazzei, *Florida Limits Ex-Felon Voting, Prompting a Lawsuit and Cries of 'Poll Tax'*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/florida-felons-voting-rights.html>. The Eleventh Circuit upheld the restriction in September 2020, finding that it did not violate voting rights provided in the U.S. Constitution. *Jones v. Governor of Florida*, 975 F.3d 1016, 1025 (11th Cir. 2020).

groups *ought to* bear a higher cost for using public services.¹⁹³ Such a sentiment further reduces the likelihood that policymakers will step in to protect targeted groups from exploitation.

A person's political power and popularity (or lack thereof) should not determine her cost of government. Charging powerless groups with higher fee burdens may be convenient, but it is unprincipled and fundamentally at odds with fair public administration.

C. HUMAN COST

Because fees can balloon essentially unhindered, resulting fee amounts bear no relationship to an individual's ability to pay. While all fees are structurally separate from ability to pay, a user's ability to forego the service imposes some personal limit.¹⁹⁴ Not so for criminal fees. Further, courts impose such fees on individuals *as* individuals—that is, not on their properties or businesses. This means that individuals have no last resort option to escape the fees, such as borrowing against or selling property or closing a business. And, because these fees are imposed during the criminal process, they are often not dischargeable in bankruptcy.¹⁹⁵ For all these reasons, criminal justice fees inflict significant human cost.

After including interest and other collection charges,¹⁹⁶ these fee burdens can become an insurmountable financial hurdle for individuals already facing the significant challenge of finding employment with a criminal record.¹⁹⁷ Thousands of dollars in debt translates into severe hardship for payors. Many fee debtors face wage garnishment, bank account levies, and property liens.¹⁹⁸ Further, because these fees take so long to pay, individuals continue to show pending criminal cases on their record, which can make securing work yet more difficult.¹⁹⁹

The human toll is substantial. For many, fees lead to years of debt and continued monitoring by the criminal justice system.²⁰⁰ This never-ending government oversight causes frustration and erodes trust in the criminal justice

193. See Willon, *supra* note 16 (describing a Riverside County jail fee and quoting a county official who remarked that those who “do the crime, . . . [will also] pay the dime”).

194. It is worth questioning whether such ability exists for necessary utilities, like heat in freezing temperatures.

195. See *In re Sanders*, 589 B.R. 874, 881 (Bankr. W.D. Wash. 2018).

196. HARRIS, *supra* note 7, at 28–41 tbl.2.4 (discussing various collection fees by state, including interest and payment plan fees); *id.* at 52–55 (describing individuals' experiences with criminal justice debt, which only rose due to interest, despite debtors making regular payments).

197. FIN. JUST. PROJECT, *supra* note 67, at 2 (noting that most formerly incarcerated individuals in their survey were unemployed, and that those who were employed earned on average \$2,500 per year).

198. *Id.* at 6.

199. *Id.* at 10.

200. HARRIS, *supra* note 7, at 56–57 (explaining that those with lower income make smaller monthly payments, resulting in larger total debt burdens over time due to high interest rates); DILLER, *supra* note 96, at 10–13 (describing how Florida's criminal justice debt hinders reentry by straining debtors' ability to pay for basic needs).

system, as payors feel exploited.²⁰¹ Some are forced into untenable living situations, such as relying on estranged partners.²⁰² Government debt also makes securing credit difficult or impossible, preventing some from buying vehicles or homes, and otherwise constraining their independence and stability.²⁰³ Debt can also strain relationships, for example, by preventing people from marrying.²⁰⁴ As these hardships compound, debtors often face deep and prolonged despair.²⁰⁵

This human cost extends to defendants' families as well. Survey research conducted by the Ella Baker Center for Human Rights found that non-incarcerated family members were primarily responsible for paying criminal justice debt, including court and prison fees, for nearly two-thirds of respondent households.²⁰⁶ Thirty-eight percent of paying families reported that court fines and fees were the most difficult costs to repay, second only to attorney's fees.²⁰⁷ The report also noted that such costs are disproportionately borne by women, often mothers and even grandmothers of defendants.²⁰⁸

While a lack of restraint need not cause exorbitant fees, when coupled with revenue incentives on the part of the collecting agency, such a result is likely. Unsurprisingly, excessive fees have been the actual result in the criminal justice system, resulting in significant human cost.

D. A RIGHT TO MEANINGFUL PROTECTION

Some may be unbothered by the ballooning size and scope of criminal justice fees. Perhaps, they might argue, these fees accurately reflect the cost to government.²⁰⁹ Perhaps criminal defendants should rightly bear this cost.²¹⁰ Or

201. HARRIS, *supra* note 7, at 59.

202. *Id.* at 63 (describing a debtor forced to live with her ex-husband, which she described as "uncomfortable").

203. *Id.*

204. *Id.* at 64 (describing a couple who decided not to get married out of fear of the ramifications of one person's legal debt).

205. *Id.* at 70.

206. SANETA DE VUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, ELLA BAKER CTR. FOR HUM. RTS., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 13 (2015), <http://whopaysreport.org/who-pays-full-report/> (finding that "63% of respondents reported that family members were primarily responsible for covering conviction-related costs," including court fines and fees and incarceration fees, as well attorney's fees, commissary costs, bail, and other related charges).

207. *Id.* at 14.

208. *Id.*

209. Although, as explained above, determining the actual cost of government services is difficult, and in some cases impossible. *See supra* notes 162–165 and accompanying text. Truly, the boundary of includible costs is endless, especially if social costs are considered. *See Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1354 (Cal. 1997) (allowing consideration of social harms in setting regulatory fees). The social cost of criminal behavior could arguably include indeterminable items such as emotional trauma, increased future police costs, and so forth. Thus, the potential inclusion of social costs renders such an inquiry pointless. This reasoning may suggest that fees are not appropriate in such circumstances, and even that fines may be the more appropriate absorber of social cost.

210. Supporters of such fees might argue that this distribution of costs is appropriate because these payors make disproportionate use of the service being funded. Similar arguments have been made in the context of other fees, such as fire response fees. *See, e.g.,* Kevin Schwaller, *City of Peoria Looking to Add Fees for Fire Department Responses*, CENT. ILL. PROUD (Feb. 7, 2019, 10:13 PM),

perhaps these fees encompass negative externalities, deter bad behavior, or punish the guilty.²¹¹

Even if true, none of these rationales obviates the government's responsibility to ensure a principled limit on fees imposed on system users.²¹² In other words, the lack of a principled limit on government exactions is per se harmful. While the other three harms described in this Part are consequential, this harm is based in payors' inherent rights. Specifically, payors deserve meaningful political and procedural protections against potentially exploitative government exactions.²¹³

Political philosophy frameworks tend to agree that coercive government exactions must be subject to some restraint, whether by individual or aggregate consent, or via substantive limits such as fairness principles.²¹⁴ Without restriction, for instance, government exactions risk becoming unauthorized takings.²¹⁵ Taxes escape such a fate, according to some, because they are enacted by elected representatives and thus benefit from aggregate consent via the political process.²¹⁶ At the state and local level, taxes are also often subject to voter approval, further increasing aggregate consent.²¹⁷

For fees, because courts and agencies typically decide fee amounts,²¹⁸ the aggregate consent conferred via elected officials and public political processes is severely attenuated. Fees' legitimacy instead most often arises not from aggregate consent, but from individual consent. Payors can avoid most user fees by foregoing the levied good or service. Not so for criminal justice fees. Lacking both aggregate and individual consent, other substantive restrictions are necessary to protect payors from exploitation.²¹⁹ However, as described above, neither the market, nor the political process, nor, in many states, the judicial

<https://www.centralillinoisproud.com/news/local-news/city-of-peoria-looking-to-add-fees-for-fire-department-responses/> (explaining that fees are appropriate to fund fire services rather than a property tax increase because “not all residents call the fire department”).

211. Surely, the desire to punish criminal acts and deter criminal behavior plays a role in the ballooning of criminal justice fees. However, it neither fully explains nor justifies the size of criminal justice fees, because the fees bear no relationship to the severity of the offense. In fact, lesser offenses often carry larger fee burdens. See Harris et al., *supra* note 48, at 253–54.

212. See U.S. CONST. amend. VIII.

213. Such rights are enshrined, most notably, in Fifth Amendment protections against government takings without compensation, U.S. CONST. amend. V, as well as Eighth Amendment protections against excessive fines, U.S. CONST. amend. VIII.

214. Wolfgang Schön, *Taxation and Democracy*, 72 TAX L. REV. 235, 244–45 (2019) (labeling these as consent- versus content-based restrictions).

215. See Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 203–06 (2002) (defining a possible boundary between taxes and takings).

216. *M'Culloch v. State*, 17 U.S. 316, 428 (1819) (“In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.”); Schön, *supra* note 214, at 238 (noting, but ultimately questioning, the common view that taxation is “legitimized by the people’s consent” via elected representatives).

217. Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884, 1920 tbl.1 (2020).

218. HARRIS, *supra* note 7, at 27.

219. See Schön, *supra* note 214, at 236, 254.

process imposes meaningful restraint on criminal justice fees. The lack of restriction violates payors' fundamental right to protection from unrestrained government exactions.

IV. IMPLICATIONS OF A PUBLIC FINANCE FRAMEWORK

Applying a public finance framework to criminal justice fees is useful for at least two reasons. First, it allows us not only to recognize a serious structural flaw in criminal justice fees, but also to identify and distinguish similar fees imposed in other settings. Criminal justice fees serve as the most extreme example of nonmarket fees, which fall along a spectrum ranging from benign to severely problematic, as described below.²²⁰

Second, a public finance lens suggests certain judicial and policy reforms for egregious nonmarket fees. Most importantly, policymakers should seriously consider whether fee-financing is appropriate where a monopolistic agency provides a mandatory service to a captive payor. Fees may be patently inappropriate in such a nonmarket context. However, if policymakers decide otherwise, nonmarket fees must be subject to meaningful restraint and should avoid creating perverse incentives for collecting agencies. To that end, the Article briefly surveys several judicial and statutory reforms that judges and policymakers should consider, including reinstating a voluntariness requirement, limiting fees to actual expenses, prohibiting agencies from keeping the fee revenue they collect, and placing a per-person cap on total fees.

A. COMPARING NONMARKET FEES

Many user fees operate outside of a market environment, particularly regulatory or licensing fees.²²¹ For instance, a driver's license is a basic necessity in most places in the United States and can only be obtained from the state motor vehicle agency. Such agencies clearly do not operate in a competitive market. Yet, driver's license fees are unlikely to raise the same concerns highlighted above.

This Subpart breaks down the reasoning in Part II, detailing user fee characteristics that may erode meaningful constraints. Doing so provides a framework for evaluating other potentially exploitative nonmarket fees. This analysis reveals that nonmarket fees fall on a loose continuum, with criminal justice fees occupying the extreme end.

Monopolistic Agency. A government monopoly is a necessary condition for unbounded fees, but it is not a sufficient condition on its own. Many government agencies are monopoly providers of the public goods and services they offer because they operate without significant competition.²²² That fact alone does not

220. Jensen, *supra* note 25 (describing fees imposed on accident victims).

221. A regulatory fee is based on the government's police power to regulate a certain activity, often including licensing or inspection fees. *See* Duff, *supra* note 14, at 393 (defining regulatory fees); *supra* notes 31–37 and accompanying text (describing user fees and regulatory fees).

222. Examples of monopoly-provided public goods include police and military protection, courts, regulatory licenses, parks, public transportation, and the postal service. *See, e.g.*, Steven G. Calabresi & Larissa C.

render their fee-pricing suspect. So long as the government monopolist faces the limits of consumer demand, it will face some limits on fee pricing.²²³

Mandatory Services Decided by the Agency. This feature contributes significantly to criminal fees' unbounded nature. Where agencies assign mandatory services to users, consumer demand cannot exert downward pressure on fee levels.²²⁴ The feature encompasses agencies' power to decide the level of service consumption, as well as users' inability to reduce or forego consumption of the charged service. Importantly, when agencies have the power to determine service consumption, they face incentives to increase the fee-funded services provided to users.

Lack of User Choice to Enter the Regulated System. If users cannot avoid triggering the charged service at the outset, they are at the whim of agencies that face perverse fiscal incentives to inflate service provision.²²⁵ For instance, criminal behavior is based on complex social and psychological factors²²⁶ and is therefore quite distinct from, say, the decision to purchase real estate that may be subject to mandatory fees. Even within the criminal justice system, fees differ with regard to the user's initial control over triggering fees. For instance, one surely can choose whether or not to commit premeditated murder. However, someone who lacks stable housing may have little control over sleeping or eating on the sidewalk.²²⁷

Users' Lack of Political Power. The powerlessness of targeted payors is an important feature as well. Agencies may be able to target criminal defendants in part because criminal defendants lack the political power to effectively challenge exploitative charges.²²⁸ In contrast, where payors represent an important

Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983, 986 (2013) (describing various government-run or government-sanctioned monopolies, including public schools); U.S. POSTAL SERV., UNIVERSAL SERVICE AND THE POSTAL MONOPOLY: A BRIEF HISTORY 12 (2008), <https://about.usps.com/universal-postal-service/universal-service-and-postal-monopoly-history.pdf> (“The group of federal laws known collectively as the Private Express Statutes gives the United States Postal Service a monopoly over the carriage of letter-mail.”).

223. See *supra* notes 106–112 and accompanying text.

224. See *supra* notes 120–128 and accompanying text.

225. See *supra* notes 175–180 and accompanying text.

226. For a more detailed discussion of these factors, see *supra* Part II.B.

227. See *supra* notes 86–90 and accompanying text.

228. Criminal defendants may lack political power for several reasons. First, formerly incarcerated individuals may be unable to vote in many jurisdictions, directly curtailing an important source of political power. HARRIS, *supra* note 7, at 49. Second, they often belong to historically marginalized groups, such as racial minorities and the poor, that have been targets of political suppression. See *supra* notes 183–189 and accompanying text; see also Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and American Democracy*, CTR. FOR AM. PROGRESS (Aug. 7, 2019, 7:00 AM), <https://www.americanprogress.org/issues/race/reports/2019/08/07/473003/systematic-inequality-american-democracy/> (explaining how recent Supreme Court decisions may result in the suppression of voters of color). Lastly, criminal defendants' unpopularity may reduce the public outcry over their exploitation. See *Pay-As-You-Go Government*, *supra* note 129; see also Reynolds, *supra* note 21, at 390–91 (“[T]he realities of political representation will undoubtedly provide an incentive for local government to seek a way to impose costs on those who have no voice in its political process.”).

political constituency, or where they are able to organize into a cohesive group, they may have some protections against ballooning fee burdens.²²⁹

Other Factors. Other factors are important to identifying and differentiating harmful from benign nonmarket fees. For example, the involvement of private companies in levying and collecting fees exacerbates many of the perverse incentives described herein, in part due to lack of political oversight.²³⁰ On the payor side, private insurance companies may alleviate some of the harms delineated above by paying individuals' fee burdens and by acting as a powerful lobbying group. Additionally, some fee structures reflect users' ability to pay, such as those based on property size, which also reduces individual harms.

Together, these characteristics describe a nonmarket user fee continuum. Fees that exhibit fewer problematic characteristics, or exhibit them more weakly, will have built-in constraints and thus should not require additional intervention. Those fees that exhibit a greater number of problematic characteristics, or exhibit them more strongly, will require additional restraint via courts and policymakers. Many criminal justice fees occupy the extreme end of the continuum and therefore require additional constraints. At the other end of the continuum may lie other nonmarket fees that differ from criminal justice fees in notable ways, for example, fees attaching to real property or business licensing fees.

Fees that attach to real property seemingly bear many similarities to nonmarket criminal justice fees, and thus require special attention.²³¹ For instance, special assessments fund public capital improvements via mandatory property assessments.²³² The cost of new sidewalks might be funded by a special assessment levied on all properties abutting them.²³³ Stormwater remediation fees work similarly, funding agencies that address stormwater runoff, as required by the Federal Clean Water Act.²³⁴ Localities often base the fees on a property's impervious surface area because impervious ground cover increases harmful

229. *Cf.* Reynolds, *supra* note 21, at 391 (noting that, compared to politically powerless constituencies, effective opposition to government charges is more likely to arise from "residents who can use the political process to voice their displeasure with the actions of their local representatives"). For instance, homeowners are more active in local politics than renters are, which may protect homeowners from exploitative government charges. See Andrew Hall & Jesse Yoder, Does Homeownership Influence Political Behavior? Evidence from Administrative Data (Mar. 26, 2019) (unpublished manuscript), <http://www.andrewbenjaminhall.com/homeowner.pdf> (finding that homeowners are more active in local elections compared to non-homeowners).

230. See generally Highsmith, *supra* note 76, at 13–21 (detailing the involvement of private companies throughout the corrections system, and describing common problems such as lack of consumer protections, kickbacks to corrections agencies, lack of consumer choice, and so forth).

231. See *Bloom v. City of Fort Collins*, 784 P.2d 304, 304–05 (Colo. 1989) (allowing a "transportation maintenance fee" charged to property owners for upkeep of city streets abutting their properties); *Dean v. Town of Addison*, 534 S.E.2d 403, 405 (W. Va. 2000) (allowing a "fire service fee" to fund a volunteer fire department). *But see Covell v. City of Seattle*, 905 P.2d 324, 333 (Wash. 1995) (en banc) (disallowing a residential street utility charge as an unconstitutional tax); *First Baptist Church of St. Paul v. City of St. Paul*, 884 N.W.2d 355, 365 (Minn. 2016) (holding that a city's right-of-way street maintenance assessment was a tax, not a fee, and thus was "subject to constitutional restrictions on the taxing power").

232. BIRD, *supra* note 12, at 17; Reynolds, *supra* note 21, at 397–402 (describing special assessments).

233. BIRD, *supra* note 12, at 17; Reynolds, *supra* note 21, at 397.

234. Water Quality Act of 1987, 33 U.S.C. § 1342(p) (2018).

stormwater runoff.²³⁵ Both special assessments and stormwater fees attach to real property and are assessed against property owners who have limited control over the charged amount.²³⁶

Special assessments, stormwater fees, and other similar charges operate outside of a normal market. They are levied by monopolistic agencies that decide the scope of services and the fee amount. And yet, they are not subject to the same abuses as criminal justice fees because they differ in several important ways.

For one, homeowners have a great deal of control over whether or not to enter the regulated system, since they can choose not to buy property in a locality that levies stormwater fees or other assessments. Most homebuyers engage in a lengthy research process prior to purchasing a home, which should include researching property taxes and additional charges. Those who cannot pay such fees can forgo the home purchase. Certainly, if fees or assessments are enacted after purchase, payors' options are more limited. However, those who truly cannot afford the additional charge can sell their home.

In terms of fee-setting incentives, agencies may still face incentives to inflate fee levels because any charge remains attached to the property, meaning that someone must ultimately pay it. However, unlike criminal defendants, homeowners have political power. They are stable residents of a district, able to vote in local elections, and tend to be more active in local politics compared to renters.²³⁷ Local agencies may balk at gouging such fee payors for fear of political reprisal.

Lastly, fees attaching to real property are less harmful to payors' lives. Because the charges depend on property size,²³⁸ they roughly account for ability-to-pay. And, where the charges funded capital improvements such as new sidewalks, benefits should be capitalized into the price of the home, allowing the homeowner to recover a portion of the cost upon sale. For these various reasons, fees attached to real property do not raise the same concerns as criminal justice fees.

Further along the continuum, and closer to criminal justice fees, may fall accident fees and fire fees.²³⁹ Such fees allow police and fire departments to bill motorists or homeowners for services provided in responding to traffic

235. See Scharff, *supra* note 113, at 205–09 (describing stormwater remediation fees); Jerry Zhirong Zhao, Camila Fonseca & Raihana Zeerak, *Stormwater Utility Fees and Credits: A Funding Strategy for Sustainability*, 11 SUSTAINABILITY, Apr. 1, 2019, at 1, 12–13 (exploring the increased use and benefits of stormwater utility fees).

236. Property owners have *some* control over the charged amount in the long-term, as they can resurface their properties with permeable ground cover or choose to live on smaller parcels.

237. See Hall & Yoder, *supra* note 229, at 2, 22 (finding that homeowners are more active in local elections compared to non-homeowners).

238. See Scharff, *supra* note 113, at 205–09.

239. See TAMI STANTON & JOE THESING, NAT'L ASS'N OF MUT. INS. COS., OMINOUS TREND: GROWTH OF MUNICIPAL ACCIDENT RESPONSE FEES 1 (2006), <https://www.namic.org/pdf/publicpolicy/060413AccidentResponseFees.pdf>; Ina Jaffe, 'Crash Tax' More Bust than Boom for Many Cities, NPR (Mar. 8, 2011, 12:01 AM), <https://www.npr.org/2011/03/08/134265786/crash-tax-more-bust-than-boom-for-many-cities>.

accidents, structure fires, and other emergencies.²⁴⁰ Although insurance companies cover the cost in some cases, individuals may be held responsible if their insurance refuses to pay.²⁴¹

Like criminal court fees, monopolistic agencies impose public safety fees on system users who have little or no control over the services consumed.²⁴² The fire department decides how many trucks and firefighters to send, without input from the homeowner.²⁴³ Further, and unlike fees attaching to property, many payors have no choice in triggering the onset of services—that is, they do not choose for their house to catch on fire.²⁴⁴ Of course, some do have control over their actions. A driver using her cell phone chooses to behave unsafely and thus could have prevented her use of public services. For this reason, fees attaching only to at-fault individuals are perhaps less problematic than those applying to faultless accident victims.

Political power is once again an important factor as well, although it cuts in different directions. Fire department fees typically apply to homeowners, a group with some political power, as explained above. Nonresident drivers, on

240. See, e.g., Sarah Netter, *Fire Departments Charge for Service, Asking Accident Victims to Pay Up*, ABC NEWS (Feb. 3, 2010, 7:34 AM), <https://abcnews.go.com/Business/fire-department-bills-basic-services-horri-fy-residents-insurance/story?id=9736696>; David Lohr, *Arizona Firefighters Charge Families Nearly \$20,000 After Home Burns Down*, HUFFPOST, https://www.huffingtonpost.com/2013/11/08/justin-purcell-fire_n_4242734.html (Nov. 11, 2013); see also Mariel Garza, *Opinion: 'First Responder Fee' Is a Backward Response to Changing Duties of Urban Fire Departments*, L.A. TIMES (July 24, 2015, 1:03 PM), <https://www.latimes.com/opinion/opinion-la/la-ol-first-reponder-fee-long-beach-0724-story.html>.

Some states have outlawed certain accident response fees. See, e.g., OKLA. STAT. ANN. tit. 47, § 10-118 (West 2020) (enacted 2009); KAN. STAT. ANN. § 12-16,129 (West 2020) (enacted 2011); ALA. CODE § 32-10-13 (West 2020) (enacted 2010); Tenn. Att'y Gen. Op. No. 09-153 (Sept. 8, 2009) (holding that a Tennessee statute banning accident response service fees did not apply to fire departments); Jensen, *supra* note 25; Sam Metz, *Brown Signs 'Prosecution Fee' Bill Sparked by Desert Sun Investigation*, DESERT SUN, <https://www.desertsun.com/story/news/politics/2018/09/06/california-bans-cities-charging-residents-prosecution-fees/1208614002/> (Sept. 6, 2018).

241. See Complaint at 3, *Moore v. Cost Recovery Corp.*, 2008 WL 823209 (E.D. Tex. Jan. 14, 2008) (No. 508-cv-00007DF) (filing claim against Cost Recovery Corporation for debt collection against plaintiff personally, after her insurance company failed to pay the fees); see also Jaffe, *supra* note 239 (reporting that insurance companies often refuse to pay such fees, and that the cost ultimately devolves to the motorist); LEAGUE OF MINN. CITIES, FIRE DEPARTMENT MANAGEMENT AND LIABILITY ISSUES 21 (2019), <https://www.lmc.org/wp-content/uploads/documents/Fire-Department-Management-and-Liability-Issues.pdf> (providing that Minnesota cities and towns can “use any means available to private parties to collect” unpaid fire service fees).

242. See Netter, *supra* note 240 (detailing costs involved in a fire fee, which are outside of the payor's control); Vicki Gonzalez, *Questions Surround Sacramento Fire 911 Response Fee*, KCRA, <https://www.kcra.com/article/questions-surround-sacramento-fire-911-response-fee/20724253> (May 16, 2018); *Taken for a Ride? Ambulances Stick Patients with Surprise Bills*, NBC NEWS (Nov. 27, 2017, 7:18 AM), <https://www.nbcnews.com/health/health-news/taken-ride-ambulances-stick-patients-surprise-bills-n824141> (reporting on “questionable billing practices” by ambulance providers).

243. Netter, *supra* note 240.

244. In the context of car accidents, occasionally such fees are levied only on nonresident drivers or at-fault drivers. See INT'L FIRE CHIEFS ASS'N, COST RECOVERY FOR FIRE-BASED EMERGENCY RESPONSE SERVICES 1, <https://www.iafc.org/topics-and-tools/resources/resource/cost-recovery-for-fire-based-emergency-response-services> (last visited Feb. 4, 2021) (supporting accident fees imposed on nonresident, at-fault motorists). However, other fees are levied on residents who were not at fault. See Jensen, *supra* note 25 (reporting that the scope of the fees varies by location).

the other hand, lack any political power, making them a particularly vulnerable payor group.²⁴⁵

The involvement of insurance companies may also mitigate some concerns about accident and fire fees. By bearing some of the financial burden, they reduce the human toll of these fees. Insurance companies also represent powerful business interests that can lobby against many such charges.²⁴⁶ Thus, fees that may be covered by insurance are less problematic.

Classifying fees according to these features is extraordinarily complex. Thousands of local and state government agencies, operating under fifty different state legal systems, impose countless nonmarket charges on users. This Article cannot comprehensively categorize all such fees. Rather it seeks to identify and assess one particularly harmful category—criminal justice fees—and to flag that similar problems could potentially arise in other areas under certain circumstances. It also seeks to encourage others to undertake similar fee analysis using the framework provided herein. By being mindful of agency incentives and payor power, policymakers and advocates can identify and prevent other potentially unbounded nonmarket fees before they become entrenched.

B. REFORMING NONMARKET CRIMINAL JUSTICE FEES

Recognizing the nonmarket nature of criminal justice fees suggests certain reforms. In the most egregious cases, governments should carefully consider the propriety of fee-financing. If fees are deemed necessary—perhaps to raise essential revenue in the face of tax limits—they should be subject to principled constraints. Indeed, banning one source of revenue may drive government agents to create other, worse financial exactions. With that in mind, this Subpart suggests how judges and policymakers might impose meaningful restraint on criminal justice fees and reduce perverse incentives for collecting agencies.

Reforming criminal justice financing is a topic that deserves concerted and thorough attention. This Subpart does not have the space to address such financing generally. Nor does this Subpart describe a comprehensive reform package for criminal justice fees. Rather, its aim is to suggest a short list of criminal justice fee reforms based specifically on the public finance reasoning herein. Other criminal justice fee problems—for example, race-based motivations and racially disparate outcomes²⁴⁷—deserve and require their own separate consideration and targeted responses.

Before describing the proposed reforms, it is also worth noting that this Article does not advocate ability-to-pay inquiries for criminal justice fees, or

245. Many car accident fees only apply to out-of-town drivers. See Jaffe, *supra* note 239; INT'L FIRE CHIEFS ASS'N, *supra* note 244.

246. For an example of such public policy advocacy by insurance companies, see STANTON & THESING, *supra* note 239.

247. See generally Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93 (2015) (arguing that a comprehensive response to debtors' prisons requires acknowledging race-based motivations).

suggest basing fees on payors' income.²⁴⁸ While ability-to-pay inquiries can be beneficial, unbounded fees are problematic even if imposed only on those who can afford to pay them. For example, even with such limits, police may continue to target and exploit politically powerless groups, such as communities of color or nonresidents.²⁴⁹ Moreover, ability-to-pay inquiries are invasive, inconsistently applied, and difficult to administer.²⁵⁰ Thus, ability-to-pay inquiries are insufficient to solve the problems raised herein.

1. *Ban Nonmarket Criminal Justice Fees*

Perhaps fee funding is wholly inappropriate in the criminal justice context, where users have little control over consumption of a mandatory service provided by a monopolistic agency. This is especially true where introducing market-like forces would be difficult or impossible for various reasons. For instance, allowing defendants to choose their criminal justice services might undermine their punitive nature. It may also enable wealthier defendants to opt into better services, creating a two-tiered criminal justice system.²⁵¹ For these reasons, banning most criminal justice fees may be the appropriate response.²⁵²

However, policymakers who wish to ban entire fee categories should also ensure that government can equitably raise the missing revenue elsewhere. Many local governments face tax limiting laws at the state level that make raising non-fee revenue difficult.²⁵³ Eliminating or weakening tax limits is necessary in those places. Without additional funding, agencies may respond to fee bans by cutting vital public services or by crafting more exploitative and less transparent revenue sources. Because of this, fee reforms that account for agencies' revenue needs may be more effective at addressing the problems raised herein.

2. *Judicial Reforms*

As explained above, courts in some states have relaxed judicial fee doctrine, making space for more creative financing mechanisms.²⁵⁴ Courts should consider reversing this pattern for criminal justice fees because these fees lack built-in restraints and thus require outside intervention. Broadly speaking, when

248. As an example of an ability-to-pay policy, Philadelphia eliminated fees as well as fines for defendants with income at or below 125% of the federal poverty line. See Michael Tanenbaum, *Philly D.A. Wipes Out Fines and Fees for Impoverished Defendants*, PHILLYVOICE (July 3, 2019), <https://www.phillyvoice.com/larry-krasner-philadelphia-no-fines-fees-indigent-defendants-poverty-courts/>. An ability-to-pay inquiry is also already required prior to incarcerating individuals for nonpayment. See *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (holding that a court cannot incarcerate individuals for nonpayment of fees without a finding of willfulness).

249. See Zhen, *supra* note 89, at 192–95 (making this argument).

250. See *id.* at 201–04.

251. Alysia Santo, Victoria Kim & Anna Flagg, *Upgrade Your Jail Cell—For a Price*, L.A. TIMES (Mar. 9, 2017), <https://www.latimes.com/projects/la-me-pay-to-stay-jails/> (describing Los Angeles and Orange County's upgraded fee-funded jails).

252. Others have argued for abolishment of criminal justice fees. See Ruback, *supra* note 11, at 1800; Reitz, *supra* note 11, at 1760.

253. See Jurov Kleiman, *supra* note 217, at 1887–88.

254. See *supra* Part II.C.

adjudicating challenges to criminal court fees, courts should be especially mindful of the incentives that fee-setting and collecting agencies face. For instance, if resource-starved criminal courts and agencies must fund themselves via fee collection, and if reviewing courts do not question the propriety of the level of services assigned to payors, agencies will have the incentive and the power to inflate fees by increasing judicial, carceral, and monitoring services. Such considerations should be paramount to regulating criminal justice fees.²⁵⁵

This Subpart suggests two possible avenues through which courts might increase judicial scrutiny of criminal justice fees: reengage a voluntariness requirement and limit fees to actual expenditures. Importantly, the Article merely introduces these opportunities as possible avenues for advocacy and judicial reform. It is not a deep dive. Both strategies should be further explored by courts, advocates, and scholars seeking solutions to the problem of criminal fees.

a. Reengage Voluntariness Requirement

Although traditional user fee doctrine required that fees be voluntary, courts in many states have abandoned or loosened this condition.²⁵⁶ By allowing fees to apply to mandatory services, courts have enabled agencies to exploit captive and powerless payors.²⁵⁷ Reengaging a strict voluntariness requirement may reverse this pattern by rendering invalid such mandatory charges. However, requiring voluntariness could also disqualify useful charges such as the stormwater assessment fees described above. Advocates and courts should therefore approach this strategy with caution.

In states where courts have eliminated a voluntariness requirement altogether,²⁵⁸ such a strategy may prove difficult. However, some states' fee doctrine may leave room for challenge by continuing to require that user fees be voluntary in some cases. Michigan may offer such an opportunity. In *Bolt v. City of Lansing*, the Supreme Court of Michigan held that a user fee must be voluntary,²⁵⁹ meaning that the payor can "refuse or limit their use of the commodity or service."²⁶⁰ In the years since *Bolt* was decided, the Michigan

255. Certainly, some courts have considered courts' and agencies' incentives when adjudicating challenges to criminal justice fees. Such inquiries typically focus on courts', attorneys', and agencies' incentives to punish or jail criminal defendants in contravention of their constitutional rights. *See, e.g.,* *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding that subjecting a defendant to a trial before a local judge and village mayor with a "direct . . . pecuniary interest in convicting the defendant" violated the Due Process Clause of the Fourteenth Amendment). Such incentives are certainly egregious, but they overlook fees' financial consequences as problematic in and of themselves.

256. *See* *State v. Medeiros*, 973 P.2d 736, 741–42 (Haw. 1999) (summarizing the declining reliance on voluntariness in determining the validity of fees).

257. *See supra* Parts II.A and III.B.

258. *Medeiros*, 973 P.2d at 741–42; *Bloom v. City of Fort Collins*, 784 P.2d 304, 310–11, 311 n.8 (Colo. 1989) (declining to "engraft a 'voluntariness' factor onto the tax-fee distinction" in resolving the case).

259. *Bolt v. City of Lansing*, 587 N.W.2d 264, 269–72 (Mich. 1998). The charge must "serve a regulatory purpose" and be "proportionate to the necessary costs of the service." *Id.* at 269.

260. *Id.* at 270.

Court of Appeals has inconsistently applied such reasoning to criminal justice fees.

Notably, in *Dawson v. Secretary of State*, the court considered substantial “driver responsibility fees” assessed on misdemeanor and felony traffic violations.²⁶¹ The court held the fees to be invalid in part because “they [were] clearly not voluntary, but automatic upon the conviction of relevant offenses.”²⁶² Expanding such reasoning might create space to invalidate other similar criminal court fees. However, the Michigan Court of Appeals has more recently held otherwise, either finding criminal court charges to be allowable as taxes,²⁶³ or simply declaring that the *Bolt* holding does not apply to criminal court charges authorized by statute.²⁶⁴ In Michigan and similar states, courts should carefully consider what incentives they create by acquiescing to mandatory criminal justice charges. Doing so has allowed agencies to exploit powerless payors. Reengaging a strict voluntariness requirement may reverse this pattern.

Invoking a voluntariness requirement should be approached with caution for at least two reasons. For one, as in Michigan, a court can simply declare involuntary fees to be allowable taxes.²⁶⁵ Such a tax would likely only be declared invalid if it fails to meet tax procedural requirements, which differ greatly from state to state. For instance, some states require that state or local voters approve certain new taxes.²⁶⁶ In states without such requirements, declaring a criminal justice fee to be a tax may simply remove it from user fee analysis, and thus from rigorous court oversight, altogether. Second, reviving a broadly applicable, strict voluntariness requirement could result in courts invalidating other regulatory fees, such as the stormwater remediation fees described above. Because such fees do not raise the same concerns as criminal justice fees, stricter scrutiny for such fees is likely unnecessary. Thus, any litigation strategy invoking the voluntariness requirement should be carefully cabined to criminal justice fees.

261. *Dawson v. Sec’y of State*, 739 N.W.2d 339, 356 (Mich. Ct. App. 2007). The fee amount ranged from \$1,000 to \$2,000 and supported general revenue as well as fire protection funds. *Id.* at 345, 365.

262. *Id.* at 355.

263. In *People v. Duke*, the court classified criminal justice charges as taxes rather than fees, and merely required a showing that the charge be reasonable as such. *People v. Duke*, No. 325473, 2016 WL 1445219, at *1 (Mich. Ct. App. Apr. 12, 2016) (remanding to the trial court and requiring it to “articulate a factual basis for the costs it imposed”). The court reached a similar holding in *People v. Cameron*. *People v. Cameron*, No. 321387, 2015 WL 4599186, at *1 (Mich. Ct. App. July 28, 2015), *appeal denied*, 929 N.W.2d 785 (Mich. 2019). Interestingly, upon denying the appeal in *People v. Cameron*, Michigan Supreme Court Justice McCormack issued a concurrence that noted the special problems raised by the imposition of criminal court fees, including “the pressures [district judges] face . . . to ensure their courts are well-funded.” 929 N.W.2d at 786.

264. *People v. Knight*, No. 324028, 2016 WL 716330, at *2 (Mich. Ct. App. Feb. 23, 2016) (“We seriously question the application of *Bolt* to the issue of court costs authorized by state statute.”).

265. This Article does not take the position that criminal justice fees are actually taxes. *See supra* note 49 and accompanying text.

266. *See generally* Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 1 (2001) (discussing laws requiring voter approval of new taxes imposed by local governments).

b. Limit Fees to Actual Expenditures

As explained above, current judicial fee doctrine in most states fails to meaningfully limit criminal justice fees to actual expenses.²⁶⁷ Meanwhile, courts and criminal justice agencies impose myriad fees with little incentive to ensure that the amount collected reflects the costs imposed by the system user. To remedy this, courts should require that criminal justice fees not exceed agencies' actual expenditures on a defendant's case. The Model Penal Code recommends the same.²⁶⁸ Under such a rule, while total fees could fall below actual expenses, in no event could they exceed expenditures.²⁶⁹ This rule would not only restrain fee burdens, but by imposing substantiation costs on agencies, it would ensure that agencies consider actual costs when determining fee levels.

Imposing a strictly enforced expenditure limit raises many challenges, the greatest of which is defining clear and reasonable criteria for measuring per-case expenditures. Such analysis requires thoughtfulness, rigor, and more space than this Subpart allows. Rather than providing a detailed blueprint, this Subpart will note several important considerations in the hope of encouraging further work in this area, and with particular attention paid to incentives created for fee-levying agencies.

Courts should consider limiting criminal justice fees to marginal costs only. Where fees cover marginal costs, agencies face little financial incentive to inflate fee-funded services because the fees only generate enough revenue to offset those specific services. That is, there is no net revenue benefit to service expansion. However, where fees encompass agencies' fixed costs—such as utilities or personnel—or capital expenditures—such as the cost to build a courthouse—agencies can justify inflating services to satisfy general budgetary needs.²⁷⁰ In such a case, resource-starved agencies face a financial incentive to engage in fee-chasing behavior.

Courts should categorically disallow criminal justice fees from including social costs, which are indeterminate, non-separable, and allow for essentially unlimited fees.²⁷¹ Indeed, fees covering social costs currently represent some of the more egregious criminal charges, as they fund services entirely separate from

267. See *supra* Part II.C.

268. The Model Penal Code takes this position. See Reitz, *supra* note 11, at 1764 (“[N]o costs, fees, or assessments may be imposed in excess of actual expenditures in the offender’s case.”).

269. The court in *Bolt v. City of Lansing* offers an example of such analysis in the context of stormwater service fees. There, the court found that the charges included a significant portion of the \$176 million total capital expenditure underlying the project. *Bolt v. City of Lansing*, 587 N.W.2d 264, 270 (Mich. 1998). As a result, the charges included investments in capital from which the city would benefit for many years, far beyond the benefit provided to each individual payor. *Id.*

270. Fixed costs and capital costs would occur regardless of any one individual’s behavior. For instance, if a courthouse must remain open during normal business hours, each individual user imposes no additional marginal cost in terms of building utilities or court personnel. This is similar to the idea of “nonrivalrous” public goods—goods in which one person’s use does not diminish that of another.

271. Despite these issues, courts have sanctioned fees covering social costs. See *State v. Young*, 238 So. 2d 589, 590 (Fla. 1970) (“It is not unreasonable that one who stands convicted of such an offense 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.”).

a payor's particular case. For example, criminal defendants currently pay fees to cover counseling services for unrelated parties, educational programs, highway maintenance funds, and so forth.²⁷² Courts should invalidate such fees, as they allow for ever expanding fee burdens and transform criminal courts into revenue generators.

3. Policy Reforms

In addition to heightened judicial scrutiny of criminal court fees, state and local policymakers should reduce agencies' incentives to pursue increased fee revenue. Perhaps most important, providing criminal courts and criminal justice agencies with adequate non-fee revenue would drastically reduce the need for alternative funds.²⁷³ In addition to better supporting the criminal justice system, policymakers should reduce the direct financial benefits that agencies derive from fees, by requiring fee-sharing and imposing a strict per-person fee cap.

a. Require Fee Sharing

Agencies will be less aggressive in levying fees if they do not directly benefit from the collected fee revenue. Instead, fee revenue should be diverted to the regional or state level—for example, to a state public safety fund that is strictly monitored by independent agents outside of the criminal justice system.²⁷⁴ The revenue can then be redistributed downward according to exogenous criteria—for example, by district population.²⁷⁵ The Model Penal Code and others have proposed the same.²⁷⁶

State reforms related to civil asset forfeiture can provide a model for such a policy. Civil asset forfeiture laws allow law enforcement agencies to seize property associated with illegal activity, even in the absence of a criminal conviction.²⁷⁷ The practice has been roundly criticized in recent years for

272. See, e.g., *State v. Claborn*, 870 P.2d 169, 171 (Okla. Crim. App. 1994); *Broyles v. State*, 688 S.W.2d 290, 291 (Ark. 1985) (upholding a fee allocated to general programs addressing drunk driving and alcohol and drug abuse rehabilitation); *Peraza v. State*, 467 S.W.3d 508, 510, 519–20 (Tex. Crim. App. 2015) (upholding a fee that contributed to the state's highway fund); *Young*, 238 So. 2d at 590.

273. CONF. OF STATE COURT ADM'RS, *supra* note 53, at 14 (arguing the same, and noting that executive and legislative branches are constitutionally obligated to adequately fund the judicial branch).

274. Note that fee revenue cannot be diverted to general revenue, as this would convert the charge from a fee to a tax in many states, and thus trigger additional procedural requirements. See *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992) (“The classic ‘tax’ . . . raises money, contributed to a general fund, and spent for the benefit of the entire community.”); HENCHMAN, *supra* note 38, at 621–22 (distinguishing taxes from fees).

275. MICHAEL MAKOWSKY, HAMILTON PROJECT, A PROPOSAL TO END REGRESSIVE TAXATION THROUGH LAW ENFORCEMENT 16–17 (2019), https://www.hamiltonproject.org/assets/files/Makowsky_PP_20190314.pdf (proposing that criminal justice revenue be remitted to the state level and redistributed downward to localities by population size).

276. Reitz, *supra* note 11, at 1764 (describing the Model Penal Code); MAKOWSKY, *supra* note 275, at 16–17.

277. See Anne Tiegen & Lucia Bragg, *Evolving Civil Asset Forfeiture Laws*, 26 LEGISBRIEF, Feb. 2018, https://www.ncsl.org/Portals/1/Documents/cj/advancing-justice/Anne_Teigan_and_Lucia_Bragg_Evolving_Civil_Asset_Forfeiture_Laws.pdf.

incentivizing corrupt and exploitative behavior by collecting agencies.²⁷⁸ In response, various states and Washington, D.C. have passed laws precluding enforcement agencies from retaining the seized property.²⁷⁹ Some require that proceeds be routed to the state level,²⁸⁰ others limit the percentage of local law enforcement budgets that forfeitures can comprise.²⁸¹ Such policies reduce law enforcement agencies' incentives to seize property in order to increase their departments' revenue. Similar rules for criminal justice fees would do the same.

b. Impose a Per-Person Fee Cap

Imposing a relatively low per-person cap on criminal justice fees would also reduce perverse agency incentives. Such a rule would provide that any one individual cannot bear total fees in excess of some set amount, say \$100. A per-person cap would eliminate agency incentives to inflate services provided to specific individuals, or to prolong monitoring periods to inflate fee revenue.²⁸² It would also significantly reduce the human toll of such fees. However, even with such a cap, agencies would still face incentives to target aggregate resources at fee-funded activities, such as arrests generally, rather than non-fee activities such as community engagement.

Each of these reforms, on its own, is insufficient to correct the problems herein. However, if enacted together they would make criminal justice system funding significantly fairer. If fees were subject to a per-person limit, in no event higher than actual expenditures, and agencies were precluded from keeping the funds, user fee levels would likely decrease significantly. More importantly, the fees would be subject to meaningful constraint, reducing agencies' incentives to misallocate resources, and reducing the likelihood of exploitation of powerless groups. Such reforms would benefit formerly incarcerated individuals struggling to reenter society. Broader society would benefit as well, as public safety agencies refocus their attention on community needs rather than revenue generation.

278. *Id.*; Adam Brandon, Opinion, *Time for Congress to Reform Civil Asset Forfeiture After Court Ruling*, HILL (Feb. 21, 2019, 7:00 PM), <https://thehill.com/opinion/civil-rights/431063-time-for-congress-to-reform-civil-asset-forfeiture-after-court-ruling>; *Forfeiture*, NAT'L ASS'N OF CRIM. DEF. LAWS., <https://www.nacdl.org/forfeiture/> (last visited Feb. 4, 2021).

279. See MAKOWSKY, *supra* note 275, at 15 ("As of early 2019 eight states do not allow the arresting police department to retain seized property.").

280. See IND. CONST. art. VIII, § 2; MO. CONST. art. IX, § 7. Although, notably, the Indiana Supreme Court recently held that law enforcement agencies can keep seized property up to the cost of administering the case, raising the same problems described herein. Olivia Covington, *Divided Supreme Court Upholds Civil Forfeiture Reimbursement of Law Enforcement*, IND. LAW. (June 27, 2019), <https://www.theindianalawyer.com/articles/50719-divided-supreme-court-upholds-civil-forfeiture-reimbursement-of-law-enforcement>. A similar law in Washington, D.C. requires that forfeiture proceeds be deposited into general funds. D.C. CODE ANN. § 41-310 (West 2020) ("The law enforcement agency that seized property forfeited under this chapter may not retain the property for its own use or sell it directly or indirectly to an employee of the agency, to a relative of an employee, or to another law enforcement agency . . .").

281. See GA. CODE ANN. § 9-16-19(f)(4)(A)(ii) (West 2020) (precluding forfeited property from comprising more than one third of the budget of local law enforcement agencies or task forces).

282. See Logan & Wright, *supra* note 98, at 1188 & n.83.

CONCLUSION

This Article has applied a public finance lens to criminal justice fees to show that they occur outside of the market-like environment envisioned for traditional user fee financing. As a result, criminal justice fees operate without meaningful restraint, and instead face upward pressure from monopolistic agencies seeking increased revenue. These unbounded fees incentivize misallocation of public resources, heighten the risk of exploitation of powerless groups, cause significant human suffering, and deny payors meaningful protection from exploitative government exactions.

This Article also sounds a warning alarm: Unbounded, nonmarket fees can arise outside of the criminal justice system. To aid policymakers and advocates in identifying and halting the spread of potentially exploitative fees, this Article provides a list of problematic fee characteristics, the presence of which may erode meaningful restraints. Policymakers and advocates can use this framework to prevent unbounded nonmarket fees in other areas before they become entrenched revenue streams.

Levying agencies are hardly to blame for nonmarket fees. They face an unholy trinity of insufficient funding, the power to impose fees on captive payors, and a mandate to provide vital public services. Rather, state and local legislators—the architects of current funding shortfalls—and voters—the drivers of such policies—bear the ultimate responsibility for creating the incentives to which agency staff have responded.

But, there is good news. Policymakers and courts can correct these incentives, and this Article provides a blueprint for how to do so. The answer lies in prudent fiscal design based on thoughtful consideration of agency incentives. Without such vigilance, government systems become victims of their own profligacies, and public wellbeing suffers in the process.