

# COMMENT

## THE BROKEN TAILLIGHT THEORY: STRIKING A BALANCE BETWEEN DUE PROCESS REQUIREMENTS AND BUDGETARY CONCERNS IN TEXAS MUNICIPAL COURTS\*

### ABSTRACT

There has been a recent surge of due process constitutional concerns in the criminal justice system. One such concern comes in the form of the imposition of fines and fees on indigent individuals, specifically in the Houston municipal context. This Comment explores the current caselaw and legislation around municipal fines and fees and indigency. Part I uses a hypothetical to set out the issues posed by imposing municipal fines and fees on the indigent. In Part II, this Comment analyzes the offender-funded model of the American criminal justice system through both past and present practices. In Part III, the analysis focuses on striking a balance between the criminal justice system's budgetary needs and due process concerns. Part IV uses recent Tennessee driver's license suspension policies and Houston bail bonds cases as potential guideposts in approaching the due process issues. Finally, Part V proposes policy reforms to supplement current Texas legislation and delves into the current legislation's effectiveness.

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## I. INTRODUCTION

Imagine: all because of a broken taillight. A native Houstonian is driving her children to school; it's 5 a.m. and daylight has barely broken over the city. The Beltway, Houston's greater loop highway, is sparsely crowded with early-morning commuters who are slowly beginning their day. Houston's city

limits are expansive.<sup>1</sup> Driving is a daily necessity<sup>2</sup> and often a chore. A single mother drops her two children off at school before heading to her 29-hour-a-week job (just shy of the federal minimum hour requirement to gain benefits such as health insurance and sick days).<sup>3</sup> After working for minimum wage for seven hours, the woman picks up her children from their afterschool activities before beginning the long trek home. Red and blue lights fill her rear-view mirror.

Getting pulled over by the police is an unwelcome event thousands of Americans experience every day.<sup>4</sup> Traffic violations in Texas are often class C misdemeanors, carrying only a fine for the offense.<sup>5</sup> But the municipal fines and fees imposed on the socioeconomically disadvantaged often carry heavier burdens than simply a fine.<sup>6</sup> This scenario is typical for many indigent individuals making their way through Texas municipal courts.

For the individual in the above hypothetical, a broken taillight can have dire consequences.<sup>7</sup> The offense itself carries

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1. *Facts & Figures*, VISIT HOUS., <https://www.visithoustontexas.com/about-houston/facts-and-figures/> [<https://perma.cc/H5FR-X3B6>] (last visited Jan. 8, 2019); *About Houston*, CITY HOUS., <https://www.houstontx.gov/about/houston/houstonfacts.html> [<https://perma.cc/NSY2-JCJJ>] (last visited Jan. 8, 2019) (explaining that Houston is approximately 655 square miles, but including its surrounding suburbs, the mega-urban center stands at approximately 9,444 square miles).

2. Mass transit is not a reliable or practical option for many Houstonians, hence the necessity of driving. See generally Dug Begley, *Houston's Public Transit Challenges Highlighted in U.S. Analysis of Bus, Rail Networks*, HOUS. CHRON. (June 10, 2016), <https://www.houstonchronicle.com/news/transportation/article/Houston-s-public-transit-challenges-highlighted-7975258.php> [<https://perma.cc/GB7E-BUTU>].

3. Tess Taylor, *The Requirements of Offering Part Time Employee Benefits*, BALANCE CAREERS, <https://www.thebalancecareers.com/part-time-employee-benefits-4059873> [<https://perma.cc/7T96-8ZE2>] (last updated Oct. 3, 2019).

4. *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings/> [<https://perma.cc/Z5DW-SVMP>] (last visited Feb. 15, 2020).

5. *Misunderstanding "Fine-Only" Misdemeanors*, MUN. CT. RECORDER, Oct. 2016, at 11, 11–12.

6. See, e.g., Cassandra Pollock, *Bill to End Jail Time for Those Too Poor to Pay Fines Heads to Texas Governor*, TEX. TRIB. (May 28, 2017, 7:00 PM), <https://www.texastribune.org/2017/05/28/bill-end-jail-time-those-too-poor-pay-fines-heads-texas-governor/> [<https://perma.cc/JJ49-E42Z>]. This hypothetical situation is based loosely on the story of a Tennessean man (Nathan Scruggs) who spent eleven months in jail for criminal justice debt and associated court costs. Upon his release, Scruggs failed to pay the \$25 monthly installments imposed by a court but has since paid roughly \$800 towards his debt. Dave Boucher, *Judge: Tennessee Can't Revoke Driver's Licenses from People Who Can't Pay Court Costs*, TENNESSEAN (July 3, 2018, 10:35 AM), <https://www.tennessean.com/story/news/crime/2018/07/03/federal-court-tennessee-law-revoking-drivers-licenses-unconstitutional/754596002/> [<https://perma.cc/WX64-5C24>].

7. Legal financial obligations (LFOs) have long since been a part of the criminal justice system. “[T]he legal and policy ramifications for government institutions” using LFOs are far-reaching. Criminal justice system agents turned mercenaries are in effect

with it a \$164 fine, along with a summons to appear before a municipal court judge if the fine is not paid by the court date.<sup>8</sup> Payment can be made (1) in person at the municipal courthouse; (2) by mail; or (3) through an online portal.<sup>9</sup> These methods alone are problematic for those without (1) transportation to or from the courthouse; (2) disposable income for a stamp; (3) a stable address from which to send and receive mail; or (4) access to technology to process an online payment.

Further complications exist for the aforementioned single mother as she could otherwise use the \$164 Houston municipal fine money to purchase that month's groceries.<sup>10</sup> For low- and middle-income families, incurring these extra expenses can inhibit their ability to provide daily necessities.<sup>11</sup> Payments made in any form other than a lump sum require a payment installation fee of \$15.<sup>12</sup> An indigent person without the means to fix the broken taillight must still get to work each morning and pick up their children each afternoon, potentially amassing several citations in the process. Failure to pay these fines or appear in court can lead to refusal to renew the individual's driver's license (which could result in a \$219 fine if the person is caught driving without a license)<sup>13</sup> and the possible inability to obtain insurance coverage.<sup>14</sup> The fine for driving without insurance (Failure to Establish Financial Responsibility) is \$289.<sup>15</sup> Our single mother is now potentially saddled with \$687 in municipal fines.<sup>16</sup> If delinquent for more than sixty days, she becomes a debtor.<sup>17</sup> This delinquency

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"working on commission" to perpetuate the institutional need for revenue and the societal need for retribution from criminal defendants. See Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 4, 1175, 1177, 1179, 1210–11.

8. See generally MUN. COURTS DEP'T, *Schedule of Fees*, CITY HOUS., <https://www.houstontx.gov/courts/documents/schedule-of-fines-2020.pdf> [<https://perma.cc/QJP9-UG6W>] (last modified Jan. 2020).

9. *Fines and Fees Information*, CITY HOUS., [https://www.houstontx.gov/courts/fine\\_and\\_fees.html](https://www.houstontx.gov/courts/fine_and_fees.html) [<https://perma.cc/B5YS-VXZE>] (last visited Sept. 20, 2018).

10. *Id.* The average cost of food in Houston is \$754 a month for a two-adult-and-two-child household. L.M. Sixel, *What Does It Cost to Live Decently in Houston?*, HOUS. CHRON. (July 17, 2013) <https://www.houstonchronicle.com/news/article/What-does-it-cost-to-live-decently-in-Houston-4671400.php> [<https://perma.cc/G2C2-Z79X>].

11. See Sixel, *supra* note 10.

12. *Fines and Fees Information*, *supra* note 9.

13. *Id.*

14. Product Expert, *Can You Buy a Car Without a Driver's License in Texas?*, THIRD COAST AUTO GROUP (Mar. 16, 2019, 9:13 AM), <https://www.thirdcoastautos.com/blog/can-you-buy-a-car-without-a-drivers-license-in-texas/> [<https://perma.cc/U877-TSG5>]. While obtaining auto insurance without a driver's license is possible, it is tricky.

15. *Fines and Fees Information*, *supra* note 9.

16. *Id.* (calculating the aforementioned fines together).

17. *Id.* This additional fee for individuals sent to collections seems counterintuitive

can have serious ramifications, including the possibility that the debt will be sent to collections (where a 30% collection fee may be added), or the possibility that the debtor will have to file for bankruptcy.<sup>18</sup>

A fine-only offender can be arrested for failure to appear in a municipal court or failure to comply with a court's order imposing such fines and fees.<sup>19</sup> The Fourteenth Amendment of the Constitution guarantees due process of the law before the denial of life and liberty.<sup>20</sup> In the modern-day criminal justice system, the imposition of municipal fines and fees on an individual from a low socioeconomic background who cannot pay such a fine or fee is a violation of this most basic assurance.<sup>21</sup> The Fourteenth Amendment also guarantees equal protection under the law.<sup>22</sup> Although the Supreme Court has held that a person cannot be punished for being poor,<sup>23</sup> municipal fines and fees for fine-only offenses are still the reason many Houstonians face incarceration. By virtue of continuous revenue generation, fine-only offenses and their associated fees have become virtual "money trees" for municipalities across the United States. In Texas, the revenue generated from these money trees is often used to fund the state budget, not the budget of the cities that collect it.<sup>24</sup>

While the state needs a revenue stream to fund ever-expanding criminal justice expenses,<sup>25</sup> Texas should not obtain such revenue from the pockets of low-income Texans through this masquerade of municipal fines and fees. The current administration of fines and fees in Texas municipal courts is unconstitutionally weighed against the due process rights of indigent individuals. These rights are continuously set aside in favor of a legislative effort to fund the criminal justice system.

As a result of our earlier hypothetical individual's entanglement with the municipal court system, the single mother

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considering the overarching goals of bankruptcy: paying off creditors while not sentencing a debtor to lifelong debts. *See Process – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics> [https://perma.cc/58MD-SN5T] (last visited Feb. 16, 2020).

18. *Fines and Fees Information*, *supra* note 9. Both the collection agency and bankruptcy issues are outside the scope of this Comment.

19. *Id.*

20. U.S. CONST. amend. XIV, § 1.

21. *See infra* Part IV.

22. U.S. CONST. amend. XIV, § 1.

23. *Tate v. Short*, 401 U.S. 395, 397–98 (1971).

24. *See infra* Section III.A.

25. *See infra* Section IV.C.

has a \$687 fine,<sup>26</sup> associated court costs, several hearings (clogging up the court's already limited time and resources), and a warrant issued by the court. The city sees almost no benefit from the funds incurred by this municipal process;<sup>27</sup> however, it must finance the jail time served by the single mother whose Achilles' heel was being too poor to pay to fix her car. All this because of a broken taillight.

This Comment examines the potential concerns with the constitutionality of municipally imposed fines and fees on indigent individuals. Specifically, this constitutional concern is analyzed in the context of Houston, Texas. This Part introduces a picture of how these fines and fees affect an individual through the hypothetical single mother living and working in Houston. In Part II, this Comment summarizes the harsh realities of the current system of fines and fees, namely, that the criminal justice system is primarily funded through their imposition and collection. Part III discusses the perils of an offender-funded criminal justice system and also explores the criminal justice system's need for a revenue stream. Part IV addresses due process concerns specifically. Part V explores changes in policy that may alleviate many of the constitutional concerns addressed in this Comment. Finally, this Comment concludes in Part VI.

## II. AN OFFENDER-FUNDED CRIMINAL JUSTICE SYSTEM

The current structure for imposing fines and fees has led to an offender-funded criminal justice system.<sup>28</sup> Though state and federal law prohibit the practice, modern-day debtor's prisons still exist when indigent individuals are incarcerated within the American penal system for criminal justice debt.<sup>29</sup>

Part of this criminal justice debt can be traced back to seemingly non-jailable offenses, such as traffic infractions.<sup>30</sup> The monetization of retribution can lead to negative effects on indigent communities, including the infringement of constitutionally

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26. This fine is calculated under the assumption that a payment plan (\$15 fee) was utilized and that there were further citations for a driver's license suspension and Failure to Establish Financial Responsibility. *Fines and Fees Information*, *supra* note 9.

27. *See infra* Section III.A.

28. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtor's Prisons*, 75 MD. L. REV. 486, 492 (2016).

29. *Id.* at 491–92. This system uses criminal justice debt as a revenue-raising stream, turning people into profits. Devon King, *Towards an Institutional Challenge of Imprisonment for Legal Financial Obligation Nonpayment in Washington State*, 90 WASH. L. REV. 1349, 1351 (2015); *see also No Exit, Texas: Modern-Day Debtors' Prisons and the Poverty Trap*, ACLU TEX. (Nov. 3, 2016), <https://www.aclutx.org/en/publications/no-exit-texas-modern-day-debtors-prisons-and-poverty-trap> [<https://perma.cc/MSF7-EX6V>].

30. Sobol, *supra* note 28, at 513.

protected rights.<sup>31</sup> Putting a price tag on such retributive actions can lead towards an “offender-funded” criminal justice system,<sup>32</sup> which may be constitutionally troublesome.<sup>33</sup> The imposition of fines and fees on an individual without the means to pay such a mandated cost can put that individual’s due process rights in peril.<sup>34</sup>

#### A. *Debtor’s Prisons*

The term “debtor’s prison”<sup>35</sup> refers to the jailing of an individual for his or her inability to pay a debt. Although common in colonial America,<sup>36</sup> they date back to biblical times.<sup>37</sup> Many ancient civilizations used debtor’s prisons to formalize the incarceration of those unwilling or unable to pay their debts.<sup>38</sup> In Europe, this continued into the Middle Ages.<sup>39</sup> In American colonial times, debtor’s prisons had a disparate impact on the low socioeconomic class.<sup>40</sup>

In addition to federal protections, currently, every state has statutory or constitutional provisions prohibiting imprisonment for debt.<sup>41</sup> Although state and federal law prohibit imprisonment for debt, it is a common misconception that modern-day debtor’s prisons are relics of a bygone era.<sup>42</sup> While debtor’s prisons no longer legally exist in the modern era, criminal justice debt is the underlying reason for many individuals’ incarceration.<sup>43</sup> Reasons for criminal justice debt incarceration include: the failure to pay

31. See *infra* Part IV.

32. Sobol, *supra* note 28, at 492.

33. See U.S. CONST. amend. XIV, § 1.

34. See generally Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 524 (2011).

35. In modern times, the term debtor’s prison refers to “the arrest and jailing of poor people for failure to pay legal debts they can never hope to afford, through criminal justice procedures that violate their most basic rights.” *Ending Modern-Day Debtor’s Prisons*, ACLU, <https://www.aclu.org/issues/smart-justice/sentencing-reform/ending-modern-day-debtors-prisons> [https://perma.cc/6B5B-5P4T] (last visited Mar. 2, 2019).

36. Sobol, *supra* note 28, at 496.

37. See *Matthew* 18:29–31.

38. Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 358–59 (2006) (describing the Roman system).

39. Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 154 (1982) (detailing the scope of imprisonment statutes).

40. Steve Fraser, *Another Day Older and Deeper in Debt*, RARITAN, Fall 2013, at 67, 68–70.

41. Becky A. Vogt, *State v. Allison: Imprisonment for Debt in South Dakota*, 46 S.D. L. REV. 334, 348 (2001); see also 28 U.S.C. § 2007 (2012).

42. Beckett & Harris, *supra* note 34, at 524.

43. *Id.*

administrative fines and fees, civil contempt from failure to pay such fines and fees, and child support delinquency.<sup>44</sup> Socioeconomically disadvantaged individuals are jailed despite statutory and common law prohibitions.<sup>45</sup> Incarceration is a “particularly burdensome and consequential form of debt on a significant and growing share of the poor.”<sup>46</sup> As a result, the bans on debtor’s prisons enacted centuries<sup>47</sup> ago have been nullified by the modern debtor’s prison—municipal fines and fees.

*B. Traffic Enforcement and Monetary Fines and Fees to Control Behavior*

Fines and fees imposed for traffic offenses can be mandated by the legislature or by keeping the system’s status quo. A traffic ticket is generally a citation, a summons to appear before a municipal judge.<sup>48</sup> When a citation is given, it must be signed by the violator as an acknowledgment that they must appear before the judge.<sup>49</sup> This appearance is in lieu of the police officer executing a custodial arrest.<sup>50</sup> If an individual is unable or unwilling to appear, they may be charged with a “Failure to Appear,” a warrant may be issued for their arrest, and they may be incarcerated.<sup>51</sup> In addition to all this, fines and fees may be

44. Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 228, 234 (2012).

45. 15 U.S.C. § 1692e(4) (2012); *Bearden v. Georgia*, 461 U.S. 660, 671–73 (1983).

46. Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756 (2010).

47. The first American prisons were created in the early eighteenth century, and the only long-term inhabitants were imprisoned for debt. Jack Lynch, *Cruel and Unusual: Prisons and Prison Reform*, COLONIAL WILLIAMSBURG J. (2011), <https://www.history.org/foundation/journal/summer11/prison.cfm> [<https://web.archive.org/web/20190321032432/https://www.history.org/Foundation/journal/Summer11/prison.cfm>].

48. See Tex. Transp. Code § 543.005; *Information About Traffic Cases: Options for Responding to a Traffic Ticket*, HARRIS COUNTY JUST. CTS., <http://www.jp.hctx.net/traffic/responding.htm> [<https://perma.cc/9PE3-LSU7>] (last visited Mar. 24, 2020).

49. Transp. § 543.005. This is an acknowledgment that an individual received the citation and understood their commitment to appear before a municipal judge, it has no bearing on guilt. See *id.*

50. See *id.* The practice of issuing a citation as opposed to executing a custodial arrest is rooted in the common goal of decreasing pretrial detention rates. *Citation in Lieu of Arrest*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx> [<https://perma.cc/23KN-V22M>] (last visited Mar. 9, 2019).

51. See *Information About Traffic Cases: Failure to Appear to Your Court Date*, HARRIS COUNTY JUST. CTS., <http://www.jp.hctx.net/traffic/fta.htm> [<https://perma.cc/2E8D-R9JA>] (last visited Feb. 16, 2020).

imposed.<sup>52</sup> Furthermore, the court may impose additional costs.<sup>53</sup> A judge may use their discretion to defer final disposition and suspend sentencing.<sup>54</sup> These tools, which are used to keep an offense off the individual's driving record, come with an additional expense to the individual, as well as the imposition of court costs.<sup>55</sup>

While the offense itself may only be punishable by fines under state law, failure to comply with a court order—such as payment of those fines and fees—is a jailable offense.<sup>56</sup> Traffic offenses in Texas are often Class C misdemeanors.<sup>57</sup> Although technically crimes, most are regulatory in nature.<sup>58</sup> In Houston, a defendant looking to pay in installments, rather than in one lump sum, incurs an additional \$25 fee.<sup>59</sup> Unfortunately, defendants who pursue this option are overwhelmingly socioeconomically disadvantaged.<sup>60</sup>

### C. Criminal Justice Debt and an Offender-Funded System

Criminal justice debt can be divided into many categories, including fines, fees, and restitution charges.<sup>61</sup> Over the past forty

52. Failure to appear carries a fine of approximately \$500, while a violation of a promise to appear is approximately a \$200 fine. *Id.*

53. *Consequences of Neglecting a Ticket*, CITY HOUS., <https://www.houstontx.gov/courts/consequences-of-neglecting-ticket.html> [<https://perma.cc/EG8X-3UWC>] (last visited Feb. 16, 2020).

54. *Deferred Disposition*, CITY LEONARD, <http://www.cityofleonard.net/page/Deferred%20Disposition> [<https://perma.cc/8L3K-FELB>] (last visited Mar. 9, 2019). A deferral request includes payment of a bond and associated court costs. A bond may cost at least \$243.90. *Requesting Deferred Disposition*, CITY HOUS., <https://www.houstontx.gov/courts/HowDoIRequestDeferredDisposition.html> [<https://perma.cc/99EP-3DNY>] (last visited Mar. 9, 2019).

55. In an attempt to keep such driving infractions off a permanent driving record or to keep insurance rates down, an application to request deferred disposition can still require payment of a bond, plus additional application fees and associated court costs. *Deferred Disposition*, *supra* note 54.

56. In the case of traffic violations, most individuals do not get incarcerated for the underlying infraction but instead can have a warrant issued for failure to appear or failure to comply with a court order, such as an order to pay fines and fees. *See, e.g.*, Dylan Baddour, *What Happens When You Don't Pay a Ticket*, HOUS. CHRON. (Aug. 11, 2016) <https://www.houstonchronicle.com/local/explainer/article/Explained-what-happens-when-you-pay-your-tickets-9136577.php> [<https://perma.cc/B8P8-FW7G>] (describing the failure to appear warrant put out for the author's arrest after a minor class C offense).

57. *See Misunderstanding "Fine-Only" Misdemeanors*, *supra* note 5, at 11–12.

58. Regulatory crimes are created by statute and not common law and carry a lower culpability requirement. *See Regulatory Offense Legal Definition*, MERRIAM WEBSTER L. DICTIONARY, <https://www.merriam-webster.com/legal/regulatory%20offense> [<https://perma.cc/W95M-W2MB>] (last visited Mar. 14, 2020).

59. *Paying Your Fine/Payment Options*, CITY HOUS., <https://www.houstontx.gov/courts/paying-your-fine.html> [<https://perma.cc/CJK7-VYUN>] (last visited Feb. 16, 2020).

60. *Criminalization of Poverty*, S. CTR. FOR HUM. RTS., <https://www.schr.org/our-work/criminalization-of-poverty> [<https://perma.cc/6MFY-T2V3>] (last visited Feb. 16, 2020).

61. Sobol, *supra* note 28, at 491.

years, with the rise of the administrative state, the cost of operating the criminal justice system has risen in a positive correlation with the criminal justice debt categories.<sup>62</sup> The administrative state is often “fundamentally at odds” with our Constitution.<sup>63</sup> The main source of tension arises when one contrasts the vast power conferred on bureaucratic agencies with the emphasis on Constitutional rights.<sup>64</sup>

Fines and fees from criminal justice debt are needed to fund bureaucratic agencies without raising taxes.<sup>65</sup> These fines and fees are imposed at nearly every stage of the criminal justice system.<sup>66</sup> Large municipal fines and fees are often imposed for victimless crimes (often non-jailable on their own).<sup>67</sup> These fines and fees contribute to the growth of mass incarceration.<sup>68</sup> Although the United States accounts for approximately 5% of the global population, almost 25% of incarcerated individuals worldwide are housed in American jails or prisons.<sup>69</sup> Despite both state and federal prohibitions against debtor’s prisons for criminal justice debt, many indigent individuals are jailed for their inability to pay fines and fees issued by municipal courts.<sup>70</sup>

### III. STRIKING A BALANCE BETWEEN THE CRIMINAL JUSTICE SYSTEM’S NEED FOR FEE-BASED REVENUE AND AN INDIVIDUAL’S DUE PROCESS RIGHTS

Fines and fees imposed by municipal courts pose specific constitutional concerns as they can be an infringement of a

62. Beckett & Murakawa, *supra* note 44, at 232–34.

63. Ronald Pestritto, *The Birth of the Administrative State: Where It Came from and What It Means for Limited Government*, HERITAGE FOUND. (Nov. 20, 2007), <https://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-wh-at-it-means-limited> [<https://perma.cc/2VDF-A8WU>].

64. *Id.*

65. See Texas, CRIM. JUST. POL’Y PROGRAM HARV. L. SCH. 50-ST. CRIM. JUST. DEBT REFORM BUILDER, <https://cjdebtreform.org/state/124> [<https://perma.cc/K4QR-R2NL>] (last visited on Jan. 8, 2019).

66. *Id.*

67. Texas, *supra* note 65.

68. Beckett & Harris, *supra* note 34, at 524; see also ACLU, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS 5 (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons> [<https://perma.cc/EE7U-DEUU>].

69. INIMAI CHETTIAR ET AL., BRENNAN CTR. FOR JUST., REFORMING FUNDING TO REDUCE MASS INCARCERATION 3 (2013) (citing ROY WALMSLEY, INT’L CTR. FOR PRISON STUD., WORLD PRISON POPULATION LIST 1, 3 (9th ed. 2011), [https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1\\_9.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_9.pdf) [<https://perma.cc/X6WM-M72X>] (finding that the U.S. has 4.4% of the world’s population and 22.7% of the world’s prison population)), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Reforming-Funding-Reduce-Mass-Incarceration.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Reforming-Funding-Reduce-Mass-Incarceration.pdf) [<https://perma.cc/N6HB-5JFC>].

70. Sobol, *supra* note 28, at 492, 504–07.

socioeconomically-disadvantaged individual's due process rights.<sup>71</sup> The rise of an administrative criminal justice system and its increasing need for revenue can contribute to the offender-funded model.<sup>72</sup> Balancing the need for funding the criminal justice system with protecting indigent individual's constitutional right to due process can be troublesome.<sup>73</sup>

The criminal justice system is a product of the administrative state, requiring a reliable method of raising revenue.<sup>74</sup> Municipal fines and fees act as a source of revenue for the municipal court system.<sup>75</sup> Though there are safety-valves in place to ensure that these imposed fines and fees are not unduly burdening an indigent individual, Houston municipal courts have fallen short of utilizing these precautions.<sup>76</sup> Burdening an indigent individual with municipally imposed fines and fees can have alarming negative externalities.<sup>77</sup> Due process concerns exist when a municipal court imposes a fine or fee on an individual who lacks the means and funds to pay it.<sup>78</sup> The legislative impacts of this offender-funded model of the criminal justice system can undermine the municipal court system itself by projecting judges as tax collectors and making the courthouse seem like an extension of the IRS.<sup>79</sup>

71. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983); *Tate v. Short*, 401 U.S. 396, 397–99 (1971); *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970); Beckett & Murakawa, *supra* note 44, at 235. *See generally* U.S. CONST. amend. XIV.

72. Beckett & Harris, *supra* note 34, at 512–13.

73. *See* HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 1, 68–69 (2014), [https://www.hrw.org/sites/default/files/reports/us0214\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf) [<https://perma.cc/56QV-2ZLT>] (discussing problems that arise from offender-funded probation).

74. Sobol, *supra* note 28, at 508.

75. HUMAN RIGHTS WATCH, *supra* note 73, at 13–14.

76. *See generally* Tyler Whitson & Joy Diaz, *Why Your Speeding Ticket Doesn't Pay for What You Think It Does*, KUT NEWS (Apr. 22, 2015), <https://www.kut.org/post/why-your-speeding-ticket-doesn-t-pay-what-you-think-it-does> [<https://perma.cc/B88P-TJJH>]; *Reform of Bail and Muni Fines Would Be Big Boon for H-Town Indigents*, GRITS FOR BREAKFAST (May 26, 2016), <https://gritsforbreakfast.blogspot.com/2016/05/reform-on-bail-and-muni-fines-would-be.html> [<https://perma.cc/J46Z-T7DK>].

77. *See generally* Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1, 9–11 (2017); ACLU, *supra* note 68, at 81; ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 13, 19, 25, 27 (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf) [<https://perma.cc/6VR4-WJMK>].

78. *Bearden v. Georgia*, 461 U.S. 660, 673 (1983); *Tate v. Short*, 401 U.S. 396, 397–99 (1971); *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970).

79. King, *supra* note 29, at 1359; *see also* No Exit, *Texas: Modern-Day Debtors' Prisons and the Poverty Trap*, *supra* note 29.

A. *The Criminal Justice System's Need for Fee-Based Revenue*

Much of the American criminal justice system is offender-funded.<sup>80</sup> The revenue stream from municipal fines and fees is often used to fund the Goliath criminal justice machine.<sup>81</sup> While many people may think that fines and fees fund local municipalities, the Texas legislature requires many Texas cities to merely administer the fines and fees and then send the bulk back to the state.<sup>82</sup> In many cases, the municipal court itself only keeps “five to ten percent of the fees it collects.”<sup>83</sup> A 2014 study shows that the state government benefits more than municipal governments, despite the local municipality bearing the majority of the burden.<sup>84</sup> Cities are expected to fund the revenue-raising venture, from the extra police officer hours to the increased incarceration costs as more people are housed in municipal jails. This scheme is a classic example of an “unfunded mandate,” handed down by the state, which reaps the profits the city sows.<sup>85</sup> An unfunded mandate occurs when a larger government imposes requirements on a smaller government “without budgeting adequate money for implementation.”<sup>86</sup>

Although Houston municipal courts issue fines and fees for non-jailable offenses, a municipal court judge may reduce the fines or fees upon a finding that a defendant is too poor to pay the full amount.<sup>87</sup> In these cases, reduced fines or community service are supposed to be utilized.<sup>88</sup> But the reality in Houston is that this is rarely done.<sup>89</sup> Community service was imposed in lieu of fines and fees in only 2,759 of 168,948 Houston municipal court convictions in 2014.<sup>90</sup> Only in six of these convictions did the judge deem a defendant too indigent to pay, reducing or partially waiving the

80. HUMAN RIGHTS WATCH, *supra* note 73, at 15.

81. *Id.*

82. Whitson & Diaz, *supra* note 76.

83. *Id.*

84. In 2015, Austin municipal courts were expected to have general expenses of \$19.7 million and to pull in \$16 million of general revenue, leaving a shortage of \$3.7 million. *Id.*

85. *Id.*

86. *Id.*

87. *Reform of Bail and Muni Fines Would Be Big Boon for H-Town Indigents*, *supra* note 76.

88. *Id.* (also noting that judges typically have the discretion to impose alternatives to court fines and fees).

89. *Id.* Any Houston peace officer is authorized to arrest the defendant until the fines and fees due upon judgment and the further costs of collecting the same are paid or until the defendant is otherwise legally discharged. *Id.* This authorization has been called “problematic” by the ACLU. *Id.* (quoting Trigilio with the ACLU).

90. *Id.*

finer and fees.<sup>91</sup> This practice is still ongoing. A 2019 study found that—despite caselaw to the contrary<sup>92</sup>—Texas judges still rarely conduct hearings to determine an individual’s ability to pay.<sup>93</sup> This is especially inequitable.<sup>94</sup> Approximately 25% percent of Houstonians live below the national poverty line, but the alternatives which should be available to socioeconomically disadvantaged Texans are used in less than 2% of Houston municipal cases.<sup>95</sup>

Under *Bearden v. Georgia*, a state has the burden to prove that there is no other way to accomplish its interest other than by imprisoning debtors who can’t pay their judgment creditors.<sup>96</sup> Despite the state carrying such a burden, the court must inquire as to why the defendant has not paid his debt.<sup>97</sup> If the debtor cannot pay in spite of “sufficient bona fide efforts to get the resources to do so, the court must consider alternatives to imprisonment.”<sup>98</sup>

### B. *Effects of the Criminal Justice System on an Individual*

The effects of the criminal justice system on an individual can be deep and long-lasting.<sup>99</sup> Economically, an indigent individual can face the loss of money in order to pay the fine, the loss of their job if incarcerated or if unable to take leave to deal with court appearances, liens on property, and wage garnishment, among others. Nonpayment of fines and fees is the leading cause of driver’s license suspensions in Texas.<sup>100</sup> Dealing with the criminal

91. *Id.*

92. *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

93. MENENDEZ ET AL., BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 5, 10, 22, 52–54 (2019), [https://www.brennancenter.org/sites/default/files/2019-11/2019\\_10\\_Fees%26Fines\\_Final5.pdf](https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf) [<https://perma.cc/M3QX-69EB>].

94. *See Reform of Bail and Muni Fines Would be Big Boon for H-Town Indigents*, *supra* note 76. “Mary Schmid Mergler, with the advocacy group Texas Appleseed, says there’s pretty good evidence” that Houston is jailing people who qualify as indigent. *Id.*

Mergler . . . says data she pulled from Houston’s Municipal Courts Department show that between the start of 2012 and the end of 2015, 12,132 people were jailed for failure to pay fines or to otherwise comply with a municipal court judge’s orders. That averages out to approximately 3,000 per year, or about eight per day. . . . [M]ore than 1,000 of those defendants were listed as “homeless.”

*Id.*

95. *Id.*

96. *Bearden*, 461 U.S. at 672.

97. *Id.*

98. Hampson, *supra* note 77, at 35 n.256, 36 n.263.

99. *See supra* Section II.B.

100. Pollock, *supra* note 6; Tex. Fair Def. Project & Tex. Appleseed, *Driven by Debt: How Driver’s License Suspensions for Unpaid Fines and Fees Hurt Texas Families*, TEX.

justice system can also put a strain on employment status, and for many Houstonians who work paycheck-to-paycheck, there is a rippling effect on their lives. There are additional fees for enrollment in a payment plan and late fees for a delayed payment—which often occurs when the court’s deadline does not align with an individual’s pay schedule.<sup>101</sup> These so-called poverty penalties further victimize indigent individuals.<sup>102</sup> Besides the financial and professional repercussions, there is a stigma around incarceration for failure to pay fines and fees.<sup>103</sup> This stigma ranges from rendering one unable to secure stable employment due to their criminal record to criminalizing individuals for what was initially a “non-jailable” offense.<sup>104</sup>

### C. *The Legislative Impact*

The effects on municipal courts are not any better. The mandatory legislative imposition of fines and fees turns judicial courts into tax collection agencies, and judges into their agents.<sup>105</sup> This brings into question the separation of powers issue between the Legislative and Judicial Branches of government.<sup>106</sup> Although the *Salinas v. State* court refused to answer the constitutionality of fines and fees question and the separation of powers question, it articulated a compelling argument against such mandatory fines and fees—albeit outside the scope of this Comment.<sup>107</sup> In this offender-funded model of revenue collection, fines and fees act as a regressive tax, burdening those with the least means to pay it.<sup>108</sup>

This practice has been a longstanding tradition of municipal courts and is often mandated by the state.<sup>109</sup> Driven by the Great Recession, many municipalities looked for other sources of income

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APPLESEED, <http://stories.texasappleseed.org/driven-by-debt> [https://perma.cc/PK9A-CW-PB] (last visited Mar. 4, 2020).

101. ACLU, *supra* note 68, at 50; BANNON ET AL., *supra* note 77, at 7, 15.

102. BANNON ET AL., *supra* note 77, at 17.

103. James Forman Jr., *A Prison Sentence Ends. But the Stigma Doesn't*, N.Y. TIMES (Sept. 15, 2017), <https://nyti.ms/2h6WpyI> [https://perma.cc/EDQ4-8VHK].

104. *See, e.g., id.*

105. *See Salinas v. State*, 464 S.W.3d 363, 368 (Tex. Crim. App. 2015); Whitson & Diaz, *supra* note 76.

106. *Salinas*, 464 S.W.3d at 366.

107. *Failed Litigation May Still Spur Debtors Prison Reforms in Austin*, GRITS FOR BREAKFAST (May 20, 2016), <https://gritsforbreakfast.blogspot.com/2016/05/failed-litigation-may-still-spur.html> [https://perma.cc/7UUY-TXAP]; *see also id.*

108. *See* Developments in the Law, *Policing and Profit*, 128 HARV. L. REV. 1723, 1734 (2015); Sobol, *supra* note 28, at 503.

109. Sobol, *supra* note 28, at 501–04.

and revenue to fund their court systems.<sup>110</sup> Officials claim that this practice is grounded in “penological interests” or “in punishment and deterrence,” but in actuality, it only seeks to grease the criminal justice machine’s cogs.<sup>111</sup> For these “fine-only” offenses, courts are clogged when warrants are issued for failure to pay and failure to comply with court orders that compel payment from those who could not pay the original fine.<sup>112</sup> There is a certain sense of futility in imposing fines and fees on those who cannot pay.<sup>113</sup>

#### IV. CONSTITUTIONAL DUE PROCESS CONCERNS WITH AN OFFENDER-FUNDED SYSTEM

The imposition of fines and fees on indigent individuals by municipal court systems can be a due process concern.<sup>114</sup> Houston’s current structure of municipally imposed fines and fees mirrors the fact patterns in recent<sup>115</sup> findings of unconstitutionality by various jurisdictions.<sup>116</sup> The Tennessee driver’s license case<sup>117</sup> and the Houston bail bond issue<sup>118</sup> are such examples.

State legislative bodies “confer powers of both criminal and civil law [on municipal courts] while excusing them from the due process duties of both criminal and civil law.”<sup>119</sup> The potential for a due process violation comes from demanding payment and imposing fines and fees from those without the means to pay.<sup>120</sup> To avoid the reinstatement of debtor’s prisons, courts are mandated

110. Hampson, *supra* note 77, at 8; *see also No Exit, Texas: Modern-Day Debtors’ Prisons and the Poverty Trap*, *supra* note 29.

111. *Bearden v. Georgia*, 461 U.S. 660, 670–71 (1983).

112. *Id.*; MENENDEZ ET AL., *supra* note 93, at 36.

113. Some Texas counties spent 41% of a single dollar’s value just to collect it in the first place. MENENDEZ ET AL., *supra* note 93, at 5, 9.

114. The Fourteenth Amendment guarantees a right to due process before an individual is deprived of life or liberty. U.S. CONST. amend. XIV.

115. Jolie McCullough, *Poor Inmates Sue Dallas County Over Bail System Following Harris County Ruling*, TEX. TRIB. (Jan. 22, 2018), <https://www.texastribune.org/2018/01/22/following-harris-county-ruling-poor-inmates-sue-dallas-county-over-bail/> [https://perma.cc/HZG8-5S5V].

116. *Bearden*, 461 U.S. at 674.

117. *Thomas v. Haslem*, 329 F. Supp. 3d 475 (M.D. Tenn. 2018), *vacated as moot sub nom. Thomas v. Lee*, 776 Fed. App’x 910 (6th Cir. 2019); Boucher, *supra* note 6.

118. Jolie McCullough, *Appeals Court Largely Upholds Ruling Against Harris County Bail Practices, Reins Back Orders*, TEX. TRIB. (Feb. 14, 2018), <https://www.texastribune.org/2018/02/14/appeals-court-mostly-upholds-ruling-against-harris-county-bail-practic/> [https://perma.cc/JQ7A-X7GQ].

119. Adam Macleod, *That Time I Turned a Routine Traffic Ticket into the Constitutional Trial of the Century*, PUB. DISCOURSE (Jan. 13, 2017), <https://www.thepublicdiscourse.com/2017/01/18093/> [https://perma.cc/P7EB-BE4K].

120. *Bearden*, 461 U.S. at 666; *Tate v. Short*, 401 U.S. 395, 399 (1971); *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970).

by precedent<sup>121</sup> to assess a defendant's ability to pay imposed fines and fees—a process called an indigence screening.<sup>122</sup> These indigence screenings are meant to ensure that “life and liberty [are not] taken away from [individuals]” because of, or due to, an inability to pay a fine or fee.<sup>123</sup> From the beginning of 2012 to the end of 2015, Houston municipal courts incarcerated 12,132 individuals for “failure to pay fines or fees or to otherwise comply with a municipal court judge’s orders.”<sup>124</sup> That is approximately eight individuals incarcerated per day and 3,000 individuals incarcerated per year.<sup>125</sup> Of these individuals, over 1,000 were classified as homeless.<sup>126</sup> When the government imprisons someone for their inability to pay, the government denies that person their Fourteenth Amendment rights.<sup>127</sup> In these instances, incarceration merely punishes poverty instead of diverting or preventing criminal acts.

The policy stemming from *Tate v. Short* encourages municipal judges to engage in indigence screenings before they impose fines and fees.<sup>128</sup> If a Texas municipal judge finds that an indigent individual cannot pay the assessed fines and fees in a lump-sum payment, the judge can allow the individual to pay in installments.<sup>129</sup> If the indigent individual picks this method of payment, they will be assessed a fifteen dollar installation fee.<sup>130</sup> Although Texas has policies meant to protect indigent individuals' due process rights, judges do not always follow these policies.<sup>131</sup> This is evidenced by the fact that although the poverty rate in

121. *Bearden*, 461 U.S. at 672; *see also Tate*, 401 U.S. at 397–98; *Williams*, 399 U.S. at 242–43.

122. TEX. INDIGENT DEF. COMM'N, EFFECTIVE INDIGENCE SCREENING 1 (2015), <http://www.tidc.texas.gov/media/40461/effective-indigence-screening-final.pdf> [<https://perma.cc/E959-2NXB>].

123. Pollock, *supra* note 6.

124. Michael Barajas, *Get a Ticket While Being Poor in Houston? Here's How You Might Wind Up in Jail*, HOUS. PRESS (May 26, 2016, 5:00 AM), <https://www.houstonpress.com/news/get-a-ticket-while-being-poor-in-houston-heres-how-you-might-wind-up-in-jail-8424862> [<https://perma.cc/AT85-86JL>].

125. *Id.*

126. *Id.*

127. *Tate v. Short*, 401 U.S. 395, 398–99 (1971) (citing *Williams v. Illinois*, 399 U.S. 235, 244 (1970)).

128. *See id.* at 399.

129. The cost of such a payment plan is \$15. *See Fines and Fees Information*, *supra* note 9.

130. *Id.*

131. Hampson, *supra* note 77, at 21–22; MENENDEZ ET AL., *supra* note 93, at 5, 9, 50, 52 (finding that Texas judges rarely hold indigency hearings).

Houston is high, municipal judges do not use the alternative punishments available to them when deciding a violator's fate.<sup>132</sup>

A. *Examining Due Process Concerns in Tennessee's Driver's License Suspension and Texas's Municipal Fines and Fees Policies*

A United States District Court in Tennessee held it was unconstitutional to revoke an individual's driver's license for failure to pay court-imposed fines and fees.<sup>133</sup> The court recognized that these municipal fines and fees can “sabotage[]” a defendant's ability to pay if his driver's license is revoked.<sup>134</sup> Calling the practice of revoking licenses for those with the inability to pay “not merely ineffective[,] . . . [but] powerfully counterproductive[,]” United States District Judge Aleta Trauger refused to uphold the constitutionality of a law allowing for the revocation of driver's licenses for the failure to pay fines and fees.<sup>135</sup> If an individual has no means to pay a debt, they “cannot be threatened or cajoled into paying it; [they] may, however, become able to pay it in the future.”<sup>136</sup> This opportunity in the future to repay criminal justice debt cannot be accomplished when an indigent individual is “sabotage[d]” by being jailed, having their license suspended, or being riddled with additional fines and fees they have no hope or ability to pay.<sup>137</sup>

This profit-over-people mentality appears throughout the criminal justice system in Texas. In fact, while 84% of Texas municipal courts closely monitor payment plans, only 79% set “show-cause” hearings.<sup>138</sup> Thus, these show-cause hearings—used to establish whether a defendant's default on a court-ordered fine or fee is due to an inability or unwillingness to pay—are not held

132. MENENDEZ ET AL., *supra* note 93, at 9.

133. *Thomas v. Haslem*, 329 F. Supp. 3d 475 (M.D. Tenn. 2018), *vacated as moot sub nom. Thomas v. Lee*, 776 Fed. App'x 910 (6th Cir. 2019); Boucher, *supra* note 6.

134. *Thomas*, 329 F. Supp. 3d at 484; Boucher, *supra* note 6.

135. *Thomas*, 329 F. Supp. 3d at 483; Boucher, *supra* note 6.

136. *Thomas*, 329 F. Supp. 3d at 483–84; Boucher, *supra* note 6. While there is a possibility of an indigent individual having the ability to pay back criminal justice debt, the analysis of a socioeconomically disadvantaged individual's constitutional protections should not center on such a possibility.

137. Boucher, *supra* note 6; *see also* Kendall Taggart & Alex Campbell, *In Texas It's a Crime to Be Poor*, BUZZFEED NEWS (Oct. 7, 2015, 5:21 PM), <https://www.buzzfeednews.com/article/kendalltaggart/in-texas-its-a-crime-to-be-poor> [<https://perma.cc/E5JR-KP68>].

138. BONNIE TOWNSEND, INST. FOR COURT MGMT., EVALUATING COLLECTION PRACTICES IN SMALL-VOLUME TEXAS MUNICIPAL COURTS 17 (2012), <https://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2012/Evaluating%20Municipal%20Court%20Collection%20Practices.ashx> [<https://perma.cc/3UMS-D4AH>].

in 21% of cases.<sup>139</sup> As the number of indigent individuals in the criminal justice system increases, 21% is unacceptable. Individuals deprived of show-cause hearings are also potentially deprived of their constitutionally protected due process rights.<sup>140</sup> The most common constitutional challenges faced in municipal courts today are due process rights challenges.<sup>141</sup> Especially with the holding of the aforementioned United States District Court in Tennessee,<sup>142</sup> Texas should be wary of its current practices concerning its indigent citizens and municipal court fines and fees.

As the debate over these issues progresses, the ruling in Tennessee may set a national precedent. Court-imposed fines and fees can total hundreds or thousands of dollars for each defendant.<sup>143</sup> Punishing indigent individuals for their inability to pay fines and fees “make[s] it harder for poor people to pay their [criminal justice] debts.”<sup>144</sup> This difficulty exists “because the only way for [people to pay back this criminal justice debt is] to get in the car and go to work[, which] means breaking the law.”<sup>145</sup>

Although the Tennessee ruling does not change the law of municipal courts in Houston, it furthers critics’ arguments that these types of statutes “effectively criminalize poverty.”<sup>146</sup> Municipal fines and fees can easily become “a vortex of mounting debts out of which many will never climb.”<sup>147</sup> This criminalization of poverty has caused over four million drivers to lose their licenses “over failure to pay court debts or traffic fines in just five states: Texas, Michigan, North Carolina, Virginia, and Tennessee.”<sup>148</sup> The policy behind the Tennessee ruling was followed in Michigan, where a federal district judge “issued a preliminary injunction

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139. *See id.*

140. *Id.*; *see also* *Bearden v. Georgia*, 461 U.S. 660, 666, 672–73 (1983).

141. RODNEY D. PATTEN, CONSTITUTIONAL CHALLENGES IN MUNICIPAL COURT AND CITY ORDINANCES 10 (2006).

142. *Thomas v. Haslem*, 329 F. Supp. 3d 475 (M.D. Tenn. 2018), *vacated as moot sub nom. Thomas v. Lee*, 776 Fed. App’x 910 (6th Cir. 2019); Boucher, *supra* note 6.

143. Richard A. Oppel, Jr., *Being Poor Can Mean Losing a Driver’s License. Not Anymore in Tennessee*, N.Y. TIMES (July 4, 2018), <https://www.nytimes.com/2018/07/04/us/drivers-license-tennessee.html> [<https://perma.cc/Y43V-45KY>].

144. *Id.*

145. *Id.*

146. *Id.* As of February 2019, the Supreme Court of the United States has found that the Constitution’s ban on excessive fines is applicable to the states as well. This holding cautions states against the criminalization of poverty. Nina Totenberg, *Supreme Court Limits Civil Asset Forfeiture, Rules Excessive Fines Apply to States*, NPR (Feb. 20, 2019, 3:04 PM), <https://www.npr.org/2019/02/20/696360090/supreme-court-limits-civil-asset-forfeiture-rules-excessive-fines-apply-to-state> [<https://perma.cc/6UCS-NHMB>].

147. Oppel, *supra* note 143.

148. *Id.*

against a license revocation law.”<sup>149</sup> Unfortunately, the Sixth Circuit has since reversed and remanded the case, finding that the plaintiffs were unlikely to succeed on the merits.<sup>150</sup>

*B. Bail Bond Constitutional Concerns Compared to Texas’s Municipal Court Issues*

Like municipal fines and fees, bail bond cases raise constitutional concerns.<sup>151</sup> Though the Eighth Amendment prohibits excessive bail, civil rights proponents criticize incarcerating an individual who is too poor to pay bail.<sup>152</sup> Imposing a bail requirement on an individual without considering their indigency is “problematic.”<sup>153</sup> After an allegation that this bail bond structure was a violation of the Fourteenth Amendment,<sup>154</sup> the Eleventh Circuit analyzed how a structure that imposes bail on indigent individuals can be constitutionally convoluted.<sup>155</sup> Because city officials proposed new legislation restructuring the bail bonds in Calhoun, Georgia, the Eleventh Circuit remanded the case back to the district court for further review.<sup>156</sup> There are constitutional due process concerns when the “right of any individual to liberty[] . . . depend[s] on that person’s ability to pay.”<sup>157</sup>

149. *Fowler v. Johnson*, No. 17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017), *rev’d and remanded*, *Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019). The current judicial trend leans towards protecting indigent individual’s constitutional due process rights rather than the budgetary concerns of the offender-funded criminal justice system. See Oppel, *supra* note 143; Totenberg, *supra* note 146.

150. *Benson*, 924 F.3d 247.

151. John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, AM. BAR ASS’N (Dec. 10, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/economic-justice/criminal-justice-debt-problems/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/) [https://perma.cc/2VAT-KFPN]. For information about bail and bonds, see *Bail and Bonds*, JUSTIA, <https://www.justia.com/criminal/bail-bonds/> [https://perma.cc/X2MU-U85X] (last updated Apr. 2018) (“Bail is the money a defendant must pay in order to get out of jail.”).

152. U.S. CONST. amend. VIII; Bill Rankin, *Don’t Lock Up People Too Poor to Make Bail, Atlanta Court Is Urged*, ATLANTA J.-CONST. (Feb. 23, 2017), <https://www.ajc.com/news/local/don-lock-people-too-poor-make-bail-atlanta-court-urged/eXnLj4IGc8osYMtUsmh5uN/> [https://perma.cc/H35Z-QYAH] (describing a lawsuit brought by a man relying on a monthly \$530 disability check who was detained for six days following a bail demand of \$160).

153. Rankin, *supra* note 152 (quoting Judge Adalberto Jordan).

154. Originally, it was argued that this bail structure should be analyzed under the Eighth Amendment, but the Eleventh Circuit found that “bail is not excessive under the Eighth Amendment merely because it is unaffordable.” *Walker v. City of Calhoun*, 901 F.3d 1245, 1251–52, 1258 (11th Cir. 2018).

155. *Id.* at 1262–65 (synthesizing the approach to a due process and equal protection hybrid-analysis).

156. *Id.* at 1252, 1271–72.

157. Judy Walton, *Georgia Appeal Has Potential to Upend Bail Bonding System as We*

Similarly, the Fifth Circuit upheld a lower court ruling that “Harris County’s bail practices unconstitutionally discriminate against poor misdemeanor defendants.”<sup>158</sup> Echoing the sentiments surrounding the Georgia bail bond case,<sup>159</sup> the appellate court held that Harris County “sets bail in a way that keeps people in jail . . . simply because they are too poor to pay their bail bonds.”<sup>160</sup> Critics of the system criminalizing poverty and its disproportionate retributive properties towards indigent individuals hope to help “craft a system that does not violate the Constitution and devastate tens of thousands of human beings and their families every year.”<sup>161</sup>

Indigent individuals are fighting against the criminalization of poverty in the courts.<sup>162</sup> This series of bail bond cases shows that there is a current judicial trend towards lifting the burdens placed on indigent individuals in the form of monetary handcuffs.<sup>163</sup> This trend foreshadows the judicial and legislative response to the current constitutional issues concerning the imposition of municipal fines and fees.

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*Know It*, CHATTANOOGA TIMES FREE PRESS (Sept. 4, 2016), <https://www.timesfreepress.com/news/local/story/2016/sep/04/money-justice-ripples-georgiabond-case-echo-te/384921/> [<https://perma.cc/QG95-SBDQ>].

158. Jolie McCullough, *Appeals Court Largely Upholds Ruling Against Harris County Bail Practices, Reins Back Orders*, TEX. TRIB. (Feb. 14, 2018), <https://www.texastribune.org/2018/02/14/appeals-court-mostly-upholds-ruling-against-harris-county-bail-practic/> [<https://perma.cc/6U74-2VHA>].

159. Walton, *supra* note 157.

160. McCullough, *supra* note 158. The Fifth Circuit, while upholding the lower court’s ruling that the current administration of bail bonds was unconstitutional, remanded the case for further consideration of the methodology of fixing such a system. Specifically, the lower court was given instructions to rein back the ruling that “release[d] almost all poor misdemeanor defendants from jail within 24 hours of arrest at no cost, regardless of their court-set bond amount.” *Id.*

161. *Id.*

162. Jolie McCullough, *Poor Inmates Sue Dallas County over Bail System Following Harris County Ruling*, TEX. TRIB. (Jan. 22, 2018, 6:00 AM), <https://www.texastribune.org/2018/01/22/following-harris-county-ruling-poor-inmates-sue-dallas-county-over-bai/> [<https://perma.cc/HZG8-5S5V>] (reporting six Dallas County lawsuits where indigent individuals are taking a stand against a socioeconomically discriminatory criminal justice system).

163. A lawsuit in January 2019 purports that the bail bond situation in Harris County is still an ongoing issue. After the 2018 election ushered in many new Democratic judges, the new bail bond rules have been loosened to better account for indigent defendants facing misdemeanor charges. An important part of the analysis for setting an indigent defendant’s bail, as 80th Civil Court Judge Larry Weiman claims, is to “balance the constitutional rights of the defendants . . . who are arrested and charged with a crime.” See Nicole Hensley & Mike Morris, *Bond Companies Sue Harris County Judges, Sheriff over New Bail Rules*, HOUS. CHRON. (Feb. 14, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Bond-companies-sue-Harris-County-judges-sheriff-13617685.php> [<https://perma.cc/KU5Q-U5MF>].

C. *Texas Senate Bill 1913*

In 2017, the Texas Legislature passed Senate Bill 1913 to remedy the due process concerns of imposing fines and fees on indigent individuals.<sup>164</sup> Senate Bill 1913 amended the Texas Code of Criminal Procedure but is still colloquially referred to by its pre-passage name.<sup>165</sup> The bill's primary focus is on "dismantl[ing] the modern-day 'debtors' prison' system that jails thousands of low-income Texans for no reason other than their inability to pay fines."<sup>166</sup> Recommended by the Texas Judicial Council, Senate Bill 1913 claims "to provide judges with new tools and procedures to hold low-income Texans accountable without jail time when they cannot pay their fines and court costs in criminal cases."<sup>167</sup> Following the four-decades-old Supreme Court decision which held that a person cannot be punished for their poverty, Senate Bill 1913 aims to free indigent Texans from the cyclical "trap" of criminal justice debt.<sup>168</sup> This trap is riddled with "license suspensions, arrest warrants and jail time when [indigent Texans] cannot afford to pay traffic tickets and other low-level, fine-only citations."<sup>169</sup>

Annually, "[t]ens of thousands of [Texans] are booked into county jails . . . for fine-only offenses"—often in municipal courts.<sup>170</sup> In 2015, a single municipal court in Arlington, Texas incarcerated 4,590 individuals for failure to pay fines and fees, and a Plano, Texas municipal court incarcerated more than 2,600 individuals.<sup>171</sup> In 2016, prior to the passage of Senate Bill 1913, Texas municipal courts handled seven million traffic, parking, and minor offenses.<sup>172</sup> Of these cases, 640,000—roughly 16%—ended with the incarceration of individuals for minor offenses.<sup>173</sup>

Senate Bill 1913 seeks to reduce the number of indigent Texans who are incarcerated for criminal justice debt by

164. Pollock, *supra* note 6.

165. See Ryan Kocian, *Texas Reforms Its System of Debtors' Prisons*, COURTHOUSE NEWS SERV. (June 20, 2017), <https://www.courthousenews.com/texas-reforms-system-debtors-prisons/> [<https://perma.cc/D3CY-S4UH>].

166. Press Release, Texas Senate, Texas Senate Passes Senator Zaffirini's Bill Combating "Debtors' Prisons" (May 3, 2017), <https://senate.texas.gov/press.php?id=21-20170503a&print=1> [<https://perma.cc/8J52-V3P3>].

167. *Id.*

168. *Id.*; *Senate Bill 1913 & House Bill 351 Infographic*, TEX. APPLESEED, <https://www.texasappleseed.org/sites/default/files/SB1913andHB351-NewLawInfographic.pdf> [<https://perma.cc/2G36-DVC4>] (last visited Mar. 6, 2019).

169. Press Release, *supra* note 166.

170. *Id.*

171. *Id.*

172. Kocian, *supra* note 165.

173. *Id.*

expanding the availability of community service and work options in lieu of payment of fines and costs.<sup>174</sup> Specifically, Senate Bill 1913 requires: (1) that the police officers issuing a citation provide “information regarding the alternatives to the full payment of any fine or costs assessed against the [individual if said individual] . . . is unable to pay that amount”;<sup>175</sup> (2) that the court notify an individual of any costs or fees imposed, along with information “regarding the alternatives to the full payment of any fines or costs assessed against the [individual] if [they are] unable to pay”;<sup>176</sup> and (3) that a court may impose a fine and costs *only if* the court makes a written determination that the individual “has sufficient resources or income to immediately pay all or part of the fines and costs.”<sup>177</sup> Factors considered when making this ability-to-pay determination include (1) the individual’s financial status;<sup>178</sup> (2) whether the individual is a full-time student;<sup>179</sup> (3) whether the household income level is at or below the federal poverty level or below the state or local median household income;<sup>180</sup> and (4) if the individual receives financial assistance from any federal or local assistance program.<sup>181</sup>

Senate Bill 1913 also prohibits a court from issuing a warrant upon a defendant’s unsuccessful fulfillment of the judgment unless a hearing is held on the defendant’s ability to satisfy the judgment.<sup>182</sup> Even then, Senate Bill 1913 requires a court not to issue a warrant for failure to satisfy a court judgment unless the defendant fails to appear at the hearing.<sup>183</sup> If the hearing occurs, a court may issue a warrant if the court makes a:

written determination that: (1) the defendant is *not indigent* and has failed to make a good faith effort to discharge the fine or costs; or (2) the defendant is *indigent* and: (A) has failed to make a good faith effort to discharge the fine or costs . . . and (B) could have discharged the fine or costs . . . without experiencing any undue hardship.<sup>184</sup>

174. Pollock, *supra* note 6; *Senate Bill 1913 & House Bill 351 Infographic*, *supra* note 168.

175. Tex. Crim. Proc. Code § 14.06.

176. *Id.* § 27.14(b).

177. *Id.* § 42.15(a–1).

178. Tex. Transp. Code § 706.006(d).

179. *Id.* § 706.006(d)(1).

180. *Id.* § 706.006(d)(2).

181. *Id.* § 706.006(d)(3).

182. Tex. Crim. Proc. Code § 43.05(a–1).

183. *Id.* § 43.05(a–1)(1).

184. *Id.* § 45.046(a) (emphasis added).

The poverty rate in Houston is 21.2%.<sup>185</sup> In 2018, the national median income was roughly \$61,937,<sup>186</sup> while Houston's was \$51,203.<sup>187</sup> With a household median income approximately \$10,000 below national levels,<sup>188</sup> Houston municipal courts should be utilizing Senate Bill 1913's alternatives for many of its indigent individuals. Before Senate Bill 1913, Houston municipal courts used alternatives to fines and fees in less than 2% of cases.<sup>189</sup> Senate Bill 1913 seeks to decrease the number of poverty penalties and poverty traps in the Texas municipal court system.<sup>190</sup>

Critics of Senate Bill 1913 predicted massive revenue drops, which in turn prompted an extra fee assessed to "indigent defendants sentenced to community service, aiming to offset [the] presumed revenue drops."<sup>191</sup> Approximately one year after the passage and implementation of Senate Bill 1913, warrants for both failure to appear and failure to pay have declined, cases resolved through community service as opposed to strict fines and fees have increased, and the number of payment plans utilized has increased.<sup>192</sup> Nevertheless, critics are still wary of the overall implications of Senate Bill 1913 and the ever-increasing need for revenue streams to fund the criminal justice system.

However, as the criminal justice system expands, so does its need for income. There is an internal struggle with the system issuing the fines and fees when the revenue is needed to finance that system.<sup>193</sup> Criminal justice debt can "undermine the legitimacy of the [criminal] justice system by supporting the perception that [it] privileges budgetary imperatives over the needs of justice."<sup>194</sup> This states that criminal justice debt imposed

185. *Houston, TX*, DATA USA, <https://datausa.io/profile/geo/houston-tx/> [<https://perma.cc/C2KE-22B2>] (last visited Mar. 7, 2020).

186. *United States*, DATA USA, <https://datausa.io/profile/geo/united-states> [<https://perma.cc/HYS3-4VAX>] (last visited Apr. 8, 2020) (showing a margin of error of \$94).

187. *Houston, TX*, *supra* note 185 (showing a margin of error of \$904).

188. *Compare United States*, *supra* note 185, with *Houston, TX*, *supra* note 186 (showing, in 2018, a \$10,734 difference between the median income of Houston versus the rest of the country).

189. *Reform of Bail and Muni Fines Would be Big Boon for H-Town Indigents*, *supra* note 76.

190. See Press Release, *supra* note 166.

191. *Texas #debtorsprison Legislation Overachieving, Even Boosted Revenue*, GRITS FOR BREAKFAST (Sept. 3, 2018, 11:46 AM), <https://gritsforbreakfast.blogspot.com/2018/09/texas-debtorsprison-legislation.html> [<https://perma.cc/F7X2-N9RT>].

192. *Id.*

193. See CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 8 (2016), <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf> [<https://perma.cc/EX6L-727F>].

194. *Id.* at 7.

by municipal courts is used to finance the very system into which indigent Texans pay.<sup>195</sup> Senate Bill 1913 purports to circumvent this perception.<sup>196</sup> Even so, Texas municipal courts can still violate the due process rights of indigent Texans by imposing such fines and fees.

To measure the true success of Senate Bill 1913, the Texas Public Policy Foundation and the Brennan Center conducted a joint report on the costs associated with collecting Class C misdemeanor debt.<sup>197</sup> This report demonstrates that the costs associated with collecting Class C misdemeanor criminal justice debt heavily outweighs not only the individual's constitutional due process concerns, but also the fiscal responsibility of raising revenue to fund the criminal justice system.<sup>198</sup> In more concrete terms, Texas municipal courts spend roughly forty-one cents to collect a single dollar.<sup>199</sup> Though Houston's Harris County was not among the Texas counties studied, this study shows the common trend that criminal justice debt is both an "expensive proposition" and a "burden for courts and defendants alike."<sup>200</sup> As a revenue source, these fines and fees are neither practical nor constitutional.<sup>201</sup>

#### V. PROPOSED POLICY REFORMS BALANCING THE BUDGETARY AND DUE PROCESS CONCERNS OF THE IMPOSITION OF FINES AND FEES

Though current Texas legislation seeks to combat the tension between raising funds for an ever-growing criminal justice system and protecting the due process rights of socioeconomically disadvantaged individuals, more policy reforms are needed to further address the issue.<sup>202</sup> Such policy reforms should include: (1) resolving the conflicts of interests issue that allows a cost-

195. *Id.* at 6–8.

196. Kocian, *supra* note 165.

197. *Texas #debtorsprison Legislation Overachieving, Even Boosted Revenue*, *supra* note 191.

198. MENENDEZ ET AL., *supra* note 93, at 9.

199. Andrew Weber, *Courts Struggle to Collect Debt in Texas, Study Says. That's Costly and Puts Poor Violators in Jail*, KUT 90.5 (Nov. 21, 2019), <https://www.kut.org/post/courts-struggle-collect-debt-texas-study-says-s-costly-and-puts-poor-violators-jail> [https://perma.cc/PV5J-M6RY].

200. *Id.*; MENENDEZ ET AL., *supra* note 93, at 22 (the Texas counties studied were Travis, El Paso, Jim Hogg, and Marion).

201. Between 2012 and 2018, Texas was unable to collect approximately 40% of these fines and fees. Even more troubling, roughly 35% of the costs collected in Travis County were funneled back into the collection process itself. MENENDEZ ET AL., *supra* note 93, at 22.

202. See generally Tex. S.B. 1913, 85th Leg., R.S. (2017); Press Release, *supra* note 166; Kocian, *supra* note 165.

imposing municipal court system to then be funded by those same costs;<sup>203</sup> and (2) adopting a transparency and visibility framework to hold municipal court systems accountable for how such municipal fines and fees are imposed and where municipal funding is sourced from.<sup>204</sup>

Texas Senate Bill 1913 aims to solve the constitutional concerns existing during the imposition of fines and fees on indigent individuals.<sup>205</sup> While an initial study with data on Texas Senate Bill 1913's success has been published, other policy considerations should be implemented to either additionally alleviate the constitutional constraints or act as a new path for a solution.<sup>206</sup> Though Texas Senate Bill 1913 was implemented to alleviate the constitutional constraints on indigent Texans, other policy reforms should be addressed as well.

Texas localities and municipalities are drowning in governmental debt.<sup>207</sup> In 2016, the “amount of unpaid principal on debt owed by Texas’ political subdivisions . . . grew to an estimated \$218.5 billion.”<sup>208</sup> Translated to a per capita basis, that is roughly \$30,000 owed by every four-person household in the state.<sup>209</sup> The debt increased “\$22.99 billion (11.8 percent) over the past five fiscal years.”<sup>210</sup> Of this debt, \$71.1 billion is owed by Texas municipalities.<sup>211</sup> Since the government has “no wealth of its own,” it must rely on “new or higher taxes” as a revenue stream to pay down this enormous debt.<sup>212</sup> Municipal criminal debt totals “\$106.2 billion or 31 percent of the overall [debt] burden[]”; second

203. See CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 12.

204. See *id.* at 32–33.

205. Press Release, *supra* note 166; see also Tex. S.B. 1913.

206. Though a 2019 study conducted by the Brennan Center and the Texas Public Policy Foundation stated that many of the issues that existed prior to Senate Bill 1913 still exist after its passage, it was unable to obtain information for a large number of Texas counties. MENENDEZ ET AL., *supra* note 93, at 15, 25.

207. JAMES QUINTERO, TEX. PUB. POLICY FOUND., PP04-2017, RED INK RISING IN THE LONE STAR STATE: FY 2016, at 1 (2017), <https://files.texaspolicy.com/uploads/2018/08/16103449/2017-03-PP04-LocalDebt-CLG-JamesQuintero.pdf> [<https://perma.cc/SVA6-4UFU>].

208. *Id.*

209. *Id.* A staggering number, approximately \$8,000 would be owed by each man, woman, and child in the state of Texas. *Id.*

210. *Id.* (quoting TEX. BOND REVIEW BD., 2016 LOCAL GOVERNMENT ANNUAL REPORT FISCAL YEAR ENDED AUGUST 31, 2016, at 2 (2016), <http://www.brb.state.tx.us/pub/lgs/fy2016/2016LocalARFinal.pdf> [<https://perma.cc/KX9H-B42Q>]).

211. *Id.* Municipalities owe approximately 32.54% of the state’s total debt amount. See *id.*

212. *Id.* at 2. But even local governments and municipalities fall prey to interest rates. As of 2016, the combined total of Texas’s principal debt coupled with interest comes in at a staggering \$342.1 billion. *Id.* at 3.

only to school district debt.<sup>213</sup> While the municipal and local criminal justice system is not the entire source of this debt, it is a substantial portion. For fiscal year 2018, Houston municipal courts have a budget of \$33,779,955.<sup>214</sup> This budgetary amount has increased by \$3,482,540 since fiscal year 2016.<sup>215</sup> According to the fiscal year 2018 budget, municipal court fines and fees bring in an estimated revenue of \$21,371,058.<sup>216</sup> From these numbers, the revenue generated from municipal court fines and fees covers approximately 63% of the budget for municipal courts.<sup>217</sup>

The implications of allowing a governmental body, such as municipal courts, to draw its predominant source of revenue from the same source it imposes on individuals can be problematic.<sup>218</sup> Although Senate Bill 1913 sought to unwind this entanglement of municipal courts' revenue stream and budgetary concerns, the data found has not supported that the Bill's goals have been reached.<sup>219</sup> In actuality, the data found that Texas judges still rarely conduct indigency hearings and that courts spend forty-one cents in the collection of a single dollar.<sup>220</sup> Admittedly, the study was unable to find concrete data on court costs collection for many large counties in Texas—likely due to a lack of transparency municipal courts have on the matter.<sup>221</sup> Regardless of whether or not Senate Bill 1913's goals were fully achieved,<sup>222</sup> there are other policy considerations that could help to better balance an individual's due process rights and the criminal justice system's need for a reliable revenue stream.

“By disproportionately burdening poor people with financial sanctions, . . . jailing people who lack the means to pay, . . . [and] needlessly enmesh[ing] poor people [into] the criminal justice system,” fines and fees imposed by municipal courts on indigent Texans create a “two-tiered system of criminal justice.”<sup>223</sup> This

213. *Id.* at 4 (showing that only educational debt for the entire state of Texas outweighs municipal court debt).

214. CITY OF HOUS., FISCAL YEAR 2018 PROPOSED BUDGET 8 (2017), [http://www.houstontx.gov/budget/18budprop/FY2018\\_Proposed\\_Budget.pdf](http://www.houstontx.gov/budget/18budprop/FY2018_Proposed_Budget.pdf) [<https://perma.cc/6P2V-KQDM>].

215. *Id.*

216. *Id.* at II-2.

217. *See id.* The exact percentage is 63.2655017%. *Id.*

218. *See* MENENDEZ ET AL., *supra* note 93, at 9–10.

219. *See id.* at 9.

220. *Id.*

221. *Id.* at 15.

222. The 2019 Brennan Center study seems to suggest that the Bill's goals were not achieved, but the study also self-identified the difficulty in gathering data on other large Texas counties' collection costs. *Id.*

223. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 1.

two-tiered system provides different pathways for different socioeconomic classes of people who commit essentially the same infraction. For those of a higher socioeconomic status, municipally mandated fines and fees are of minimal consequence. For indigent Texans, however, these fines and fees can be the deciding factor between incarceration and freedom.

The incarceration of indigent Texans by municipally imposed fines and fees for non-jailable offenses puts an even greater strain on the criminal justice system as a whole. This stress is increased by “destabilizing people living at the economic margins and by impeding reentry of formerly incarcerated people who face impossible economic burdens, leading to cycles of poverty and imprisonment.”<sup>224</sup> Although these municipal fines and fees are imposed as a punishment or a deterrent, they “do not advance the traditional purposes of the criminal justice system.”<sup>225</sup> Rather, these fines and fees are often “authorized by state legislatures as a means to generate revenue to fund courts or other government functions without raising taxes.”<sup>226</sup>

Senate Bill 1913 is still too new for accurate data on its impact.<sup>227</sup> However, the implementation of a completely city-funded municipal court system, or a municipal court system with a clear cap on the amount of revenue that could be generated from municipal fines and fees, would further safeguard indigent Texans’ constitutional due process rights. A decreased reliance on poverty penalties, and increased incentives for indigent Texans to pay back criminal justice debt, would also help protect indigent individuals’ due process rights.<sup>228</sup>

Texas municipal courts are still in a precarious constitutional conundrum when it comes to due process rights and indigent individuals. Although the Texas legislature has made strides towards righting this wrong, predominantly with Senate Bill 1913, further reforms should be enacted.

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224. *Id.*; Taggart & Campbell, *supra* note 137.

225. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 1.

226. *Id.*

227. *See supra* note 222.

228. *See supra* Part IV.

A. *Conflicts of Interest: An Inherent Flaw in the Imposition of Fines and Fees Model*

In Texas municipal court systems, these fines, fees, accompanying court costs, and surcharges fund the very same agencies responsible for imposing such fees and fines on individuals.<sup>229</sup> To avoid incentives for a municipal court system to fund itself through the imposition of fines and fees from individuals' pockets, the city should fully fund the municipal court system, or at least place a firm cap on the dollar amount of revenue that could be generated from the imposition of fines and fees.<sup>230</sup> By funding municipal court systems from the general revenue fund as allocated by the city, the burden of requiring a revenue stream to be funded by individuals through municipal fines and fees is diminished.<sup>231</sup> This revenue stream also has the benefit of reflecting the "important principle that [municipal] courts are an equal branch of government and [are] essential to the common welfare, not a user-pays service provider."<sup>232</sup> This method of funding the Texas municipal court system also has the added potential benefit of decreasing the need and reliance on "poverty traps" or "poverty penalties."

A poverty penalty is a penalty that results in "a poor person [being] punished more severely than a wealthier person for the same infraction as a direct consequence of [their] poverty."<sup>233</sup> These types of penalties can include: late fees, collections fees (like Houston's 30% collections fee), payment plan installation fees, and fines for the failure to satisfy a judgment, with associated court costs and interest.<sup>234</sup> A poverty trap is a "policy that not only punishes the poor more severely, but keeps a person in poverty by inhibiting his or her ability to make a living or meet basic needs

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229. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 1. This agency conflict of interest should give pause for constitutional concern.

230. *Id.*

231. *Id.* Recognizing that the needed funds would be diverted from other budgets to fund the municipal court system, the importance of protecting the poor's constitutional due process rights, as well as the costs incurred from probable litigation against such a fines and fees system, the benefits outweigh the costs.

232. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 12 (describing how the offender-funded model of the criminal justice system seems to conflict with the harmony amongst the branches of government and general societal good).

233. *Id.* at 15. In the United States, a defendant can expect to pay for costs from arrest to prosecution to post-sentencing monitoring and supervision. Isabel Arriagada, *Poverty Penalties in the U.S. Penal System*, SOC'Y PAGES (Nov. 9, 2017), <https://thesocietypages.org/trot/2017/11/09/poverty-penalties-in-the-u-s-penal-system/> [<https://perma.cc/SG7K-SXYZ>].

234. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 15.

and obligations.”<sup>235</sup> Poverty traps include the suspension of an individual’s driver’s license for the inability to pay municipal court-mandated fines and fees.<sup>236</sup> Cities such as Houston should “abandon reliance on poverty penalties.”<sup>237</sup>

Since 1983, the Supreme Court has mandated that municipal courts conduct investigations into an individual’s ability to pay,<sup>238</sup> and state legislation such as Senate Bill 1913 requires municipal courts to conduct indigence investigations.<sup>239</sup> Although some policies have been enacted, further measures should be taken to incentivize the repayment of criminal justice debt while preserving indigent individuals’ due process rights. One example includes incentivizing consistent compliance with payment plans.<sup>240</sup> “Incentives could range from a waiver of interest charges or waiver of the principal owed after a certain length of compliance to certificates of good conduct, which might make [an indigent] person eligible for privileges that would have been withdrawn upon a conviction for certain offenses.”<sup>241</sup> Additionally, incentives could also include requiring that payment plans have no minimum payment amount.<sup>242</sup> Good conduct and a good faith effort to absolve community service requirements rather than municipally imposed fines and fees is another alternative.<sup>243</sup>

### B. Transparency: An Accountability Tool

Texas should be transparent about the amount of revenue stemming from the imposition of fines and fees by municipal courts that is given to the criminal justice system.<sup>244</sup> This transparency could help hold the state and municipalities accountable for ensuring that indigent Texans’ due process rights are not overshadowed by the need to raise revenue for the municipal criminal justice system.<sup>245</sup> “Access to information about the exact mechanics of criminal justice debt . . . equips advocates

235. *Id.* at 15–16 (asserting that monetary sanctions disproportionately disadvantage defendants from low-income communities).

236. *Id.* at 16.

237. *Id.*

238. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

239. *Tex. Crim. Proc. Code* § 14.06(b); *Tate v. Short*, 401 U.S. 395, 400-01 (1971).

240. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 18.

241. *Id.* (footnotes omitted).

242. *Id.*

243. *Texas #debtorsprison Legislation Overachieving, Even Boosted Revenue*, *supra* note 191.

244. *See* CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 32. For difficulties a 2019 study found in obtaining data on court collection costs for some large Texas counties, see *MENENDEZ ET AL.*, *supra* note 93, at 15.

245. *See* CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 32.

[with the tools needed] to identify abusive practices, racial disparities, and inefficiencies.”<sup>246</sup> Such access can provide “lawmakers with the tools to evaluate the financial and social impacts of criminal justice debt when proposing or voting on legislation” and “provides citizens with the information required to hold their elected officials accountable.”<sup>247</sup> A transparency framework requires “[e]mpirical data on the imposition and collection of criminal justice debt [which] is often not collected or made publicly available.”<sup>248</sup> This “data is often compiled by an array of agencies and bodies—[including] clerks of courts, probation agencies, corrections officials, and private debt collection companies—which makes the information piecemeal and inaccessible.”<sup>249</sup> Transparency is necessary to ensure the protection of these indigent individual’s due process rights.

## VI. CONCLUSION

Texas municipal court systems seem to prioritize profits over people, especially indigent Texans who may not be able to satisfy municipally mandated fines and fees. Although there is a legitimate need for reliable, steady revenue to fund the ever-increasing burdens of the criminal justice system, the current system of fines and fees subrogates indigent individuals’ due process rights.<sup>250</sup> Texas legislative efforts, though a step in the right direction, are not enough to resolve this issue.

With the implementation of the reforms discussed in this Comment, the single mother in the earlier hypothetical would likely have a different outcome. Although she likely would have received a citation after being pulled over for a broken taillight, she would be afforded greater options than simply being forced to pay a fine or fee. Upon an indigence investigation and a determination she was unable (not unwilling) to pay, the municipal court could pursue alternatives, including community service. These alternatives still seek to “punish” the offense but

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246. *Id.* Racial disparities exist in Texas prisons, though this is outside the scope of this Comment. *Texas Profile*, PRISON POLY INITIATIVE, <https://www.prisonpolicy.org/profiles/TX.html> [<https://perma.cc/L6JZ-XCJ9>] (last visited Mar. 7, 2020) (showing that blacks, while representing only 12% of the state population, account for 32% of the prison population).

247. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 193, at 32.

248. *Id.*

249. *Id.*

250. *See supra* Sections IV.A–B (describing similar issues with the same constitutional concerns that were later righted by judicial intervention). For fear of following the path of the Tennessee driver’s license case and the collection of bail bond cases, Houston should implement policies to protect the due process rights of the poor when imposing municipal fines and fees.

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also protect the violator from the imposition of an unreasonable fine or fee. These reforms would prevent municipal courts from imposing on indigent Texans a \$687 fine,<sup>251</sup> associated court costs, several hearings which use the court's already limited time and resources, and a warrant issued by a court—all because of a broken taillight.

*Kirby Corley Swartz*

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251. See *supra* note 16 and accompanying text.