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Title
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Journal
UCLA Criminal Justice Law Review, 4(1)

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Publication Date
2020-05-31

DOI
10.5070/CJ8.59682

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PAY UNTO CAESAR:
Breaches of Justice in the Monetary Sanctions Regime

Mary Pattillo and Gabriela Kirk

Abstract

Monetary sanctions include fines, fees, restitution, surcharges, interest, and other costs imposed on people who are convicted of crimes ranging from traffic violations to violent felonies. We analyze how people in the court system theorize about monetary sanctions with regards to four kinds of justice: constitutional, retributive, procedural, and distributive justice. Drawing on qualitative interviews with sixty-eight people sentenced to pay monetary sanctions in Illinois, we identify five themes that illuminate how respondents think about these forms of justice: monetary sanctions are: (1) justifiable punishment, (2) impossible to pay due to poverty, (3) double punishment, (4) extortion, and (5) collected by an opaque and greedy state. We find that for defendants in the criminal justice system, monetary sanctions serve some retributive aims, but do not align with the other three domains of justice. We discuss the policy implications of these findings.

About the Authors

This research was funded by a grant from Arnold Ventures. The PI is Alexes Harris at the University of Washington. We thank the Multi-State Study of Monetary Sanctions research team for their intellectual contributions to the formulation of this Article, and the University of Washington CSDE center grant for providing computing and data support. We also received helpful comments from Alexes Harris, Mario Small, Talia Schiff, Jason Robey, and from participants in Harvard University's Sociology department colloquium, and the University of Washington's Center for Studies in Demography and Ecology's Seminar Series.

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Introduction

In his concurring opinion in the 2019 *Timbs v. Indiana* decision, Supreme Court Justice Clarence Thomas quoted a 1680 English House of Commons finding.[1] "[T]he Court of King's Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists and Persons popishly affected; and excessively oppressing his Majesty's Protestant Subjects."[2] In other words, since the days of monarchy, courts administered by those in power have used monetary sanctions as an oppressive governing tool. Yet it required the *Timbs* ruling in 2019, to recognize that the prohibition against levying excessive fines expressed in the U.S. Constitution's Eighth Amendment also applied to the states.

That state authorities have been acting like kings of old would come as no surprise to a sixty-two-year-old man we interviewed in Illinois in 2017. "Give Caesar what's due," he told us, referring to the over $5000 in court costs, fines, and fees that he estimated he had been sentenced to pay for various felonies and misdemeanors, all drug and traffic related. He continued, only somewhat sarcastically, "Why should we pay Caesar? Whose face is on the money? Caesar! Then you pay Caesar what's due." He was homeless and reported a total monthly income of $192 in food stamps. Are his fines excessive? Is that justice?

The *Timbs* ruling was the first time in over twenty years that the Supreme Court took up the excessive fines clause within the Eighth Amendment, which reads in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[3] Yet *Timbs* had a very narrow purview, only addressing the question

1. Timbs v. Indiana, 139 S. Ct. 682 (2019).
2. *Id.* at 694.
3. U.S. Const. amend VIII.

of whether states are "incorporated" to the Eighth Amendment.[4] The justices unanimously decided that they are. Given the single question, the opinions are relatively short, leaving many crucial details about what constitutes excessive fines yet to be clarified. We focus on the questions of proportionality and ability to pay as components of excessiveness.[5] We also go beyond the constitutional justice that the Supreme Court metes out to explore retributive, procedural, and distributive justice, concepts that are of broad interest to social scientists, criminologists, and legal scholars, and that together offer a comprehensive appraisal of the justness of monetary sanctions from the perspective of those ordered to pay them. Such (il)legitimacy may affect the state's ability to collect on these debts.[6]

Ideas of justice pervaded our qualitative interviews with sixty-eight people sentenced to pay court fines and fees in Illinois. We identified five primary themes in the data and discuss how each theme provides both evidence and theory regarding important domains of justice. Respondents expressed that monetary sanctions are: (1) justifiable punishment, (2) impossible to pay due to poverty, (3) double punishment, (4) extortion, (5) and collected by an opaque and greedy state. On the Eighth Amendment issues of proportionality and ability to pay (i.e., constitutional justice), we show how the seemingly small amounts of these monetary sanctions became disproportionate to the crimes committed because of the substantial financial burden they represented. Respondents saw greater alignment with retributive justice, although the addition of monetary sanctions to other punishments went too far. Monetary sanctions breached respondents' sense of procedural and distributive justice without qualification. In this Article, we first define the four types of justice and discuss the literature on monetary sanctions. We then describe our data and method and present our findings. We conclude by arguing that the purpose of monetary sanctions is the social control of disfavored groups, and we call for the elimination of monetary sanctions as a sentencing practice for poor and near poor defendants.

I. Types of Justice

Constitutional justice "addresses only a subset of justice" dealing with "urgent and nonnegotiable requirements that are fundamentally of a piece with the articulate principles of the adjudicated Constitution."[7]

4. One of the authors participated in an Amicus Curiae brief in the Timbs case. *See* Brief of Amici Curiae Professors in Support of Petition for Writ of Certiorari, Timbs v. Indiana, 139 S. Ct. 682 (2019).
5. Also to be decided is if statutory fines, costs, fees, etc. qualify *as fines* under the Eighth Amendment. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2 (2018).
6. R. Barry Ruback et. al., *Perception and Payment of Economic Sanctions: A Survey of Offenders*, 70 Fed. Prob. 26 (2006).
7. Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice 129, 142–4 (2004).

Tyson Timbs, the name plaintiff in *Timbs v. Indiana*, experienced the forfeiture of his $42,000 Land Rover as a "prominent failure"[8] of fair treatment, and he turned to constitutional protections for redress. His SUV was confiscated when he was arrested for selling drugs to an undercover cop as part of a sting. The maximum fine for the offense, his first, was $10,000. While the local court thwarted the prosecution's attempt to use civil forfeiture laws to take the SUV, and the Appeals Court agreed, the Indiana Supreme Court reversed those decisions and ordered the taking, ruling that the state was not bound by the Eighth Amendment's "excessive fines" clause.[9] In *Timbs v. Indiana*, however, the Supreme Court unanimously ruled that states are so bound, upholding the state's lower courts' decisions that the forfeiture violated constitutional justice.

Yet, many questions remain. As Timbs' lawyers argued after the ruling:

> The *Timbs* decision has gone some distance to restoring [the Eighth Amendment's] prominence, but the Court still needs to address a wide variety of critical issues. What exactly counts as a "fine"? How should courts determine when a fine becomes "excessive"? Should courts consider people's inability to pay fines or their effect on livelihoods?[10]

There is a growing body of legal theory and argumentation that addresses the issues of proportionality and ability to pay.[11] This Article offers the perspectives of people paying court costs, fines, and fees on these pending questions of constitutional justice. Can even small fines and fees be excessive given the nature of the crime and/or the defendant's inability to pay?

Beyond the constitution, our inductive analysis pointed to retributive, procedural, and distributive justice as additional domains that captured the sentiments of the people we interviewed, even if they did not use that language. Retributive justice is the idea that punishment is the just response to an offense.[12] Proportionality—or calibrating the intensity of the punishment to the seriousness of the crime—is a key

8. Sager, *supra* note 7, at 139.
9. *See* Bernadette Atuahene, *Takings as a Sociolegal Concept: An interdisciplinary examination of involuntary property loss*, 12 Ann. Rev. L. & Soc. Sci. 171 (2016).
10. Scott Bullock & Nick Sibilla, *The Supreme Court Resuscitates the Eighth Amendment*, Atlantic (Mar. 13, 2019), https://www.theatlantic.com/ideas/archive/2019/03/unanimous-supreme-court-decision-policing-profit/584506 [https://perma.cc/7RWC-2QK9].
11. Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 La. L. Rev. 21 (2016); Colgan, *supra* note 5; Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L. Q. 833 (2013); Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. Chicago L. Rev. 1869 (2018).
12. Dena. M. Gromet & John. M Darley, *Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals*. 43 L. & Soc'y Rev. 1 (2009); Michael S. Moore, Placing Blame: A Theory of Criminal Law (1997).

consideration in retributive justice.[13] Do defendants in Illinois acknowledge the punitive aims of monetary sanctions? And, in their opinion, does the punishment fit the crime?

While retributive justice is about an outcome—namely punishment—procedural justice focuses on the process. Are the rules of the game fair and followed? Were all parties heard and treated with respect? Did authorities act ethically and honestly? Do legal actors have legitimacy?[14] A considerable body of research on procedural justice asks if a fair process leads to greater compliance with the law.[15] For example, Gladfelter, Lantz and Ruback[16] find that perceptions of more fair treatment by probation officers lead probationers to pay more towards their court-ordered restitution. Yet while procedural justice is often framed in instrumental terms, it is also an end in itself, "a collective, cultural *relationship* with the law."[17] How do Illinois residents with monetary sanctions evaluate their days in court? Were they listened to? Did judges, lawyers, and probation officers follow the rules?

Finally, distributive justice is about the fairness of the distribution of "valued resources" and the allocation of "rights, responsibilities, costs, and burdens."[18] Distributive justice helps to explain attitudes towards economic systems,[19] evaluations of pay equity,[20] appraisals of material wellbeing,[21] and even Tea Party membership.[22] In criminology, ideas of distributive justice affect the allocation of police services[23] and

13. Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 Oxford J. Legal Stud. 57 (2008).
14. Tom R. Tyler, *What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & Soc'y Rev. 103 (1988). For the limitations of the procedural justice framework, *see* Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen *Situated justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 L. & Soc'y Rev. 1 (2012).
15. For a review of the literature on procedural justice, *see* Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 Ann. Rev. L. & Soc. Sci. 5 (2017).
16. Andrew S. Gladfelter, Brendan Lantz & R. Barry Ruback, *Beyond Ability to Pay: Procedural Justice and Offender Compliance with Restitution Orders*, 62 Int'l J. Offender Therapy & Comp. Criminology 4314 (2018).
17. Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054 n.134 (2017).
18. Karen S. Cook & Karen A. Hegtvedt, *Distributive Justice, Equity, and Equality*, 9 Ann. Rev. Soc. 217, 218 (1983). *See also* Serena Olsaretti, The Oxford Handbook of Distributive Justice (2018).
19. Jennifer Hochschild, What's Fair?: American Beliefs about Distributive Justice (1981).
20. C. Wesley Younts & Charles W. Mueller, *Justice Processes: Specifying the Mediating Role of Perceptions of Distributive Justice*, 66 Am. Soc. Rev. 125 (2001).
21. Duane F. Alwin, *Distributive Justice and Satisfaction with Material Well-Being*, 52 Am. Soc. Rev. 83 (1987).
22. Rory McVeigh, Kraig Beyerlein, Burrel Vann & Priyamvada Trivedi, *Educational Segregation, Tea Party Organizations, and Battles over Distributive Justice*, 79 Am. Soc. Rev. 630 (2014).
23. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy*

correctional officers' treatment of inmates.[24] We explore how interviewees talk about the literal costs that are imposed on (distributed to) them within the overall distribution of burdens and benefits in society, and their attitudes towards where their dollars go.

Our main concern in this Article is how respondents opine on these matters of justice. Their positions do not constitute a definitive reading of the justice of monetary sanctions. Instead, their legal consciousness—as disproportionately working-class, low-income, and non-white subjects in the criminal courts—represents their "participation in the process of constructing legality."[25] Moreover, we build on the proposition that "having criminal law rules reflect community shared judgments of justice . . . produces the best practical approximation of true justice."[26] Hence, understanding the perspectives of defendants is necessary to achieving the system's legitimacy and fairness.

II. Research on Monetary Sanctions

Monetary sanctions include fines, fees, restitution, surcharges, interest, assessments, and other court costs imposed on people who are convicted of crimes ranging from traffic violations

to violent felonies.[27] State and federal statutes authorize these sanctions and define the amounts and ranges to be charged, as well as the accounts into which revenues should be deposited. Fines and fees are both punitive and generate revenue for states, either to compensate the state for its labor and services or to fund special interests that have little to do with criminal justice functions.[28] Interest and penalties are levied against those who do not pay their fines or fees on time. Restitution compensates victims for their loss. The nomenclature of monetary sanctions varies from state to state, and may also include words like "assessments," "costs," or "surcharges."[29]

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in Shaping Public Support for Policing, 37 L. & Soc'y Rev. 513 (2003); David Thacher, *The Distribution of Police Protection*, 27 J. of Quantitative Criminology 275 (2011).

24. Benjamin Steiner & John Wooldredge, *Examining the Sources of Correctional Officer Legitimacy*, 105 J. of Crim. L. & Criminology. 679 (2015).
25. Patricia Ewick & Susan S. Silbey, The Common Place of Law: Stories from Everyday Life, 45 (1998) .
26. Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 Nw. U. L. Rev. 1565, 1580 (2016).
27. *See generally* Claire Greenberg, Marc Meredith & Michael Morse, *The Growing and Broad Nature of Legal Financial Obligations: Evidence from Court Records in Alabama*, 48 Conn. L. Rev. 1079 (2016) (discussing monetary sanctions imposed prior to conviction); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 4 U. of Ill. L. Rev. 1175 (2014).
28. Brittany Friedman & Mary Pattillo, *Statutory Inequality: The Logics of Monetary Sanctions in State Law*, 5 The Russell Sage Found. J. of the Soc. Sciences 173 (2019).
29. Alexes Harris, Beth Huebner, Karin Martin, Mary Pattillo, Becky Pettit, Sarah Shannon, Bryan Sykes, Chris Uggen & April Fernandes, *Monetary Sanctions in the Criminal Justice System*, Laura and John Arnold Foundation (Apr. 2017),

The policy, legal, and social science literature on monetary sanctions has grown tremendously in the last decade.[30] This body of work has documented a number of important features of monetary sanctions.[31] First, the use of monetary sanctions by the federal government, states and municipalities has grown in the past three decades, as have the amounts that people are sentenced to pay.[32] Second, people struggle to pay their court debt, which makes it even more difficult to pay for other essential expenses such as food, housing, health care, medicine,

transportation, and raising children.[33] This burden is not borne solely by those convicted of crimes, but also by their family members.[34] Third, because people are not released from criminal justice supervision until their accounts are fully paid, monetary sanctions prolong supervision, increasing the likelihood of probation violation infractions, worsening punishment for any new criminal conduct, and leading to incarceration for nonpayment.[35] Finally, there is a racially disparate impact of monetary

http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf.

30. U.S. Dep't of Just., Investigation of the Ferguson Police Department (Mar. 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.
31. Karin Martin, Bryan Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 Ann. Rev. of Criminology 471 (2018) (reviewing research on monetary sanctions).
32. Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Re-entry*, Brennan Center for Justice (2010); Devin Fergus, Land of the Fee: Hidden Costs and the Decline of the American Middle Class (2018); Greenberg et al., *supra* note 27; Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. of Soc. 1753 (2010); Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor (2016); U.S. Commission on Civil Rights, Targeted Fines and Fees against Communities of Color: Civil Rights & Constitutional Implications (Sept. 2017), www.usccr.gov/pubs/Statutory_Enforcement_Report2017.pdf.
33. Ill. Crim. Just. Info. Authority, The Cost of Justice: The Impact of Criminal Justice Financial Obligations on Individuals and Families, (Aug. 2018), http://www.icjia.state.il.us/publications/the-cost-of-justice-the-impact-of-criminal-justice-financial-obligations-on-individuals-and-families [https://perma.cc/XE87-9LLE]; Harris et al., *supra* note 32; Alexes Harris, Beth Huebner, Karin Martin, Mary Pattillo, Becky Pettit, Sarah Shannon, Bryan Sykes & Chris Uggen, *United States Systems of Justice, Poverty and the Consequences of Non-Payment of Monetary Sanctions: Interviews from California, Georgia, Illinois, Minnesota, Missouri, Texas, New York, and Washington*, Laura and John Arnold Foundation (Nov. 2018).
34. Saneta deVuono-Powell, Chris Schweidler, Alicia Walters & Azadeh Zohrabi *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design (Sept. 2015); Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 Persp. on Pol. 638 (2015); Joshua Page, Victoria Piehowski & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5(1) RSF: The Russell Sage Found. J. of the Soc. Sci. 150–172 (2019).
35. American Civil Liberties Union, In for a Penny: The Rise of America's New

sanctions due to the aggressive policing of Black and Latinx neighborhoods and because those groups are less able to immediately pay.[36,37]

Following Ewick and Silbey's[38] use of interviews and narratives to understand legal consciousness, we add to the research on monetary sanctions by listening to how people talk about their court debt to develop themes about justice. There are very few studies that use empirical data to explore how respondents theorize about the justness of their court debt. Allen and Treger found that a majority of over 80 federal probationers they surveyed saw their fines and restitution as punishment, but they struggled to pay and felt threatened by criminal justice officials if they did not pay.[39] The authors did not use a justice frame, but the findings suggest that defendants acknowledged retributive justice but experienced a lack of procedural justice. Gladfelter et al. found that offenders in Pennsylvania had strong intentions to pay ordered restitution because they saw it as a legitimate form of retributive justice (again, not the authors' frame), and were more likely to pay when their probation officers treated them fairly (procedural justice).[40] Another survey in Pennsylvania found that offenders did not rate highly any of the possible justice goals of economic

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Debtors' Prisons (Oct. 2010); Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prison*, 51 Harv. Civ. Rights-Civ. Liberties L. Rev. 189 (2016); U.S. Dep't of Just., *supra* note 30.

36. Alexes Harris, Heather Evans & Katherine Beckett, *Courtesy Stigma and Monetary Sanctions: Toward a Socio-cultural Theory of Punishment*, 76 Am. Soc. Rev. 234 (2011); Christian Henrichson, Stephen Roberts, Chris Mai, Ayesha Delany-Brumsey, Mathilde Laisne, Chelsea Davis & Rose Wilson, *Past Due: Examining the Costs and Consequences of Bail, Fines and Fees in New Orleans*, Vera Inst. of Just. (Jan. 2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans/legacy_downloads/past-due-costs-consequences-charging-for-justice-new-orleans.pdf [https://perma.cc/S887-LNLM]; Kasey Henricks & Daina Cheyenne Harvey, *Not One But Many: Monetary Punishment and the Fergusons of America*, 32 SS1 Soc. F. 930 (2017); Alex R. Piquero & Wesley G. Jennings, *Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 Youth Violence & Juv. Just. 325 (2017); Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 The J. of Pol. 1090–1094 (2017).

37. *See also* Amaia Iratzoqui & Christi Metcalfe, *Set Up For Failure? Examining the Influence of Monetary Sanctions on Probation Success*, 28 Crim. Just. Pol. Rev. 370 (2017); Douglas C. MacDonald, Judith Greene & Charles Worzella, *Day Fines in American Courts: The Staten Island and Milwaukee Experiments*, U.S. Dep't of Just. (1992); Piquero et al., *supra* note 36; R. Barry Ruback, Lauren K. Knoth, Andrew S. Gladfelter & Brendan Lantz, *Restitution Payment and Recidivism: An Experimental Analysis*, 17 Criminology & Pub. Pol'y 789 (2018).

38. Ewick, *supra* note 25.

39. G. Frederick Allen & Harvey Treger, *Fines and Restitution Orders Probationers' Perceptions*, 58 Fed. Prob. 34–40 (1994).

40. Andrew S. Gladfelter, Brendan Lantz & R. Barry Ruback, *Beyond Ability to Pay: Procedural Justice and Offender Compliance with Restitution Orders*, 62 Int'l J. of Offender Therapy & Comp. Criminology 4314 (2018).

sanctions (e.g. retribution, rehabilitation, restoration of the victim).[41] Harris interviewed people with monetary sanctions in Washington State. Many respondents in her study raised issues of distributive justice—for example, one stated "it seems to me like the way our criminal justice system works, you know, there's too many people making money out of corrections."[42] Bögelein interviewed forty-four people sentenced to pay day fines in Germany and explicitly engages ideas of retributive and procedural justice.[43] Her respondents saw monetary sanctions as justified for retributive ends, but did not understand how they were determined and felt their money was going towards a greedy state.[44] We build on these studies and put constitutional, retributive, procedural, and distributive justice at the forefront of our analysis.

III. Setting, Data, and Methods

In 2017, we conducted sixty-eight in-depth interviews with residents of Illinois who had been sentenced to pay court costs, fines, fees, and restitution.[45] We recruited this convenience sample through a range of methods, including Craigslist ads; approaching people after court hearings; and hanging flyers in courthouses, private defense attorneys' offices, public libraries, community centers, nonprofit organizations serving formerly incarcerated persons, and university legal clinics. We also gained permission to sit in the lobbies of several probation offices across the state in order to recruit participants. We did interviews in eight counties, capturing the city of Chicago and its close and far suburbs, as well as urban and rural areas in mid- and downstate Illinois. We offered respondents $15 in appreciation for their time. We do not name the places outside of Cook County and Chicago where we did interviews since many had small populations and doing so could compromise respondents' anonymity and confidentiality.

Illinois is neither unique nor an outlier in its practices regarding monetary sanctions.[46] The extreme localism of monetary sanctions at the state and municipal levels makes national comparisons difficult,[47] but various state comparisons strongly suggest that there is no such thing as

41. R. Barry Ruback, Stacy N. Hoskins, Alison C. Cares & Ben Feldmeyer, *Perception and Payment of Economic Sanctions: A Survey of Offenders*, 70 Fed. Prob. 26 (2006).
42. Harris, *supra* note 32, at 59.
43. Nicole Bögelein, *'Money Rules': Exploring Offenders' Perceptions of the Fine as Punishment*, 58 The Brit. J. of Criminology 805 (2017).
44. *See also* Ruback, *supra* note 41.
45. The coauthors conducted twenty-nine of the sixty-eight interviews. The remainder were conducted by Brandon Alston, Erica Banks, Niamba Baskerville, Brittany Friedman, and Austin Jenkins.
46. Martin et al., *supra* note 31; Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, Nat'l Pub. Radio (May 1, 2014), [https://perma.cc/C3P7-Z657].
47. Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in. U.S. Systems of Justice*, 1 Ann. Rev. of Criminology 471 (2018).

a representative state or jurisdiction in the case of monetary sanctions.[48] Like many states, Illinois' constitution contains language about proportionality, stating that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."[49] It also states that "[n]o person shall be imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has willfully failed to make payment."[50]

Many states are reviewing their systems and laws regarding monetary sanctions, making it a critical moment to offer evidence on the topic.[51] In Illinois, the Criminal and Traffic Assessment Act was signed into law in 2018.[52] It took effect in July of 2019, with an automatic repeal provision at the end of 2020, if key state agencies determine that it has been detrimental to their finances. The new law introduces sliding scale fee waivers for people earning up to 400 percent of the poverty level. Because the law is not retroactive, it offers no relief to the people we interviewed. We discuss future implications of the new law throughout the Article.

The descriptive characteristics of our interview sample are included in Table 1. Our sample was 57 percent men and 43 percent women. African American respondents made up half of the interviewees, White respondents were 32 percent, and Latinx respondents were 12 percent. Most of our interviewees were poor or near poor; the majority (59 percent) had incomes (including government assistance and/or social security) of under $1500/month. A small minority (10 percent) had incomes over $3000/month. Just over half were unemployed and just over half had experienced homelessness at some point in their lives. Nearly half (46 percent) had both felony and misdemeanor convictions, and a minority of convictions (26 percent) were for violent offenses.

48. Alicia Bannon, Mitali Nagrecha & Rebekah Diller, The Brennan Cent. for Justice, Criminal Justice Debt: A Barrier to Re-Entry (2010), https://perma.cc/ARN5-5W6E; U.S. Comm'n on Civil Rights, Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications (2017).
49. Ill. Const. art 1, § 11, [https://perma.cc/W6MS-5NWD]. *See* Collaboration for Justice, Statement on Excessive Court Fines, Fees, and Costs (2016), [https://perma.cc/WRN8-AN83].
50. Ill. Const. art. 1 § 14.
51. U.S. Comm'n on Civil Rights, *supra* note 48, at 51–68, 196–218; *The Clearinghouse*, Fines & Fees Justice Center, (last visited Jan. 25, 2020), https://finesandfeesjusticecenter.org/clearinghouse/?sortByDate=true.
52. Ill. Criminal and Traffic Assessment Act, 705 ILCS § 135, (2018).

Table 1: Sample Characteristics

Sample	N = 68
Gender	
Men	57%
Women	43%
Mean Age	41
Race	
Black	50%
White	32%
Latinx	12%
Biracial/Other	6%
Income	
Below $1,500/mo	59%
$1,500–$3,000/mo	31%
Above $3,000/mo	10%
Percent unemployed	50%
Percent ever homeless	51%
Criminal Case	
Felony only	31%
Misdemeanor only	24%
Both felony and misdemeanor	46%
Violent felony or misdemeanor	26%
Percent served jail/prison time	84%

We cannot accurately determine the representativeness of the sample because there is no state-level data on people with financial sentences. However, our numbers on race and poverty align pretty closely with those in the court system. In 2017, 62 percent, 29 percent, and 9 percent of misdemeanants in Illinois were White, Black, and Other, respectively.[53] The racial makeup of Illinois' imprisoned population—most of whom have felony convictions—is 56 percent Black, 31 percent White, and 13 percent Latinx.[54] Our sample overrepresents women (43 percent), given that they are 29 percent of those convicted of misdemeanors, and 6 percent of the imprisoned population.[55] There is little information on the socioeconomic status of justice-involved Illinois residents. In Cook County, 89 percent of defendants qualify for a public defender, which suggests that the financial precarity of our respondents is not unusual.[56]

53. Ill. Sentencing Pol'y Advisory Council, Misdemeanor Sentencing: Trends and Analysis (2018).
54. Ill. Dept. of Corrections, Fiscal Year 2017 Annual Report 79 (2017), https://perma.cc/EFW7-TGV2.
55. Illinois Sentencing Policy Advisory Council, *supra* note 53; Ill. Dept. of Corrections, *supra* note 54.
56. Kim Bellware, *Chicago Judge Orders Access to Free Lawyers at Police Stations*, Huffington Post (Mar. 15, 2017), [https://perma.cc/D7QM-7K7A]; Illinois

Interviews lasted forty-two minutes on average. They took place in coffee shops, restaurants, probation offices, and, less frequently, in a respondent's home. We used a uniform interview guide, which included a close-ended survey for demographic characteristics, details about monetary sanctions, and general wellbeing questions (e.g. "Have you ever had any periods of homelessness?"), and open-ended interview questions about respondents' experiences at sentencing and how monetary sanctions affected their lives—employment, housing, finances, health, family, and overall. The transcribed interviews were analyzed using NVIVO qualitative data analysis software. Because this study is part of a larger five-year, eight-state study of monetary sanctions, the coding strategy was particularly comprehensive. We coded for sixty-two topics across eleven domains, ranging from respondents' mention of "stress or strain" in paying monetary sanctions to their "public assistance" use (or nonuse) to the possible impact on attaining "professional licensing." For this Article, we draw especially from the code for respondents' evaluation of the "fairness" of their monetary sanctions, as well as the codes "consequences for non-payment," and "assessing ability to pay."

We also interviewed court personnel—judges, lawyers, probation officers, and clerks—and conducted 241 hours of courtroom observations across the state. While we use these data sparingly in this Article, they constitute an important empirical check on the narratives that we present. We do not take the interviewees' reports at face value, but rather present them within the corroboration of our larger study.[57] We are confident of the five themes that we highlight because we also saw evidence of them in our courtroom observations. In the following Subparts, we lay out the sequence of argumentation yielded by our analysis of the interviews and how each point speaks to a particular type of justice. Table 2 maps the five themes and their relationships to justice.

Table 2: Empirical Themes and Types of Justice

Theme	Type of Justice
Justifiable punishment	Satisfies retributive justice
Too poor to pay	Violates retributive and constitutional justice
Double punishment	Violates retributive and constitutional justice
Extortion	Violates procedural and constitutional justice
Collected by an opaque and greedy state	Violates procedural and distributive justice

Criminal Justice Information Authority, Examining Illinois Probationer Characteristics and Outcomes (2011), https://perma.cc/F8CP-6AHL (discussing the socioeconomic status of those on probation).

57. *See* Colin Jerolmack & Shamus Khan, *Talk is Cheap: Ethnography and the Attitudinal Fallacy*, 43 Soc. Methods & Res. 178 (2014) (discussing best practices for the use of interviews and qualitative data); Steven Lubet, Interrogating Ethnography: Why Evidence Matters (2018).

IV. Findings

A. *Justifiable Punishment*

The people we interviewed in Illinois believed in retributive justice. They recognized that there are consequences to law breaking and accepted the authority of the judicial system to impose penalties. Their statements of recognition were robust and included elements of contrition and support for deterrence and rehabilitation. A forty-eight-year-old Black woman from downstate Illinois said the following:

> You know, it's fair, because you make it on yourself. If you put yourself in the situation where you have to come into the court system, in the system, you have to just pay for your consequences, you know. I mean, it's fair. I mean, sometimes I think they can be a little bit harsh on some people, because it's hard when, like I say, you don't have a job and you know, you have to look around where you live at. Things are not easy access for some people. But like I say, you choose what you want to do. When you wake up, if you choose to do something wrong, hey, you put yourself there and you have to take your own responsibilities. That's part of life.

The interviewer probed a bit and asked, "I noticed you said you feel like you should pay for your consequences. How do you think you should pay?" The woman repeated:

> Like I know this don't belong to me, so if I walk out of this door with this, I'm stealing. So, you know, if the court, if they catch you, you going to have to pay something. You know, they going to offer you some prob[ation]. I mean, it's just how it is, it's the rules of life. We got rules.

In this exchange, the interviewer offered the respondent an opportunity to perhaps backtrack, to blame someone else, to minimize the roughly twenty misdemeanor convictions on her record, most for theft. Instead, she repeated herself, and ended with the clear affirmation that there are rules that must be followed in society. The cost for breaking the rules might justly include monetary sanctions as a form of punishment.

Others accepted their sentence with similar matter-of-factness. A middle-aged biracial woman also from downstate said, "It was my wrong doing." A young Asian man from the suburbs of Chicago said, "I'm not gonna lie. It is fair. Coming from me, I sound crazy, but it does sound fair." And a twenty-eight-year-old Black man, also living in Chicago's suburbs, said, "At the end of the day you can't really blame nobody but yourself for the fees you have to pay, because you're the one that got in trouble." When the system is working, retributive justice is well-calibrated to the crime. Sometimes it even leads to deterrence or rehabilitation. A thirty-six-year-old Black man from downstate Illinois with over twenty property felonies confessed:

> I ain't going to lie to you, man. It made me realize, it ain't them. It's me. You know what I'm saying? These fines made me realize it's

> me. I'm the problem. I'm the cause of it . . . I used to play the blame game. When that judge say, "You don't want to listen? Don't want to obey?" You know what I'm saying? "See if this $400 fine help wake you up." Yeah. Made me realize I'm the problem . . . . Basically, I done gave you permission to set me straight, [to] fine me. I done gave you permission to take out my pocket. But yeah, these fines, boy, they'll wake you up though.

Yet while many people saw monetary sanctions as in line with retributive justice, *unqualified* statements of this position were rare. More common was a sense that some monetary punishment was just, but the degree of punishment given their financial means (i.e., "you don't have a job and, you know, you have to look around where you live at") was out of balance.

B. *Too Poor to Pay*

In theory, the graduated waivers for people earning up to 400 percent of the federal poverty line approved in the 2018 Illinois Criminal and Traffic Assessment Act mean that if someone is too poor to pay, they will not be required to do so. While a momentous step forward, the reform has considerable limitations. The waivers are only applicable to fees and costs, not to fines or restitution. The mandatory fine that cannot be waived for a first-time DUI offense, for example, is $1,000.[58] Neither does the new law give waivers for probation fees or court-mandated classes or treatment. Also, defendants must apply for the waiver within thirty days of conviction, so successful implementation relies heavily on public awareness, compliance, and proactive counsel. The new law is not retroactive, offering no relief for people like our interviewees already sentenced to pay monetary sanctions. Finally, the consequences for nonpayment that we discuss later remain in effect. The waivers represent progress, but poor defendants may still be disproportionately burdened.

It is important to calibrate how the dollar amounts of court costs, fines, and fees sound to the people upon whom they are imposed. Forty of the sixty-eight people (59 percent) we interviewed had incomes below $1500 per month. Many people were facing monetary sanctions that equaled a whole month's earnings, if not more. Hence, relatively small payments could be daunting. "It's $50 a month. That's expensive," said a twenty-eight-year-old White man who lived in one of Chicago's outlying suburbs. "No one has that kind of money when you just come out of jail." He had spent five months in jail for a felony sex crime. When he first came out, he was jobless and owed $2500 in court costs, fines, and fees. When we interviewed him, he reported his earnings as between $1500 and $2000/month, so he was more advantaged than most. The judge had imposed a $50 minimum monthly payment or he risked violating probation. As with many respondents, it was the amount of the sanction given his financial situation that he protested, not the idea of punishment.

58. Ill. Vehicle Code, 625 ILCS 5 § 11-501(c)(3) (2019).

"Well, maybe you shouldn't have done something stupid?" he concluded about himself. "I know I regret what I did, I will tell you that wholeheartedly. You reap what you sow." Nonetheless, he was stressed about how he would pay his debt.

Two women in downstate Illinois, both with misdemeanors and both reporting less than $500/month in income, mentioned how paying their monetary sanctions competed with their responsibilities as mothers. "It's a strain on me," said one. "I can't get things I need for my kids because I'm thinking, 'Oh, shoot, wait, I gotta go pay this fine.' It's like they taking all my money, you know what I mean?" Her friend offered more detail:

> Now it's affected me really bad . . . . School's about to start back. [My son] does a lot of sports and stuff. Who's going to do all of that? I can't afford that. I'm just like, "Oh, please let this judge have mercy on me on the fifteenth when I go." I'm not no troublemaker. You know I'm not no troublemaker, so just give me a $25 a month fine. I'll pay that.

Several respondents similarly detailed their monthly accounting and expenses for us. A fifty-year-old transgender Latina woman in Chicago who had fines and fees of over $1000 told us, "I live out of $720 a month. With that I manage to pay rent, pay phone, pay light . . . . I do get Link [Illinois' food stamps card], but you cannot buy what you need with the Link. Sometimes you're in need of deodorant or whatever." These reports of juggling competing necessities are supported by the findings of a convenience survey of 269 people with court debt in three cities in Illinois. The authors found that 72 percent, 62 percent, and 62 percent reported forgoing groceries, utilities, and rent, respectively, to pay monetary sanctions.[59]

Not surprisingly, some respondents were involved in the criminal justice system because of crimes of poverty. A woman in downstate Illinois shared what landed her in jail on a misdemeanor theft conviction:

> You go in the store, hey, I need something to eat for my kids or something, and you take it. I mean, I know you could get help, but like I say [it's] a small town here, it's not a lot of places to help you. You go and take some food out the store and you get caught . . . and then you have to go to court and all that. And you tell the judge well, hey, the reason why I done this is my kids was hungry and there was just no other option.

She had $500 in court costs, fines, and fees and reported an income of between $500 and $750 per month. Not only is she lacking the money to pay her monetary sanctions, she continues to bear the poverty that compelled her to offend in the first place, and there are few social services available in her small town to help.

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59. Illinois Criminal Justice Information Authority, *supra* note 33. For similar findings, *see* Harris, *supra* note 32; Harris et al., *supra* note 32.

If there is some retributive justice functions of the system of monetary sanctions, which many respondents recognized, it is undermined by the fact that many people cannot afford to pay what they are assessed. A forty-two-year-old Black woman in a Chicago suburb said, "Clearly we're low-income. I know that it's a form of punishment, however it doesn't make a means to the end . . . . It's just, none of it makes any sense." Retributive justice is overwhelmed by the impossibility of complying with this form of punishment, which is more burdensome for those who cannot pay. Proportionality, then, must be examined relatively. Retributive justice is breached because complying with the punishment is nearly impossible for some defendants, which also makes such punishment interminable,[60] often for minor infractions. Constitutional justice is also imperiled when punishment is disproportionate, as proportionality is a component of excessiveness. The other component of excessiveness is ability pay. McLean traces the historical precedents of the Eighth Amendment and argues that it assumes an "economic survival norm" such "that a defendant not be fined an amount that exceeded his ability to pay."[61] The people we interviewed were routinely sentenced to pay more than they could manage without seriously affecting their general wellbeing. For them, their poverty called into question the constitutional and retributive justice of monetary sanctions. Moreover, monetary sanctions were only one component of their punishment.

C. *Double Punishment*

Uggen and Stewart describe "piling on" as the multiple layers of criminal justice sanctioning, each of which has its own collateral consequences, and the sum of which often undermines any efforts at rehabilitation or desistance.[62] In our sample, 84 percent of respondents had served either jail or prison time for their offense. Nearly all had been on probation. Their criminal records partially explained why they were too poor to pay monetary sanctions. A thirty-one-year-old White woman from the middle of the state stated it plainly:

> Most people are like "Felony? Nope. We don't want you," which is even harder because then you can't earn the money to pay the fines, you know what I'm saying? It's like a neverending circle. Like, if you get a felony, nobody wants to hire you. Nobody wants to hire you, you can't pay what you're supposed to pay.

She had two felonies and two misdemeanors for property and drug crimes. The penalties were piling on: "I mean, if I'm going to be on six years [of] probation, do I really need to pay $6,000 in fines? You guys already have me."

60. Harris, *supra* note 32.
61. McLean, *supra* note 11, at 835–37. *See* Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 Iowa L. Rev. 53 (2017).
62. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community* Supervision, 99 Minn. L. Rev. 1871 (2014). *See* Eisha Jain, *Capitalizing on Criminal Justice*, 67 Duke L.J. 1381 (2017).

Many respondents felt that having done jail time was an appropriate punishment for their crime, but that adding monetary sanctions that they could not pay was disproportionate, thus violating retributive justice and a component of constitutional justice. "I'm the one gotta do the jail time and why should I have to pay?" asked a thirty-one-year-old Black woman in Chicago's suburbs who spent twenty-six days in jail for a felony drug conviction. A fifty-one-year-old Black man, also from Chicago's suburbs, thought it was profoundly unfair that his fines and fees grew to $9000 as he did eighteen months in prison for a drug felony. "If I'm already found guilty, got to take me away from my family for the next, however so long, that's that. That's what I thought." Of course he was wrong; he owed the monetary sanctions on top of his prison sentence. And the fifty-year-old Latina woman living off of $720/month had done jail time and community service. She complained: "I have a problem with the court fees because I think, man, I did five months, I did community service . . . . I did my time for it, why should I have to pay again for it? That's double punishment for me." Far from shirking responsibility or expressing disdain for retributive justice, these respondents instead saw jail as a considerable penalty, one that they had paid. Anything above that exacted a cost far greater than the gravity of the crime.

Even when they had not done jail time, many thought that probation alone obviated the rationale for additional sanctions. The reality was quite the opposite. Probationers in Illinois are charged up to $50 per month to be on probation. This was anathema to the people we spoke with. "You shouldn't have to pay for the privilege of being on probation," said a forty-two-year-old Black man in Chicago. Probation also comes with several other conditions that have additional costs. These are the "invisible punishments" of intermediate sentencing,[63] but they are far from invisible to those facing them. A fifty-one-year-old Black man in Chicago who spent four days in jail and two years on probation for a DUI detailed some of those additional costs:

> Look, especially in Cook County, anytime you become a part of the county probationary system, if they send you to a lab for a drug screen, you're getting the bill for that. The courts aren't paying for that. They'll order you to go do something, but you have to pay for it. If you have to go to a drug and alcohol class, you have to pay for that. If they recommend you to go to a treatment program, you're paying the bill for that. Getting in trouble is very easy, getting out of trouble is very difficult.

Over many years he completed all of these facets of his sentence and paid off the roughly $4000 in court fines and fees on reported income of between $2500 and $3000/month.

63. Uggen et al., *supra* note 62. *See* Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to Collateral Punishment Policy*, 10 Harv. L. and Pol. Rev. 123 (2016).

The piling on of fees clearly breached respondents' sense of retributive justice. The multiple layers of punishment were in excess of their crime. A thirty-year-old Black man in one of Chicago's outlying counties asked, "How many times do you reprimand a person for a mistake in their life?" He went on to answer his question from firsthand experience:

> You're telling me that I get reprimanded three or four times for this offense and if something happens again, I get reprimanded three or four times for that offense plus I get more time for the old offense I did that I've already been done and over with? It's not fair.

This young man was no angel. He had two felony convictions for drugs and armed robbery. He spent four months in jail and was sentenced to roughly $2000 in monetary sanctions. His monthly income was $600 from work secured though a temporary staffing company. He recognized the "mistake in his life," but the consequences of his actions seemed to have no end.

If television courtroom dramas have made the prohibition against "double jeopardy" a commonly known fact, the possibility of double (or more) punishment is something more narrowly experienced by people within the real criminal justice system. Jain[64] shows how this piling on creates financial gain for a wide range of actors who literally capitalize off of punishment. While some part of the suite of punishment serves retributive goals, the additional penalties "come at the expense of other important interests, such as proportionality."[65] This disproportionality violates retributive justice. It is also a novel perspective for thinking about the excessiveness of fines, and thus constitutional justice. Given that monetary sanctions are imposed on top of jail, prison, probation, community service, and other court-mandated programs, the data we present raise the possibility that *most* monetary sanctions violate constitutional justice because they are excessive in low-level criminal cases where the retributive function is already served by other forms of punishment.

D. *Extortion*

Unlike for unpaid credit card bills, student loans, mortgages, or payday loans, the criminal justice system wields a big stick in compelling people to pay their court debt: incarceration.[66] Both the Illinois

64. Eisha Jain, *Capitalizing on Criminal Justice*, 67 Duke L.J. 1381 (2017).
65. Jain, *supra* note 64.
66. *See* 730 Ill. Comp. Stat. 5/5-9-3 (2013) "(a) An offender who defaults in the payment of a fine or any installment of that fine may be held in contempt and imprisoned for nonpayment. The court may issue a summons for his appearance or a warrant of arrest. (b) Unless the offender shows that his default was not due to his intentional refusal to pay, or not due to a failure on his part to make a good faith effort to pay, the court may order the offender imprisoned for a term not to exceed 6 months if the fine was for a felony, or 30 days if the fine was for a misdemeanor, a petty offense or a business offense." *See* Brittany Friedman & Mary Pattillo, *Statutory Inequality: The Logics of Monetary Sanctions in State Law*, 5 Russell Sage Found. J. of Soc. Sci. 173 (2019).

Constitution[67] and the U.S. Supreme Court ruling in *Bearden v. Georgia*[68] prohibit imprisonment for nonpayment of court fines without first holding a hearing to determine if a person was *willful* in not paying. These laws do not, however, stop states attorneys, judges, and probation officers from both scaring defendants into paying, and (unconstitutionally) imprisoning them without holding such a hearing. According to a survey conducted by the Chicago Collaboration for Justice, 26 percent of respondents reported "receiving additional jail time" for not paying their court costs, fines, and fees.[69] Several studies document the same practice in other states.[70]

The threat of incarceration and other punishments—such as extending probation time, sending bills to credit reporting agencies, and terminating probation unsuccessfully—constituted strong breaches of procedural justice for the people we interviewed. They reported that their inability to pay was never considered by court personnel, neither during sentencing nor in any subsequent hearings. Instead, they were threatened outright or intimidated by what they observed happening to other people. Obtaining something through threat of force is extortion.

The extension or revocation of supervision or probation for nonpayment of monetary sanctions was a common occurrence. Many people reported it in interviews, and we observed it regularly in our courtroom observations. This negative consequence was purely because people could not pay. "Yeah. They have me on unsupervised probation," reported a twenty-nine-year-old Black woman from downstate Illinois who had a misdemeanor conviction for fighting, which she claimed was in self-defense. "Then they put me back on unsupervised probation because my fine wasn't paid off. What do they expect? I'm moving out of [public] housing, no income, with three kids, and I'm pregnant now." The breach of procedural justice is evident in her rhetorical question: "What do they expect?" The public housing authority in the area was condemning her housing and she was unsure of where she would move. She was unemployed. She reported income of less than $500 per month. Her probation officer knew her circumstances. The assumption on the part of the court that she would pay, that she could pay, seemed ridiculous to her, and the consequence for not paying was a process failure due to having

67. Ill. Const., art. 1 § 14.
68. Bearden v. Georgia, 461 U.S. 660 (1983).
69. Ill. Crim. Just. Info. Authority, *supra* note 33.
70. American Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010), [https://perma.cc/CH9Q-29KP]; Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prison*, 51 Harv. Civ. Rts.-Civ. Liberties L. Rev. 189 (2016); Sarah Dolisca Bellacicco, *Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System*, 48 Geor. L. Rev. 227 (2014), [https://perma.cc/TM8W-768Q]; Christopher D. Hampson, *The New American Debtors' Prisons*, 44 Am. J. of Crim. L. 1 (2016), [https://perma.cc/GG7T-Z3EL].

expectations that were clearly unachievable. When the extension of probation didn't yield payment in her case, the stakes got higher:

> They told me when I went to court that if I didn't have $607 that he was going to try to send me to jail. I was like, "Can we work out a payment plan?" [He responded,] "Oh no. It's been a year. You should be done paying it." That's what the judge told me . . . . He told me I had to pay something.

With that threat, the woman came up with $100. "But he knows you don't have a source of income?" the interviewer asked about how the judge could be so firm without taking into account her inability to pay. "He don't care," was her initial response. Later, she got more verbose, imagining what she might say at her next court date:

> Well, I have to be honest and tell him just how I feel, just like he's going to tell me how he feel. He don't give a damn about my fine . . . . Y'all are desperate for some money for a self-defense. Well, just do that, because my kids come first. Sorry. If I don't have that $25 a month, I'm going to tell you. I will call and let y'all know, "Hey, I need to get something for the kids. It's school about to start back. You want to see my receipt?"

Procedural justice in her mind would first include care, some human acknowledgement of her financial struggles. Next, it would include her having a voice.[71] As she imagined telling this to the judge—speaking boldly "against the law"—she also heard her mother admonishing her for doing so.[72] "My mom's like, 'You can't talk to him like that!'" She had not talked to the judge like that when he threatened her with jail. From what we observed in our courtroom observations it was rare, if not never, that anyone spoke so frankly to judges.

While it is unclear how she came up with the $100, her motivation to do so was clear. "It makes me want to go in a rush and pay my fines, so I won't lose my kids," she said later in the interview. "[A]re you in danger of losing your kids?" the interviewer asked. "No, not through DCFS [Department of Children and Family Services], no, but if I go to jail." Jail is punishment enough for any individual, but it is a special threat for a single mother with few social supports. Partial payment of her monetary sanctions was the sole result of the threat of jail. The "structural asymmetries"[73] in the courtroom, especially for poor defendants, directed the respondent's attention to the outcome of paying or going to jail. As Jenness and Calavita[74] show, people in institutional contexts characterized

71. Monica Bell *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054 (2017).
72. Patricia Ewick & Susan S. Silbey, The Common Place of Law: Stories from Everyday Life (1998).
73. Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 L. & Soc'y Rev., 1, 1 (2012).
74. Valerie Jenness & Kitty Calavita "*It Depends on the Outcome": Prisoners, Grievances, and Perceptions of Justice*, 52 L. & Soc'y Rev. 41 (2018).

by such large power imbalances can experience the *process* as unfair because the *outcome* is so unfavorable. In this case, the threat of jail is real and legal, even if the route to imposing it (if it were to comply with constitutional justice) is more involved than the judge seemed to convey.

If extortion itself is illegal,[75] then it is not surprising that it felt like an illegitimate procedure for extracting court fines and fees for interviewees. Scholars have characterized such practices as constituting "predation",[76] "mercenary criminal justice",[77] "stategraft",[78] and "seizure"[79] of the assets of poor people. We conclude that *extortion* is much more precise because it relates to a particular courtroom moment, experienced as a breach of procedural justice, when people feel they must pay—or else. It also speaks to constitutional justice since such immediate threats are outside of the bounds of legal authorization.[80]

We heard an abundance of stories that illustrate extortion. A resident of a county in the middle of the state told us:

> When they threaten my life with the county [jail], I pay them some money . . . . They tell me all the time, they'll petition to revoke my probation and then you go to court, and if they revoke you, they be like, "We going to offer you 180 days [in county jail] unless you pay this amount." I'm fixing to pay this amount because I don't want to do 180 days.

A thirty-nine-year-old White man from Chicago was similarly facing a probation revocation for not paying his fines and fees. "I think that they're testing me to fail," he said. "It's like they wanted me to go to jail and this is one of the reasons, one of the ways I can go to jail for it." And a fifty-six-year-old Black woman from Chicago's suburbs was not certain what would happen if she did not pay her fines before her probation time was up. "It might be possible they could say, 'We can send you back to jail' . . . . I've heard of that. That they have locked up [people] that can't

75. Federal law defines extortion as "an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person." 10 U.S.C. § 3359(c)(2)(C) (2019). Illinois does not have a specific statute for extortion, but the notion of using threat to extract something of value is referenced in statutes about "Intimidation and Theft." 720 Ill. Comp. Stat. 5/12-6 (2017); 720 Ill. Comp. Stat. 5/16-1 (2019).

76. Joshua Page & Joe Soss, *Criminal Justice Predation and Neoliberal Governance*, *in* Rethinking Neoliberalism: Resisting the Disciplinary Regime (Sanford F. Schram and Marianna Pavolvskaya, eds., 2018).

77. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 4 U. Ill. L. Rev. 1175 (2014).

78. Bernadette Atuahene & Timothy Hodge, *Stategraft*, 91 S. Cal. L. Rev. 263 (2018).

79. Katzenstein et al., *supra* note 34.

80. In a lawsuit regarding incarceration for nonpayment of probation fees in Harpersville, Alabama, the judge ruled against the municipality noting that "a more accurate description of the Harpersville Municipal Court practices might be that of a judicially sanctioned extortion racket." *The New Debtors' Prisons*, The Economist (Nov. 16, 2013), https://www.economist.com/united-states/2013/11/16/the-new-debtors-prisons.

pay they fines or whatever. They're still holding them." To comply with the state constitution and the Supreme Court ruling, Illinois law requires that courts hold a hearing to determine if nonpayment was due to the defendant's "intentional refusal to pay." None of the people we interviewed got constitutional justice by being allowed such a hearing. And far from a just procedure, they felt threatened at every turn. "All you're doing is buying freedom," one man from downstate told us about paying his monetary sanctions under the threat of incarceration. "That's all you're doing. It's not right."

E. *The Opaque and Greedy State*

The final empirical finding speaks to breaches of procedural and distributive justice occasioned by the revenue generation of LFOs. Respondents protested the lack of transparency about where the revenue from monetary sanctions went and the intensity of the collection process (procedural). Additionally, they offered critiques of what monetary sanctions paid for and the state's desire—as perceived by respondents—to profit from such revenues (distributive).

Courtrooms are awash with paper.[81] Prosecutors wheel in pushcarts full of manila accordion folders that contain the accumulating records of a person's case—police reports, defense attorney motions, pretrial evaluations, driving records, evidence from discovery, etc. If someone is ultimately found (or pleads) guilty, the judge signs a sentencing order. This form is in quintuplicate, with one of the copies meant for the defendant. On the sentencing order there are checkboxes indicating the specific court costs, fines, and fees, specifying the various amounts and the statute that authorizes them. For example, "$50.00 DUI Road Side Memorial Fee (730 ILCS 5/5–9-1.17)" would be checked for anyone convicted of driving under the influence, even if there was no victim. Despite this specificity, many people we interviewed had little knowledge of where their dollars were going. Many reported that they did not receive any tally of what they owed. Others remembered seeing some paperwork, but said that their probation officer kept it in a file at the courthouse. This opacity raised procedural justice concerns for them.

A thirty-six-year-old Black man from Chicago's suburbs said: "I think they keep it and put it towards whatever they need. Once it's sent in or they take it from us, we have no idea where it goes."

A forty-year-old Black man also from Chicago's suburbs reported:

> All the sudden I get a whole lot of fees to pay for. I don't think it's fair. They took my bond money, so I thought I was going to get some of that back, but that's going towards the, I don't know where the bond money went.

In downstate Illinois, a thirty-year-old Black man segued from procedural justice to distributive justice. He asked, only somewhat rhetorically:

81. Kasey Henricks, *Power to the Paperwork? Mandatory Financial Sanctions and the Bureaucratic Means to Racially Unequal Ends*, 63 Am. Behav. Sci. 1 (2019).

> I mean, 'cause why should I give you some money? I mean, what you puttin' it towards? They can't even tell you what they puttin' it towards. Come on. I mean, they could be profiting from money for all we know. We don't know.

A twenty-nine-year-old White man from the suburbs of Chicago also suspected distributive foul play alongside the procedural infraction of no transparency:

> I don't know. I'm not even sure where this court costs go to. How come they keep going up? Is it going towards the community? I doubt it. Where's it going? Judge's pockets? Somebody else's pockets? I doubt it's going somewhere helpful 'cause I haven't seen any improvements. So what is it helping?

These sentiments first offer a critique of procedural justice. Given that a form with detailed accounting exists, the breach here is the result of the fast-paced nature of the court, the overwhelming amount of paper, the limited time and attention of court personnel, and the procedural complexity of courtroom processes.[82] In our courtroom observations, judges announced the amounts and breakdowns of fines and fees so fast that we often could not record them, and sometimes they simply said "plus court fines and costs," with no amounts at all. In our interviews with prosecutors, public defenders, and probation officers, they conveyed that the financial part of the sentence was secondary to prison or jail time, or court-mandated program participation, and so they did not routinely review these details on the sentencing order with their clients. These data corroborate defendants' perspective of a lack of information regarding what they were supposed to pay and where it was going.

Even when they read the paperwork, it was not illuminating or satisfying. A twenty-seven-year-old White woman in the greater Chicago metropolitan area said: "Because when you look into certain things you owe fines for, like keeping documents at the courthouse costs me money . . . I guess I don't really understand that." Or a fifty-four-year-old Black woman from an inner-ring Chicago suburb said, "The way they itemize was stuff that wasn't even pertaining to me as far as I remember." And a thirty-one-year-old White woman from midstate read aloud and annotated some of the things on her sentencing order:

> So, why is it that I'm having to pay all these fees that are underneath here? Like I said before, it's the "statutory surcharge, $75 VCVA [Violent Crime Victim Assistance] penalty, offense on or after 7/16/12." Then it's got "child advocacy center fee $15, state police operations assistance fee $12.50, medical costs fund $10." What does any of that have to do with me? I had no medical costs, the state police are not the ones that pulled me over, and there was no children in the car when it happened, so it has nothing to do with children. Not to mention, it wasn't a felony so statutory surcharge should not

82. Rebecca L Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 Am. Soc. Rev. 909 (2015).

> even qualify. And, VCVA penalty? It doesn't even explain what that abbreviation is.

As this evidencee shows, the existence of the sentencing order did not offer procedural justice because it was undecipherable.

Even if respondents did not know what they were paying for, there was no question that they had to pay. Aside from the threats previously discussed, the *intensity* of collection also breached respondents' sense of procedural justice. In our courtroom observations, we could sit for hours and watch the exact same interaction over and over again. The only thing that changed was the person standing in front of the judge. "How much can you pay today on your fines and costs?" the judge would ask. The answer might be $10, $25 or $100. To that, the judge would send the defendant to the clerk's window to pay and bring back their receipt as proof. An interviewee in downstate Illinois experienced just what we saw: "Because they want their money, you see? First thing they ask you. You pay today? You pay today? You pay today? You pay today?" The repetition of the question represented the steady stream of defendants to which it was asked.

The demands to pay were unrelenting. A twenty-nine-year-old Black man in the Chicago suburbs said the judge admonished him, "You got to pay these court fees and fines. I understand that it's hard for you. Just pay them when you can." While seemingly sympathetic, the recognition of hardship was no relief for the obligation to pay. A nineteen-year-old Asian man in the Chicago suburbs described his interaction with his probation officer: "Last time, she asked me for money—if I could come give her money next time I see her on March 9th. She was like, 'Try and come up with something.'" This exchange sounds more like one with a loan shark—one part solicitous, one part coercive—than a legal interaction. And in a farther out suburb of Chicago, a thirty-year-old Black man narrated his interaction with the judge:

> I have some fines to pay and I pretty much told the judge that I didn't have it . . . . I was basically in a situation where I was living in a hotel. All my money was being basically drained by this hotel I was living in. I didn't have the financial ability to pay the fines and fees at the time. I was homeless. [Interviewer: What'd he say?] He gave me some time. I have some time to come up with some money. He didn't really be too hard on me, but they still want their money.

This respondent experienced the judge's actions as lenient and kind because the reference point was the ever present threat of jail. The deferred due date in the face of the extreme hardship of homelessness, however, conveyed the reality: In the end, "they still want their money." He characterized the collections process as an "imaginary leash."[83]

The intensity of collections was not accompanied by inquiries about if people could pay. The implementation of the 2018 law that offers waivers should attenuate some of these breaches of procedural justice.

83. Harris, *supra* note 32, at 72–73 (discussing the related concept of "tethering").

Instead of badgering people to pay, defendants should be informed of the waivers, and perhaps even assisted in applying for them. Yet because the law allows waivers for fees but not fines and other costs, these kinds of exchanges will continue even with full implementation of the law.[84] The relentless demands for money at the monthly (or more) payment-status hearings represent procedures that confuse and cloud the court's formal purpose of protecting victims, adjudicating guilt, and meting out just punishment.[85] Instead of those functions, the procedures made the criminal justice system and the state appear greedy to respondents.

Without full information and because the collection was so tireless, respondents reasoned that their monies were being used to enrich the courts and court actors, which they saw as punitive rather than productive entities. This dispossession to pay for their own punishment violated their sense of distributive justice. A forty-nine-year-old White woman in Chicago said that "they claim" that the court costs, fines, and fees are "for paperwork and administration fees and the time in the courtroom." But she saw the state as double-dipping since those costs should be paid out of general tax revenue. Instead, she saw monetary sanctions as going directly to the surveillance she experienced. "It feels like a processing fee—shipping and handling, you know—that type of thing." A seemingly innocuous enough phrase, "shipping and handling" astutely captures the transportation of defendants to and from jail and prison and in and out of the court. Handling is what probation officers do. They monitor, advise, check, record, and report. As metaphorical packages, defendants pay their own freight costs. In an unjust distribution of costs, this woman saw defendants paying for a system for which they are not the beneficiaries, but rather the captive merchandise.

A thirty-eight-year-old White woman from midstate Illinois also spoke to the morose logic of the merchandise paying for its own shipping and handling:

> I feel as a member in society that they're double charging us [first in taxes, then in monetary sanctions]. I've more than paid for that jail. Then they want to call it their jail and we, as the people, are like, "That's my jail. I sleep there. You feed me. It's me that gets locked in. You work for me, I don't work for you. You work for my crimes. That's how you get paid. You get paid because I caused trouble."

This was a strident indictment of the distributive processes upon which this respondent felt the criminal justice system runs. She did not deny her crimes—three felony assault convictions and several misdemeanor traffic violations. She had spent time in jail and had been on probation for years. At the time of the interview, she had joined a church and said,

84. Colgan, *supra* note 5, at 9–10 (arguing that much advocacy and litigation has been directed at post-hoc protection, while what is needed is "protection at sentencing," which the Eighth Amendment provides).

85. Kohler-Hausmann refers to this as managerial justice. Issa Kohler-Hausmann, Misdemeanorland: Criminal courts and social control in an age of broken windows policing (2018).

"I have been improving myself, changing my people, places and things, and that's where I really noticed the difference." Yet she still owed nearly $10,000 in court costs, fines, and fees. In her mind, that money would pay for the system that offered her only punishment, never rehabilitation. In effect, whatever fines and fees she paid would use monies from someone earning less than $500/month to fund the jail where she had spent six months, and to pay the salaries of the people who ordered her there.

The maintenance (or enrichment) of the state at poor people's expense constituted an affront to distributive justice. Respondents were quite creative in expressing this sentiment. A thirty-one-year-old Black woman in downstate Illinois used the word "greed" explicitly. "It's like it don't matter, I'm just taking your money. They just want your money, they're just greedy." Others used different terminology. A twenty-nine-year-old White man in Chicago's suburbs said, "It's pretty common nowadays to get hit with big court costs, just for being an idiot, I guess. Everyone's money-hungry—corrupt." A forty-nine-year-old White woman from Chicago commented: "It just seems like a big old fat wallet." A sixty-year-old Black man in a distant Chicago suburb had this to say: "In these driving cases out here, I just look at it as like a cash cow. That they just raking in all this money . . . . I don't know, it's just like a money machine, and they're just eating you alive financially." A twenty-three-year-old White man from downstate explained: "I'm charged nearly $500 for something that costs about $0–$100. Now you're robbing me. If I rob you it's a crime. Now you're robbing me. That's not cool." And a twenty-year-old Black man from an inner-ring suburb of Chicago relayed:

> They don't give a shit. They want their money 'cause I fucked up in their system. All I am to them is a paycheck, and if I don't pay, I go back to jail. And if I want to get out of jail, I gotta get some more money. And not me, whoever I'm calling on the outside to go get it for me on the inside.

Greedy, money hungry, a wallet, a cash cow, a money machine, a robber, a paycheck. In the *Timbs* decision, Justice Ginsburg wrote that the concern that monetary sanctions would be used as a revenue source was "scarcely hypothetical."[86] Revenue generation seemed readily apparent to the people we talked to. If Ginsburg meant this to be another grounds upon which to evaluate constitutional justice, most monetary sanctions would fail the test.

The affront to distributive justice, however, is not due to the collection of revenue *per se*, but rather because the specific source of that revenue is so relatively poor. "Why don't you take it from the people who actually do have money?" asked one interviewee. Of course states do bring in millions of dollars in revenue from nonpoor people, especially in traffic violations. But the respondents we interviewed don't see those people. We rarely saw them in our hours of courtroom observations. Anyone with the means to do so could pay the fines and costs

86. *Timbs*, 139 S. Ct. at 689.

at the police station, with credit cards, or online. The courtroom is the domain of those who cannot make bail, cannot afford a lawyer to get charges dismissed or reduced, or cannot get off probation because of an outstanding financial balance. Their worldview is developed as they sit and wait for their cases to be called and as they interact with the lawyers, judges, clerks, and probation department. What they see is a ravenous machine taking from the poor and giving to a system that does not return any benefit to them, but rather perpetuates their custody.

Conclusion

In this Article we asked the question: do monetary sanctions align with important forms of justice? Taking the perspective of the people involved in the criminal justice system who we interviewed, we find that the majority of monetary sanctions imposed on this population are excessive (disproportionate and beyond their ability to pay) and thus do not provide constitutional justice. Many of the people we interviewed owed in excess of their monthly income, mostly for nonviolent offenses. When they did pay, they did so by not paying other essential bills and costs. Their inability to pay made the punishment disproportionate to their crime and redistributed monies in a regressive fashion. In drawing this conclusion, we add empirical support to Colgan's doctrinal argument that an examination of the "five key principles [that] emerge from the proportionality cases of the Cruel and Unusual Punishments Clause from which the excessiveness test is borrowed . . . [supports] the conclusion that a defendant's financial condition is relevant to assessing the severity of punishment for use in weighing its proportionality."[87]

To conclude, we turn to the question: What is the purpose of this excess? Garland[88] offers a sophisticated analysis of southern lynchings of African Americans as *penal excess*. Why did southern lynch mobs engage in collective and public violence despite the fact that U.S. criminal law had dismissed such penalties centuries prior? The answer:

> They did so to invoke a set of meanings and distinctions that America's increasingly egalitarian legal system had sought to leave behind. The lynchers' use of "cruel and unusual" punishments was a deliberate flouting of the norms of modern law and civilized penology, a self-conscious choice, intended to degrade and defile black offenders and to refuse them the treatment afforded to convicted criminals by the criminal justice institutions of the time.[89]

Of course the practice of monetary sanctions does not compare to the brutal and homicidal violence of lynchings. The important insight, however, is the role of penal excess in damaging and humiliating a marginalized population and doing so under the cover of law. Just as Garland

87. Colgan, *supra* note 5, at 47; *see also* McLean, *supra* note 11.
88. David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. & Soc. Rev. 793 (2005).
89. *Id.* at 814–15.

shows that lynchings were not extralegal in the way often assumed, the extraction of monetary sanctions happens in plain sight and with the full participation of officers of the court. The threat (without a hearing) of jail for nonpayment is regularly used to extort payment (or to actually put people in jail). The ultimate purpose of the excess is social control, the social control of Black people in the case of lynchings, and the control of poor people—or, in seventeenth-century England, "his Majesty's Protestant Subjects"[90]—in the case of monetary sanctions. The Eighth Amendment is about curtailing the excesses to which penal power can be used against disfavored groups. A forty-nine-year-old Black man in Chicago expressed this clearly: "You know, sometimes laws are to protect people, but other times laws can be construed to keep people in line."[91]

Beyond constitutional justice, we also ask about how monetary sanctions accord with retributive, procedural, and distributive justice. Our data reveal serious breaches of each. While several respondents acknowledged guilt and accepted the idea of a monetary punishment, most did so with a caveat about it being "high and outrageous," as one woman said. This disproportionate punishment violates retributive justice. The fact that many respondents had done jail and/or prison time, and were serving probation with requirements for community service, classes, or other court-mandated programs, made the financial punishment appear even more disproportionate to their offense, further violating retributive justice and perhaps also the constitutional consideration of excessiveness. Procedural justice was undermined because payments were extracted under the threat of force. They paid to avoid jail. They were "buying their freedom." This extortionist regime not only felt procedurally wrong to respondents, it also flouted the law—another sphere of constitutional injustice. Finally, bewilderment about where the money went and impressions of the greedy state violated both procedural and distributive justice. Procedurally, respondents were not thoroughly informed about the destination or purpose of the fines, fees, and costs they paid, yet they were hounded for them in frequent court appearances. Regarding revenue and distributive justice, monetary sanctions are regressive. They are

90. *Timbs*, 139 S. Ct. at 694.

91. The disproportionate poverty of African Americans and their disproportionate entanglements in the criminal justice system make this also a race story. *See* Harris et al., *supra* note 32; Kasey Henricks & Daina Cheyenne Harvey, *Not One but Many: Monetary Punishment and the Fergusons of America*, 32 Soc. F. 930 (2017); Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 L. & Soc'y Rev. 695 (2010); Melissa Sanchez & Sandhya Kambhampati, *How Chicago Ticket Debt Sends Black Motorists Into Bankruptcy*, ProPublica Illinois, Feb. 27, 2018, https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy; U.S. Comm'n. on Civ. Rts., Targeted Fines and Fees against Communities of Color: Civil Rights & Constitutional Implications (2017) www.usccr.gov/pubs/Statutory_Enforcement_Report2017.pdf; *see* Garland, *supra* note 88, at 798 (explaining lynching as simultaneously racist *and* a mode "of class and gender control").

disproportionately exacted upon those least able to pay, and redirected to the state, which uses them on criminal justice systems that further defendants' impoverishment.

These findings argue for the elimination of monetary sanctions as a sentencing practice for poor and near poor defendants. Several scholars, organizations and institutions have put forward such proposals. Harvard's Criminal Justice Policy Program recommends eliminating all fees and surcharges.[92] Colgan[93] argues for "graduated" economic sanctions along the lines of "day fines" in Europe, and McLean similarly argues for setting a penalty such "that it could reasonably be expected to be paid . . . while permitting an individual to maintain some minimal level of economic subsistence."[94] For many people we interviewed, that amount is likely be $0. The National Task Force on Fines, Fees, and Bail Practices—an entity created by the Conference of Chief Justices and the Conference of State Court Administrators—offers several principles, including: funding courts wholly from general revenue sources rather than from fees and costs, and admonishing states not to adopt mandatory fines, fees, and surcharges for "misdemeanors and traffic-related and other low-level offenses and infractions."[95] The American Law Institute's Model Penal Code recommends similar reforms on the legislative side.[96] These would all be welcome efforts to the respondents we interviewed who experienced monetary sanctions as violations of multiple forms of justice. A thirty-six-year-old Black man in downstate Illinois summarized the damage done as a result of such penal excesses "I don't get this place down here as far as their judicial system. They wicked." Kings, emperors, and wickedness—these symbols do not convey justice in a modern criminal justice system.

92. Sharon Brett & Mitali Nagrecha, *Proportionate Financial Sanctions: Policy Prescriptions for Judicial Reform*, Harv. L. Sch. Crim. Just. Pol'y Program, Sept. 2019.
93. Colgan, *supra* note 61.
94. McLean, *supra* note 11, at 896.
95. Nat'l Task Force on Fines, Fees, and Bail Prac. (2017) *Principles on Fines, Fees, and Bail Practices*, 7 (2017), https://www.ncsc.org/~/media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx.
96. American Law Institute, Univ. of Minn., Model Penal Code: Sentencing. Minneapolis 634 (2017).