
ARTICLE

THE FAILED PROMISE OF INSTALLMENT FINES

BETH A. COLGAN & JEAN GALBRAITH[†]

In the 1970s, the Supreme Court prohibited the then-common practice of incarcerating criminal defendants because they lacked the money to immediately pay off their fines and fees. The Court suggested that states could instead put defendants on installment payment plans. As this Article shows, this suggestion came against a backdrop of impressive success stories about installment fines—including earlier experiments in which selected defendants had reliably paid off modest fines through carefully calibrated payment plans. Yet as this Article also shows, installment fines practices of today differ significantly from those early experiments, as lawmakers have increased fine amounts, added on fees, surcharges, and restitution, and penalized nonpayment through additional costs and other sanctions. This has turned installment fines into tools of long-term oppression. Further, the early experiments were only ever limited solutions that left behind people in the most precarious financial circumstances, widened the government’s net around only those of limited means, and raised the risk that crime policy would be driven by revenue generation aims rather than justice. Those problems continue today. For all too many, installment fines are unaffordable, endless, and arbitrarily administered—and applied instead of better and more equitable solutions. We close the Article by arguing that the present-day uses of installment fines merit both constitutional challenge and policy reform.

[†] Beth A. Colgan is a Professor of Law, UCLA School of Law. Jean Galbraith is a Professor of Law, University of Pennsylvania Carey Law School. For comments at various stages, we thank Abbye Atkinson, Shirin Bakhshay, Cary Coglianese, Tim Curry, Tom Ginsburg, Sophia Lee, Stephen Lee, Courtney Lollar, Teemu Ruskola, Colleen Shanahan, Shirin Sinnar, Karen Tani, Kate Weisburg, Ron Wright, and participants at the Penn Carey Law faculty workshop and the University of Chicago Law School public law workshop. Special thanks to Andrew Christy for his insights and inspiration. For terrific research support, we thank law librarians Gabriela Femenia, Annemarie Geist, Rachel Green, Shangching Huitzacua, Caitlin Hunter, and Andy Lang, and research assistants Tayler Daniels, Cameron Leska-Kent, and Hannah Sachs. Finally, we thank the members of the *University of Pennsylvania Law Review*, particularly Kirsten Hanlon, Carolyn Hartwick, and Will McDonald, for their careful editing.

INTRODUCTION	990
I. THE ORIGINS OF INSTALLMENT FINES	999
A. <i>The Uptake of Installment Fines During the Progressive Era</i>	1000
1. International Efforts to Curtail Imprisonment for Failure to Pay Fines.....	1001
2. The Appeal of Installment Payments in the United States..	1004
3. The Limitations of Early Installment Fines Experiments...	1012
B. <i>Depression Era to Mid-Century American Law Reform Efforts</i>	1016
1. The Depression Era: An Experiment in Virginia	1017
2. 1950s-1960s: Academic Engagement and Law Reform Projects	1019
II. THE OVER-OPTIMISTIC EMBRACE OF INSTALLMENT FINES IN FOURTEENTH AMENDMENT LITIGATION AND ITS AFTERMATH.....	1026
A. <i>The Fines Trio: A Focus on Formalism</i>	1026
1. <i>Williams v. Illinois</i>	1028
2. <i>Tate v. Short</i>	1033
3. <i>Bearden v. Georgia</i>	1036
B. <i>Installment Fines Become Bureaucratized and Increasingly Oppressive</i>	1040
III. ADDRESSING THE ABUSES OF INSTALLMENT FINES	1048
A. <i>The Excessive Fines Clause as a Powerful Source of Protection</i>	1049
1. Proportionality	1051
2. Revenue Generation	1053
B. <i>Avenues for Policy Reform</i>	1057
CONCLUSION.....	1061

INTRODUCTION

Charles Anderson, an Army veteran, spent 28 days in jail until his elderly mother paid \$1,000 from her meager Social Security income to secure his release.¹ Jenny was evicted, struggling to make ends meet after a serious accident forced her to take a lower paying job, but intent on keeping her teenage son from being arrested on a warrant.² Sergio Thornton has difficulty

¹ Connor Sheets, *How Do You Make Them Pay?: Locked Up in Alabama for Debt*, AL.COM (July 12, 2021), <https://www.al.com/news/2021/07/how-do-you-make-them-pay-one-alabama-county-jails-people-for-months-over-debts-they-cant-afford-to-pay.html> [<https://perma.cc/3J9F-3K4N>].

² Matthew Shaer, *Trapped: Most States Let Courts Fine Teenagers. The Debt Is Taking Down Their Whole Families*, SLATE (June 22, 2020, 9:00 AM), <https://slate.com/news-and->

covering the rent and school expenses for his three daughters, and is prohibited from voting in elections.³ Annita Husband was forced to work at a Church's Chicken, taking home only \$10 per week, and to live in an overcrowded room in a motel surrounded by razor wire where she was subjected to strip searches.⁴

The people in these stories of desperation share a common tie: they are each struggling to pay economic sanctions—fines, fees, surcharges, or restitution—in installments. Seemingly benign, the offer of an installment plan within the court system can be a vicious trap by which poor Americans are kept under effectively endless payment plans, the threat of further sanctions, and ongoing surveillance and humiliation. In addition to the fine that may be imposed for an offense, lawmakers and courts have added an array of additional expenses—fees nominally designed to recoup system costs, surcharges to fund government services, and in some cases restitution—which necessarily expand the time it would take a person of limited means to pay on installment.⁵ Add to that collections and supervision costs, and reaching the principal becomes difficult, if not out of reach, for many.⁶ And missing or coming up short on a payment can result in serious repercussions—issuance of an arrest warrant, loss of a driver's license, extension of probation or parole, or periods of incarceration, just to name a few, each of which can carry even more fees.⁷ In some cases, those penalties

politics/2020/06/juvenile-debt-families.html [https://perma.cc/JMR5-NNTS] (withholding Jenny's last name).

³ Jesse Wegman, *When It Costs \$53,000 to Vote*, N.Y. TIMES (Oct. 10, 2021), <https://www.nytimes.com/2021/10/07/opinion/election-voting-fine-felony-florida.html> [https://perma.cc/7GNP-X726].

⁴ Anna Wolfe & Michelle Liu, *Think Debtors' Prisons Are a Thing of the Past? Not in Mississippi*, MARSHALL PROJECT (Jan. 9, 2020), <https://www.themarshallproject.org/2020/01/09/think-debtors-prisons-are-a-thing-of-the-past-not-in-mississippi> [https://perma.cc/BLW9-QVKM].

⁵ See Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 5-7 (2018) (illustrating the possible fees stemming from an arrest in Florida, including an application fee for a public defender, prosecution costs, surcharges for local criminal justice and crime victim compensation funds, partial payment and nonpayment fees, and administrative fees for the warrant and arrest).

⁶ *Id.*; see generally HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 32-35 (2014), http://hrw.org/sites/default/files/reports/us0214_ForUpload_o.pdf [https://perma.cc/U5YL-BC2S] (describing probation sentences and related fees imposed on people with outstanding economic sanctions); Nick Barber, *In Small-Town Georgia, A Broken Taillight Can Lead to Spiraling Debt*, IN THESE TIMES (July 18, 2022), <https://inthesetimes.com/article/small-town-georgia-predatory-private-probation-debt> [https://perma.cc/C6U8-H4NX] (regarding placing people on probation solely because they are unable to pay fines and fees in full).

⁷ See, e.g., TEX. APPLESEED, END JAIL TIME FOR UNPAID FINES IN TEXAS (2017), https://www.texasappleseed.org/sites/default/files/Infographic_EndJailTimeFines_2017.pdf [https://perma.cc/5VZ6-GNRA] (noting that in 2015, Texas courts issued 754,000 arrest warrants for nonpayment of fines); Veronica Goodman, *Driver's License Suspensions and the Debt Trap*,

are mandatory or applied automatically.⁸ In others, people are hauled back into court to explain their financial precarity, often in cursory proceedings before at times imperious judges with few public defenders.⁹

The end result is that even among those who have committed only minor offenses, the struggle to pay off these financial penalties while also meeting

GOVERNING (June 1, 2021), <https://www.governing.com/now/drivers-license-suspensions-and-the-debt-trap> [<https://perma.cc/8K8Q-WTCN>] (reporting that, at the time of publication, 35 states and Washington, D.C. suspended, revoked, or refused to renew drivers licenses over unpaid economic sanctions); Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 77-80 & Appendices C-D (2019) (describing the effects of nonpayment on probation and parole); Wegman, *supra* note 3 and accompanying text & Colgan, *supra* note 5 and accompanying text (providing examples of incarceration).

⁸ *E.g.*, IOWA CODE § 321.210A (2021) (requiring that a driver's license "shall" be suspended for nonpayment, after which a person may request placement on an installment plan); LA. STAT. ANN. § 15:571.21(B) (2018) ("For all monetary assessments imposed as a condition of probation or parole except supervision fees, the division of probation and parole shall assess a collection fee of ten percent of the funds due . . ."); MO. ANN. STAT. 302.341 (West 2015) (mandating that the court order the suspension of a driver's license for nonpayment); 75 PA. STAT. AND CONS. STAT. ANN. 1533(a) (2013) ("The department shall suspend the operating privilege of any person . . . who has failed to pay any fine, costs or restitution imposed . . .").

⁹ *See, e.g.*, *Commonwealth v. Diaz*, 191 A.3d 850, 852-53, 863 (Pa. Super. Ct. 2018) (describing lower court proceedings in which the judge imprisoned a person for failing to make installment payments after disregarding evidence of extreme poverty, asking only a single question, and appearing to consider that he could have "[sold] his blood plasma to make some money"); Class Action Complaint at 17-25, *Brown v. Lexington Cnty.*, 2018 WL 1556189 (Mar. 29, 2018) (No. 17-cv-01426) (describing the failure to assign a public defender to represent people who are arrested on warrants for nonpayment of fines and fees); Campbell Robertson, *For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time*, N.Y. TIMES (Oct. 19, 2015), <https://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html> [<https://perma.cc/7DWP-E3BT>] (describing a hearing in Marion, Alabama, in which Judge Marvin Wiggins advised defendants that "[i]f [they] don't have any money [to pay fines and fees], go out there and give blood and bring in a receipt indicating you gave blood," otherwise "[t]he sheriff has enough handcuffs"); *Profiles of Those Charged to Pay or Stay*, NPR (May 19, 2014), <https://www.npr.org/2014/05/19/310710716/profiles-of-those-forced-to-pay-or-stay> [<https://perma.cc/EMU3-WGQ3>] (providing an audio recording of an attempt by Stephen Papa, an Iraq War veteran, to explain to a judge that going to jail for nonpayment would cost him his job, to which the judge responded: "You didn't get to be 27 [years old] not having any initiative did you? . . . Make it work."). While both the initial imposition of economic sanctions and the downstream consequences of nonpayment are matters of serious concern in felony cases, the lack of counsel may be particularly dire in misdemeanor cases and cases arising in municipal court. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315, 1340-43 (2012) ("Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel.").

basic human needs¹⁰ can go on for many years.¹¹ As put by Jerry Gholston, a man from Alabama summoned in 2021 to pay financial penalties for a 1996 criminal conviction: “They want to keep people in the system once [they are] in the system.”¹² And as with many other issues in criminal justice, the hardships of the system fall unduly on people of color living in heavily policed communities.¹³

Ironically, at various times throughout history the use of “installment fines”—the payment of economic sanctions over time—has been beloved by American criminal justice reformers.¹⁴ Beginning early in the twentieth century, Progressive Era activists were appalled by the then-common practice of imprisoning people who could not immediately pay fines in full. As the Chief Probation Officer of Cook County, Illinois, explained in 1914: “[I]t is nothing else than putting a man in jail for a debt; it is a law particularly against the poor and in favor of the man who has money.”¹⁵ Coordinating

10 *E.g.*, ALA. APPLESEED CTR. FOR L. & JUST., GREATER BIRMINGHAM MINISTRIES, TAS & LEGAL SERVS. ALA., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA’S RACIAL WEALTH DIVIDE 4 (2018), <https://alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf> [<https://perma.cc/6TCZ-YUBQ>] (noting that 82.9 percent of survey respondents paying court debts in Alabama reported being unable to meet basic needs or make child support payments); Thomas B. Harvey & Janae Stacier, *Policing in St. Louis: “I Feel Like a Runaway Slave Sometimes,”* in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 49 (Tamara Rice Lave & Eric J. Miller eds., 2019) (regarding one interviewee’s need to pay court bills before medical and utility bills).

11 See Jeffrey T. Ward & Nathan W. Link, *Financial Sanctions in Pennsylvania: An Examination of Assessed Amounts and Repayment by Indigent Status*, 34 FED. SENT’G REP. 166, 168-69 (2022) (finding that the “typical” public defense client had outstanding balances a decade old).

12 Connor Sheets, *“It’s Robbery”: When Plea Deals Hinge on Promising to Always Have Money for Court Fees*, AL.COM (June 10, 2021, 6:57 AM), <https://www.al.com/news/2021/06/its-robbery-when-plea-deals-hinge-on-promising-to-always-have-money-for-court-fees.html> [<https://perma.cc/7WD6-PDRY>].

13 See *e.g.*, Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1090-92 (2017) (concluding from data from approximately 9,000 cities that budgetary reliance on fines and fees increases along with the percentage of the population that is Black); Alexes Harris, Mary Patillo, & Bryan L. Sykes, *Studying the Systems of Monetary Sanctions*, 8(2) RUSSELL SAGE FOUND. J. SOC. SCIS. 1, 2, 5, 23, 26 (2022) (describing research on the racially disparate impact of monetary sanctions); Robert Stewart et al., *Native Americans and Monetary Sanctions*, 8(2) RUSSELL SAGE FOUND. J. SOC. SCIS. 137, 148-50 (2022) (finding higher than average legal financial obligations imposed on Native Americans in Minnesota); U.S. DEP’T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4-5 (Mar. 4, 2015) (noting disproportionate use of force and harm from municipal court practices on Black residents of Ferguson).

14 We use the term “installment fines” for ease of reference in the article, though paying by installment can also apply to fees, surcharges, restitution, and other forms of economic sanctions applied through the criminal legal system.

15 *The Payment of Fines in Installments by Offenders*, 4 CHICAGO MUN. REFERENCE BULL. 1, 8 (1914) [hereinafter *1914 Chicago Report*] (quoting John W. Houston). This report was briefly referenced in an excellent note published in 1953 by the *University of Pennsylvania Law Review*, which

locally, nationally, and even internationally, reformers of that era and of later years saw installment fines as a brilliant alternative—not just a win, but a win-win-win. It would end the repugnant practice of imprisoning people solely because of poverty. It would have rehabilitative rewards because people would be “continuously reminded of their misdeeds by their reporting to court,”¹⁶ providing opportunities for “teach[ing] the improvident . . . business ideas and practices” and “train[ing] him in the virtue of self-denial in that it forces him to forego some of his luxuries.”¹⁷ And it would have financial benefits for governments, which could collect more money while eliminating the “financial strain on the public treasury to take care of the man” who would otherwise be incarcerated and his family who would otherwise be forced to rely on public welfare.¹⁸ Judges who experimented with installment fines sang its praises, and in later years support similarly developed in scholarship and in law reform projects like the Model Penal Code.

The echoes of this enthusiasm would carry through to an important trio of Supreme Court cases in the 1970s and 1980s. The Warren Court’s revolution in criminal procedure during the 1950s and 1960s had opened the door for challenging the constitutionality of the still-frequent practice of jailing people because they were too poor to pay off economic sanctions immediately. Early in the Burger Court era, *Williams v. Illinois* in 1970 and *Tate v. Short* in 1971 produced resounding victories by prohibiting the conversion of fines and fees to incarceration for those unable to pay immediately at sentencing.¹⁹ In a third case in 1983, *Bearden v. Georgia*, the Court held that judges cannot automatically revoke probation for people who fail to pay their installments and must instead inquire into their ability to pay prior to imposing any imprisonment.²⁰

As the Court grappled with what to suggest instead of imprisonment, lawyers for the defendants urged the use of installment payments as the “first” and “most promising alternative.”²¹ They pointed to prior judicial

in turn was cited in later Supreme Court litigation. See Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1023 n.78 (1953); *Tate v. Short*, 401 U.S. 395, 400 n.5 (1971) (citing *Fines and Fining*, *supra*); Brief for the Petitioner at 9 n.6, 19 n.17, *Tate v. Short*, 401 U.S. 395 (1971) (No. 324) [hereinafter *Tate* Petitioner’s Brief]; Brief for the Appellee at 8 n.16, *Williams v. Illinois*, 399 U.S. 255 (1970) (No. 1089) [hereinafter *Williams* Appellee’s Brief]; Appellant’s Brief at 20, *Williams v. Illinois*, 399 U.S. 255 (1970) (No. 1089) [hereinafter *Williams* Appellant’s Brief].

¹⁶ W. Francis Binford, *Installment Collection of Fines*, 1:5 JAIL ASS’N J. 16, 42 (1939); see also *Tate* Petitioner’s Brief, *supra* note 15, at 9 n.6 (citing Binford, *supra*, at 42).

¹⁷ *The Installment Fine As an Aid to Justice*, 10 AM. CITY 3, 4 (1914) [hereinafter *Aid to Justice*].

¹⁸ Binford, *supra* note 16, at 16.

¹⁹ *Williams*, 399 U.S. 235; *Tate*, 401 U.S. 395.

²⁰ *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (“[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay.”).

²¹ Transcript of Oral Argument at 12, *Williams v. Illinois*, 399 U.S. 235 (1970) (No. 1089) [hereinafter Transcript of *Williams* Oral Argument] (“The alternatives that we would suggest would

experiments, to scholarship, and to law reform projects as evidence that this would be an appropriate solution.²² And the Court agreed. While it did not mandate any single alternative, it emphasized that installment payments were “widely endorsed as [an] effective” solution to incarceration for nonpayment.²³ With that stamp of approval, the use of installment payments for economic sanctions accelerated in jurisdictions around the country.

So how did a system once celebrated for its promise come to inflict so much misery? This Article explores that question by drawing on sources from the Progressive Era to the present. We identify two distinct but related explanations, which in turn have implications for addressing the abuses of the present era.

First, the installment fines practices changed radically over time. Early experiments with installment payments involved fines that could be paid off in weeks or months. These experiments were administered by judges who imposed obligations that could be feasibly met and who offered flexibility for defendants who had good cause to miss payments. Under these conditions, installment fines could and did work for the defendants selected for the programs—and these success stories were the ones that framed the discussion of installment fines in the Supreme Court litigation. But as installment fines increasingly became the norm in the years after *Williams* and *Tate*, they took on a very different character. Instead of being the domain of reform-minded judges, they were administered by often uncaring judicial bureaucracies. And as installment payments for economic sanctions became more common, the potential of these sanctions as revenue-generators became more apparent to lawmakers looking to reduce taxes and look tough on crime. The economic sanctions became much heavier, the collection processes added further penalties, and installment payments became long-term traps.

Second, installment fines have only ever been partial and incomplete solutions. As a normative matter, the use of installment payments as the sole accommodation to income disparities raises serious concerns about equity. Poor defendants who must scrimp to pay economic penalties over months and years will suffer far more from these penalties than defendants with the means to pay them easily and immediately. And as a practical matter, paying installment fines requires access to reliable and adequate income—often a nonstarter for defendants with health limitations, with prior convictions that

be, first, straight installment payments.”); *Tate* Petitioner’s Brief, *supra* note 15, at 8 (“The most promising alternative is to allow a defendant to pay off a fine in installments.”).

²² See, e.g., *Williams* Appellant’s Brief, *supra* note 15 at 19-20 (advocating for the use of installment fines by describing successful initiatives in the states and other countries); *Tate* Petitioner’s Brief, *supra* note 15, at 8-9 (describing the success of installment fines by citing to research, scholarship, and ABA standards).

²³ *Tate*, 401 U.S. at 400 n.5.

reduce their access to jobs, or with families to support. Early adopters of installment fines recognized this limitation and offered this “privilege” only to handpicked defendants who had the potential to pay, while leaving others to suffer in prison.²⁴ For those so chosen, the programs involved intrusion into their private lives until they could finally pay. And, further, the promise of increased collections from these defendants carried a risk that the use of installments would be driven by revenue generation aims, rather than sound policy. When the Court gave its imprimatur to installment fines, it elided over these problems and steered away from more transformative solutions, such as scaling economic sanctions to defendants’ financial circumstances. In ending incarceration for nonpayment, it also brought installment fines to populations who will never be able to pay them. This problem persists today.

To develop these themes, our Article proceeds chronologically. We begin in Part I by exploring how support for installment fines grew in the United States between 1900 and 1970. We place particular emphasis on historical sources that would later be cited in the fines trio (or on sources that were relied on in turn by the cited sources).²⁵ What we find is a series of repeating themes. The Courts and litigants were correct that the experiments of earlier eras were successful at preventing the incarceration of thousands of people. But that success was based in significant part on the fact that these experiments only involved modest fines that could be paid in brief payment periods and offered meaningful opportunities for downstream relief. Further, these programs had significant limitations. They handpicked participants (excluding people with no meaningful ability to pay over time); they relied on surveillance that widened the courts’ net over people’s lives; and they were deeply intertwined with governmental financial interests in ways that raised concerns about perverse fiscal incentives driving crime policy. The legal scholarship and law reform efforts of the 1950s and 1960s referenced in the trio made some attempt to consider other proposed reforms—most notably, the idea that judges should be obligated to tailor the overall amounts of fines and fees closely to a person’s financial circumstances and that fines should be avoided for those with no meaningful ability to pay. But there was less confidence, less consensus, and less operational specificity around these latter

²⁴ See *Aid to Justice*, *supra* note 17, at 3-4 (detailing testimony from a judge experimenting with the use of installment fines in 1913).

²⁵ We do not seek to give a comprehensive history of the adoption of installment fines in state and local jurisdictions across the United States. Rather, we focus on examples from practice that were later picked up in the scholarly literature and then cited during the fines trio litigation, although we also include information from additional historical sources for context. To indicate the distinction, we have identified each source noted in the litigation record at first use. Importantly, we do not claim that the Court or the litigants unearthed the full account that we tell here. To the contrary, our account is largely one of problems overlooked.

ideas. If the imperative was to end the practice of imprisonment due to immediate inability to pay, then installment fines offered the least controversial—albeit imperfect—solution.

In Part II, the Article turns to the fines trio itself. We first describe the trio and show how these cases—especially *Tate*—emphasized the use of installment payments as the best alternative to incarceration for nonpayment.²⁶ The Court and the litigants drew on the enthusiastic literature that had developed around installment fines plans, but without meaningfully considering the limitations of these plans. In particular, they did not acknowledge that installment payment plans will not work for everyone, and they did not consider that installment payment plans must be carefully and humanely designed in order to work at all. Regardless of the cause for these omissions,²⁷ the Court unwittingly endorsed a recipe for failure. In short order, as we show in the second half of Part II, officials increased their use of installment plans without making careful design choices or requiring meaningful front-end consideration of whether payment by installments was feasible or fair to the individual persons affected. In the years since *Williams* and *Tate*, states vastly increased the financial burden of economic sanctions and responded more and more punitively to default, resulting in the oppressive practices in use today.²⁸ As documented in a substantial and growing body of literature, these practices leave people with limited means—disproportionately people of color living in heavily policed communities—at

²⁶ *Tate*, 401 U.S. at 400 n.5 (detailing the effectiveness of installment fines).

²⁷ We have obtained and reviewed the available archival case files in these cases, from Justices Blackmun, Brennan, Douglas, Harlan, Marshall, Powell, Stevens, Stewart and White. They do not shed clear light on why these omissions arose—whether it was lack of attention, concern about keeping a majority, or a general preference for focusing on broad answers to constitutional questions versus engaging in practical details. As discussed in Part II.A *infra*, the public interest advocates did not flag concerns about installment fines to the Court, perhaps because they wanted to offer installment payments to the Court as a clean and easy alternative to incarceration.

²⁸ Our description of the use of installment fines since the Court decided the fines trio is necessarily selective, given the wide variation that exists both across states and localities within them. The description does, however, identify practices consistent with key features of the use of economic sanctions in jurisdictions nationwide. See generally U.S. COMM'N ON C.R., TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS (2017), https://www.usccr.gov/files/pubs/2017/Statutory_Enforcement_Report2017.pdf [<https://perma.cc/S42P-4G6T>] (reporting findings on the Department of Justice's enforcement efforts related to municipal court reforms as to the targeted imposition of fines and fees). Further, though the federal government's use of economic sanctions is mentioned briefly in the Article, and though the federal courts routinely impose restitution, the federal government appears less likely than state and local governments to rely heavily on fines, fees, and surcharges. Therefore, our focus here is on state and local practice. Further examination of federal practice is warranted. See Brandon L. Garrett, *Spiraling Criminal Debt*, 34 FED. SENT'G REP. 92, 93-94 (2022) (noting the lack of scrutiny of federal practices).

risk of substantial punishment not due to the underlying offense, but because of an inability to pay.²⁹

Taken together, Parts I and II show how, over time, lawmakers and judges abandoned the most humane aspects of early installment fines systems and crowded out more transformative solutions. This story is a complex and often depressing interplay between reformist policy and constitutional litigation, and between justice and bureaucracy.

The account given in this Article has implications for both law and policy, which is the subject of Part III. With respect to law, we focus on a constitutional provision that has been embraced by even the Court's most conservative justices: the Eighth Amendment's Excessive Fines Clause.³⁰ The lower courts are now split as to whether the use of an installment plan can convert an otherwise excessive fine to a constitutional one. But the historical development of installment plans suggests that they are an insufficient remedy—both because, when improperly designed, they distort the Clause's prohibition against disproportionate punishment and because they have played into perverting the incentives that stem from the revenue generating capacity of economic sanctions. With respect to policy, we offer several lessons learned for those contemplating future reforms. While we posit that installment plans can be appropriate in well-defined and time-limited circumstances, we also argue that the purported ease of installment fines as a solution has limited attention aimed at more transformational change and

²⁹ See generally, e.g., *State Monetary Sanctions and the Cost of the Criminal Legal System: How the System of Monetary Sanctions Operates (issue 1) & The Consequence of Monetary Sanctions (issue 2)*, 8 RUSSEL SAGE FOUND. J. SOC. SCIS. issues 1 & 2 (Alexes Harris, Mary Pattillo & Bryan Sykes eds., Jan. 2022); Josh Pacewicz & John N. Robinson III, *Pocketbook Policing: How Race Shapes Municipal Reliance on Punitive Fines and Fees in the Chicago Suburbs*, 19 SOCIO-ECON. REV. 975 (2021); Monica C. Bell, Stephanie Garlock, & Alexander Nabavi-Nori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020); William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Analysis of Driver's License Suspensions in North Carolina*, 69 DUKE L.J. 1585 (2020); Karin D. Martin, *Monetary Myopia: An Examination of Institutional Response to Revenue from Monetary Sanctions for Misdemeanors*, 29 CRIM. JUST. POL'Y REV. 630 (2018); Nathan W. Link, *Criminal Justice Debt During The Prisoner Reintegration Process: Who Has It and How Much?*, 46 CRIM. JUST. & BEHAV. 154 (2019); ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016); MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, *BRENNAN CTR. FOR JUST., THE STEEP COST OF CRIMINAL JUSTICE FEES AND FINES* (2019); Kasey Henricks & Daina Cheyenne Harvey, *Not One But Many: Monetary Punishment and the Fergusons of America*, 32 SOCIO. F. 930 (2017); Neil L. Sobol, *Fighting Fines and Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COL. L. REV. 841 (2017); Alexandra Natanoff, *Misdemeanor Criminalization*, 68 VAND. L. REV. 1055 (2015); Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93 (2014).

³⁰ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); see also *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (2019) (unanimously finding the Excessive Fines Clause to be incorporated against the states). For a discussion of why we focus on the Excessive Fines Clause rather than on other constitutional doctrines relevant to indigency, see *infra* note 299-305 and accompanying text.

urge lawmakers and courts to take seriously the need to reduce the carceral footprint.

I. THE ORIGINS OF INSTALLMENT FINES

The conundrum of what to do when a person lacks the means to pay economic sanctions has deep roots. Lawmakers in the colonies and early American states were cognizant of the need to protect against abusive economic sanctions that would deprive a person of the means of subsistence.³¹ Yet American lawmakers also adopted harsh penalties for persons who could not immediately pay economic sanctions. Prior to the twentieth century, these punishments included corporal punishment³² and indenture, including the notorious Black Codes following the Civil War.³³ While these

³¹ See, e.g., PENNSYLVANIA FRAME OF GOVERNMENT § XVIII (1682) (relying upon Magna Carta and dictating “[t]hat all fines shall be moderate, and saving mens contenements, merchandise or wainage”); see also MAGNA CARTA, ch. 20-21 (1215) (as translated) (requiring that amercements—a predecessor to the modern fine—be imposed both “in accordance with the degree of the offense” and “saving always [the] contentment,” or livelihood of the person punished and adding that “a merchant [shall be amerced] in the same way, saving his merchandise; and a villein shall be amerced in the same way, saving his wainage”). These concepts were ultimately woven into the Eighth Amendment’s Excessive Fines Clause and the constitutions of each of the 50 states. See *Timbs*, 139 S. Ct. at 687-89 (overviewing the history of the protection against excessive fines). For further discussion of the historical roots of the Excessive Fines Clause, see generally Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 227 (2014); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CON. L.Q. 833 (2013).

³² See, e.g., LAWS OF NEW HAMPSHIRE VOL. I: PROVINCE PERIOD 60-63 (Albert Stillman Batchellor ed., John B. Clarke Co. 1904) (1702) (reprinting a statute enacted in 1682 that expressed concern that paying fines would be “very injurious” to indigent people and setting a poverty line below which a defendant could be whipped in the alternative); *An Act Concerning Servants*, § 11, in 2 LAWS OF THE TERRITORY OF ILLINOIS 368 (Nathanial Pope ed., 1815) (“In all cases of penal laws where free persons are punishable by fine, servants shall be punished by whipping, after the rate of twenty lashes for every eight dollars, so that no servant shall receive more than forty lashes at any one time, unless such offender can procure some person to pay the fine.”); see also Colgan, *supra* note 31, at 318 & n.208 (providing examples of colonial and early state statutes substituting corporeal punishment for the imposition of fines).

³³ The Black Codes were a series of post-emancipation era laws passed by lawmakers in southern states criminalizing the ordinary actions of Black Americans, imposing large fines as penalties, and then forcing debtors to work for whomever promised to pay off their fines most quickly. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (detailing the history of the Black Codes). The Supreme Court discussed the Black Codes in its recent opinion incorporating the Excessive Fines Clause against the states. *Timbs*, 139 S. Ct. at 688-89; see also *id.* at 697-98 (Thomas, J., concurring) (contextualizing the Black Codes in the aftermath of the Fourteenth Amendment). Native persons faced similar practices in parts of the country as well. See, e.g., *An Act for the Government and Protection of Indians of April 22, 1850*, § 14 (“When an Indian is convicted of an offense before a justice of the peace punishable by fine, any white person may, by consent of the justice, give bond for said Indian . . . and in such case the Indian shall be compelled to work for the person so bailing, until he has discharged or cancelled the fine assessed

punishments gradually became disfavored,³⁴ a third mechanism—the practice of incarcerating those unable to pay fines—maintained its foothold in the United States.³⁵

This Part describes how U.S. reformers came to celebrate installment fines as a solution to that problem in the years between 1900 and the 1970s. We show how reformers returned again and again to installment fines—including in the Progressive Era years of 1900 to 1920, during the Great Depression, and again in the 1950s and 1960s—heralding its successes and eliding its limitations.

A. *The Uptake of Installment Fines During the Progressive Era*

Our story begins around the turn of the twentieth century, as penal reformers at an influential international conference offered several solutions to the practice of incarcerating those too poor to pay fines. Of these solutions, the one that would garner the most attention from American reformers in several cities during the Progressive Era was the use of installment fines. American judges began reporting enthusiastically on their experiments, claiming that payment plans reduced imprisonment for failure to pay, taught both financial and moral lessons to people with limited means, and netted more money for their treasuries. Yet while these efforts bore fruit, they also came with limitations and left disproportionate burdens on lower-income defendants.

against him . . .”), in THEODORE H. HITTELL, *GENERAL LAW OF THE STATE OF CALIFORNIA, FROM 1850 TO 1864 INCLUSIVE* 531 (1870). Forced indenture extended even more broadly as a substitute for economic sanctions. See, e.g., *An Act Respecting Crimes and Punishments: Maiming or Disfiguring*, § 16 (“[F]or the want of the means of payment, the offender shall be sold to service by the court, before which he is convicted, for any time not exceeding five years, the purchaser finding him food and raiment during the time.”), in 1 *LAWS OF THE TERRITORY OF ILLINOIS*, *supra* note 32, at 219.

³⁴ Certain forms of forced labor—particularly through mandated community service, mandated conditions of probation or parole, or prison labor—remain a component of modern systems of punishment. See, e.g., Wolfe & Liu, *supra* note 4 (relating the story of a person who, in order to pay off court-ordered debts, was forced to work at a private fast food restaurant that had contracted with the state). These practices can be deeply problematic, raising numerous constitutional and policy concerns outside the scope of this Article.

³⁵ For a discussion of the historical use of, and efforts to abolish, debtors’ prisons in the United States, see Christopher D. Hampson, *The New American Debtors’ Prisons*, 44 AM. J. CRIM. L. 1, 14-25 (2017). In at least occasional instances, the use of incarceration for nonpayment was struck down as unconstitutional. See, e.g., *State ex rel. Garvey v. Whitaker*, 48 La. Ann. 527, 528-33 (1896) (striking down a sentence because “it would be equivalent to recognizing [the judge’s] power to sentence an individual to an indefinite period of imprisonment in default of paying exorbitant or numerous fines for the simple infraction of a city ordinance”); *Jones v. Commonwealth*, 5 Va. (1 Call) 555, 556-57 (1799) (concluding that a fine that may lead to incarceration would violate the spirit of Magna Carta and the Excessive Fines Clause by failing to account for the “estate of the offender”).

1. International Efforts to Curtail Imprisonment for Failure to Pay Fines

Numerous reformers understood the practice of imprisoning people who could not pay their fines and fees to be debtors' prisons under another name, both in the United States and in other countries with similar practices. Around the turn of the twentieth century, European reformers began to experiment increasingly with alternatives. In 1905, Norway passed a law linking the size of fines to the wealth of the defendant, and that same year, English judges moved towards giving defendants time to pay off their fines rather than immediately incarcerating those who could not do so.³⁶

Also in 1905, the topic was taken up by the International Penal and Penitentiary Congress (IPPC). This body was a semi-formal and influential gathering of international prison reformers that met almost every five years from 1872 to 1950, at which point it was incorporated into the United Nations.³⁷ In their 1905 meeting in Budapest, as "many gentlemen and some ladies [were] diligently talking prison shop,"³⁸ they debated the question of

³⁶ SAMUEL J. BARROWS, REPORT OF THE PROCEEDINGS OF THE SEVENTH INTERNATIONAL PRISON CONGRESS 28 (1907) (noting the Norwegian law that scaled fines to an offender's wealth); see also Note, *Fines and Fining*, *supra* note 15, at 1024 (observing that this approach had been proposed by a reformer at the International Penal and Penitentiary Congress's meeting in 1900); Derek A. Westen, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CALIF. L. REV. 778, 818-19 (1969) (noting that English judges received this discretion by statute in 1879, were strongly encouraged to use it by a circular sent around in 1905, and were eventually required by a 1914 statute to give defendants some time to pay); E. Cordes, *Fines and Their Enforcement* (discussing the implementation and effectiveness of the English practice), in 2 J. CRIM. SCI. 46, 46-47 (1950); see also Tate Petitioner's Brief, *supra* note 15, at 9 n.6 (citing Cordes, *supra*).

³⁷ For an account of the early days of this fascinating entity, see generally Nir Shafir, *The International Congress as Scientific and Diplomatic Technology: Global Intellectual Exchange in the International Prison Congress, 1860-90*, 9 J. GLOB. HIST. 72 (2014) (noting that, at the instigation of founder and U.S. reformer E.C. Wines, the early meetings were relatively diverse but that by the 1890s the community was "limited . . . almost exclusively" to "the more predictable group of European and North American nations"); cf. DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 60 (describing how "international conference[s] of like-minded reformers . . . [were] one of the most striking products of the era" prior to World War I). For the IPPC's later incorporation into the United Nations, see U.N. G.A. Res. 415(V), annex, Plan Prepared by the Secretary-General of the United Nations in Consultation with the International Penal and Penitentiary Commission (Dec. 1, 1950) (folding the Commission that accompanied the Congress into the United Nations and instructing that the five-year congresses should continue).

³⁸ *Prison Congress in Hungary: Budapest the Scene of the Seventh Quinquennial Meeting*, N.Y. TIMES, Nov. 9, 1905, at 11 (remarking that the Congress contained "official representatives [of countries] . . . jurists, medico-legal authorities, prison Governors, and chiefs of asylums, reformatories, homes for inebriates, and persons whose lives have been given to the study of criminology questions"). This conference appears to have been "the most high-profile international discussion of fines and [their connection to] poverty" to date. Jean Galbraith, Latifa AlMarri, Lisha Bhati, Rheem Brooks, Zachary Green, Margo Hu & Noor Irshaidat, *Poverty Penalties as Human Rights Problems*, 117 AM. J. INT'L L. 397, 418 (2023).

how fines should be set and collected.³⁹ In the end, the IPPC came up with a set of specific recommendations that reformers could take back to their own countries:

1. In the judgment the fine should be fixed proportionally to the fortune of the convicted person. To this end the judge should ascertain in the course of the procedure the financial condition of the accused. If he is without means, the judge should declare the fine irrecoverable. A fine must be regarded as irrecoverable when payment would encroach upon the necessities of the life of the condemned.
2. The authority in charge of the execution of the judgment should be authorized to permit the payment of the fine by installments or by public work. The convicted person should have the right of appeal to superior authority against the decisions of the executive authority.
3. The remainder of the fine should be remitted to the person who punctually paid by installments when due three-quarters or fulfilled his obligation to work without having incurred a new conviction.
4. In case of insolvency of the condemned person the substitution of imprisonment for the fine should be avoided by resorting to other means, and especially to public labor.⁴⁰

These recommendations foreshadowed key debates over the use of fines and other economic sanctions that we have been having ever since. They contain three strands: first, that fines should be set proportional to the person's finances; second, that people should be able in appropriate circumstances to pay off their fines in installments; and third, that fines should be abandoned with respect to extremely poor persons, with public labor potentially serving as a substitute.⁴¹

These three strands all strongly resist the idea that people should be imprisoned because they are too poor to pay economic sanctions. Yet they differ sharply in their methods and likely effects. The first strand—graduating fines proportional to income (or wealth)—is an approach that insists on

39 DELIBERATIONS OF THE INTERNATIONAL PENAL AND PENITENTIARY CONGRESSES: QUESTIONS AND ANSWERS, 1872-1935, at 118 (Negley K. Teeters, ed., 1949) [hereinafter IPPC Recommendations].

40 *Id.* at 118-19. The congress also stated that fines were an appropriate punishment “in all cases where greed is recognized as a motive for the commission of the offense” and that fines could be used in other circumstances as well. *Id.* at 118. For more detail about the widely differing views in the congress related to the use of fines, see BARROWS, *supra* note 36, at 23-32.

41 For an example of a modern document referencing these same three strands, see generally *First Steps Toward More Equitable Fines and Fees Practices: Policy Guidance on Ability-to-Pay Assessments, Payment Plans, and Community Service*, FINES & FEES JUST. CTR. (Nov. 17, 2020) https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC_Policy_Guidance_Ability_to_Pay_Payment_Plan_Community_Service_Final_2_pdf [<https://perma.cc/Z2BW-UESG>].

substantive equality between people with means and those without. This approach has since become a pillar of a graduation practice in some European and Latin American countries that is more specifically known as the “day fine,” by which fines are set by multiplying a penalty unit (that increases with offense seriousness) with a person’s adjusted daily income.⁴² By contrast, the second strand—installment payments—at best affords only formal equality between people of means and those without, who are sentenced to pay the same dollar value over different periods of time.⁴³ Finally, the third strand—avoiding fines for the very poor—acknowledges the reality that economic sanctions make no sense when imposed on people who can never pay it. But this in turn creates the need to either find an alternative punishment that is not a prison sentence or to give up on the fine as irrecoverable.

The IPPC proposed these three strands as a complementary package. But however much they were normatively interdependent, they can be applied independently in practice. And in the United States, the second suggestion—installment payments—gained the most traction. The IPPC’s recommendations were referenced in studies of the incarceration for non-payment problem in the United States,⁴⁴ including in a 1914 report that the

⁴² See Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 56-57 (2017) (explaining the day-fine model).

⁴³ See Colgan, *supra*, note 5, at 48-54 (discussing formal versus substantive equality in the context of sentencing and court-ordered fine payment structures). The scholarly debate regarding formal versus substantive equality primarily focuses on punishment through incarceration. See, e.g., John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1039 (2009) (“In designing a system of punishment, scholars and policymakers need to account for the ramifications of hedonic adaptation to the extent that penal regimes should reflect the actual experience of punishment.”); Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 186-87, 189-92 (2009) (arguing that measuring periods of incarceration by time without considering subjective experience is insufficient to assess proportionality); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 910-12 (2010) (rejecting subjective experience as a limitation to punishment); Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivists Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1, 6 (2009) (“[T]he state is not responsible for all the sensitivities (or insensitivities) of those it punishes, and thus is not obligated to adjust its punishments in response to these qualities.”); see also Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 311-13, 318-19 (1974) (arguing against consideration of comparative differences in sentencing). Interestingly, despite the vigorous debate on the issue as it relates to incarceration, there is general agreement that individual financial circumstances are appropriate considerations with respect to economic sanctions. Compare, e.g., Kolber, *supra* at 226 (“A subjective conception of punishment severity can also inform our practices of imposing monetary fines. If monetary fines are a form of retributive punishment . . . then there seems to be little retributive justification for our general practice in the United States of imposing punitive fines that are independent of offenders’ experiences of those fines.” (emphasis omitted)), with Simons, *supra* at 6 n.11 (criticizing the practice of imposing uniform fines without regard for the defendant’s financial situation).

⁴⁴ See, e.g., John E. Orchard, *Report on The Fine System*, COMM. ON PHILANTHROPIC LAB. OF PHILA. (The Cent. Bureau of Phila. Yearly Meeting of Friends, Phila, Pa.) Jan. 1917, at 9 [hereinafter 1917 *Quakers Report*] (on file with authors) (quoting at length from the resolutions of

Chicago City Council commissioned from its public library on the payment of fines by installments.⁴⁵ But while the resulting report began by quoting the IPPC's recommendation that installment fines be used instead of imprisonment, it did so *without* mentioning the congress's first recommendation that fines be proportional to the defendant's finances or the recommendation that fines be avoided for people experiencing great financial precarity.⁴⁶ The implications of that exclusion, and details of early installment fines practices, are detailed next.

2. The Appeal of Installment Payments in the United States

The IPPC's recommendations coincided with a period of significant social change in the United States, including with respect to its criminal justice systems. Industrialization, urbanization, the Great Migration, and concerns about the mercenary nature of criminal courts converged as an impetus to rethink the modes of administering and enforcing criminal law.⁴⁷ Through the early 1900s, crimes were processed primarily through justices of the peace—local adjudicators who oversaw misdemeanor cases and served as a gateway through which felonies were ultimately referred to other courts.⁴⁸ Justices of the peace and other criminal justice actors were compensated through fees imposed on defendants, leading to concerns about corruption.⁴⁹

the 1905 IPPC and stating that “[w]e believe . . . that the solution to the problem lies in the second resolution”—i.e., the resolution authorizing the use of installment fines); *see also* Note, *Fines and Fining*, *supra* note 15, at 1022-23 & n. 70 (noting that the IPCC had “recommended” the “payment of fines in instalments”); *see also id.* at 1030 n. * (referencing the 1917 *Quakers Report*).

⁴⁵ 1914 *Chicago Report*, *supra* note 15, at 3 (noting the City Council had created a sub-committee on the “feasibility and desirability” of installment fines and that the sub-committee chair had in turn commissioned the report).

⁴⁶ *Id.* at 5.

⁴⁷ For a thorough exploration of the changing landscape and its relationship to the development of municipal court systems to handle criminal cases, see MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* 4-9 (2003).

⁴⁸ *Id.* at 8 (describing the “decentralized and enterprising character” of the justices of the peace system).

⁴⁹ *See* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1182-85 (2014) (providing an overview of the use of fees to fund investigation, prosecution, and adjudication of crimes in the United States from the colonial period to the 1930s); *see also* Kellen Funk & Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. (forthcoming 2024) (manuscript at 46-47), <https://ssrn.com/abstract=4367646> [<https://perma.cc/NX4L-8ZPK>] (discussing public consternation about constables' and magistrates' abuse of the fee system). Compensation in the justice of the peace system also came from the imposition of fees in cases involving private litigants. WILLRICH, *supra* note 47, at 4-5, 12. Despite increasing public concerns about corruption, justice of the peace systems have had surprising staying power, due in part to being mandated in several states' constitutional provisions. *See* Kenneth E. Vanlandingham, *The Decline of Justice of the Peace*, 12 U. KAN. L. REV. 389, 389-90 (1964) (reporting that “[a]s late as 1928, no state had eliminated the office of justice of the peace throughout its borders” and that, as of 1964, it had only been fully eliminated

For those unable to pay fees and fines immediately, incarceration was widespread. Nationally, data from the 1910 Census demonstrates that over 275,000 people were imprisoned that year solely for nonpayment.⁵⁰ Astoundingly, this number represented 55 percent of the total commitments of all White people and 63 percent of all Black people that year.⁵¹ The particular practices varied. In some states, each day of incarceration was treated as the equivalent of paying a certain amount of money toward the fine or fees.⁵² In others, judges had discretion in setting the length of the term.⁵³ In still other jurisdictions, a poor person could make a sworn statement of indigency (sometimes known as a “pauper’s oath”) after a fixed amount of time had passed to gain release.⁵⁴ Even within states, practices could differ wildly across jurisdictions.⁵⁵

in eight states, though in many states, outside of rural areas, justices of the peace often “did no judicial business”).

50 DEP’T OF COM., BUREAU OF THE CENSUS, PRISONERS AND JUVENILE DELINQUENTS IN THE UNITED STATES 1910, at 94 (1918) (noting that another 42,000 persons received sentences of both imprisonment and a fine).

51 *Id.* Most fines could be served off in less than a month, but some would have taken much longer. *See id.* at 54-56 (providing statistics about those imprisoned for nonpayment of fines). The median fine was between \$10 and \$19, with about 7 percent of total fines exceeding \$50. *Id.* at 54. The median rate for satisfying fines was about \$1 a day but ranged from under 10 cents per day to over \$3 per day. *Id.* at 55-56.

52 *See, e.g.*, ALABAMA CODE Ch. 183, art. 5, § 5425 (1897) (“If the fine does not exceed twenty dollars, ten days; if it exceeds twenty, and does not exceed fifty dollars, twenty days; if it exceeds fifty, and does not exceed one hundred dollars, thirty days; if it exceeds one hundred and does not exceed one hundred and fifty dollars, fifty days; if it exceeds one hundred and fifty, and does not exceed two hundred dollars, seventy days; if it exceeds two hundred, and does not exceed three hundred dollars, ninety days; and for every additional one hundred dollars, or fractional part thereof, twenty-five days.”).

53 *See, e.g.*, Alaska Penal Code Ch. 42, § 430 (1900) (providing a standard judgment and sentence form, which included: “I have adjudged that he be . . . taxed at ___ dollars (or that he pay a fine of ___ dollars and such costs and be imprisoned in such jail until such fine and costs be paid, not exceeding ___ days, as the case may be.”).

54 *See, e.g.*, An Act to Further the Administration of Justice, ch. 255, 17 Stat. 196, 199 (1872) (providing that after being imprisoned for thirty days for failing to pay fines and costs, a convicted person could seek release by taking an oath that “I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars . . .”).

55 The following description of Pennsylvania practice in 1917 is striking:

In the 67 counties of Pennsylvania are found almost 67 different methods of treating prisoners who are unable to pay their fines. In five counties there is an iron-clad rule: an offender is imprisoned for thirty days if his fine is less than fifteen dollars; if it is more, his imprisonment is fixed at ninety days. In other counties the offender may enter a plea of insolvency after ten or fifteen days. In some counties the prisoner is not detained unless he has been fined for certain specified offenses. Eleven counties believe that a man should be held one day for every dollar in the fine. In three counties he is held for ninety days and then permitted to enter a plea of insolvency . . . Many counties report a brief or indefinite sentence, the prisoner being released at the discretion of the court.

These astounding incarceration rates caught the attention of Progressive Era reformers, as part of a broader spirit of criminal justice reform. A hallmark of the Era was reformers' rising social understanding of crime. Criminal behavior was increasingly explained at least in part by social causes, and reformers also came to see punishment as extending beyond the individual, reaching to the family members that were left without the wages necessary to meet basic needs.⁵⁶ Historian Michael Willrich has explained that, with attention to root causes and downstream consequences increasing, “[s]ocial activists and judges championed new approaches to criminality and dependency, turning city courts into flexible, administrative instruments of social governance.”⁵⁷

Against this backdrop, Chicago, Illinois, emerged as an influential situs of reform.⁵⁸ The “Second City” became the first to establish a dedicated juvenile court in 1899,⁵⁹ the first city to create a municipal court in lieu of the justice of the peace system in 1906,⁶⁰ and an early adopter of probation⁶¹—a

1917 *Quakers Report*, *supra* note 44, at 5-6 (also noting that one county used installment fines). For an analysis of Philadelphia's incarceration practices between 1791 and 1800, including incarceration for nonpayment of fines and fees, see Funk & Mayson, *supra* note 49 at 44.

56 WILLRICH, *supra* note 47, at xxv-xxvi, 68-69, 78, 96-115 (discussing the increasing understanding that crime was linked to social conditions such as poverty rather than mere individual moral failing and how the innocent family members of those punished were harmed).

57 *Id.* at 60.

58 *Id.* at xxi-xxxi, 6-7 (explaining that Chicago “led the nation in pioneering new approaches to crime and urban social government,” including through the development of its municipal court system).

59 ADELE SIMMONS, *Forward to A CENTURY OF JUVENILE JUSTICE* ix-xi (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhuas & Bernadine Dohrn eds., 2002).

60 WILLRICH, *supra* note 47, at 6, 34-46 (discussing the origins of the Municipal Court of Chicago).

61 Service as the first probation officer in the United States is credited to John Augustus, a shoemaker in Boston, Massachusetts, who in 1841 “happened to be in court one day and heard a man arraigned for drunkenness. The man could not pay his fine. John Augustus requested that the man be allowed a short probation period and be placed in his care.” Sheldon Glueck, *Forward to JOHN AUGUSTUS, JOHN AUGUSTUS: FIRST PROBATION OFFICER*, at vi (photo. reprt. 1939) (1852). There are distinctions between this first probation system and the Progressive Era projects detailed here. Most notably, when Augustus reported that the person under his care made successful progress, courts would typically reduce the fine to one cent plus court costs (which appear to have been \$3.75); in many cases, Augustus himself paid. *Id.* at xiv, xvi; AUGUSTUS, *supra* at 4-5. But Augustus's work and the Progressive Era systems also shared similarities. Augustus carefully selected those he would assist. *Id.* at 19 (“I confined my efforts mainly to those who were indicted for their first offence, and whose hearts were not wholly depraved, but gave promise of better things.”). Augustus, along with others, also promoted his work by touting its potential to save costs related to incarceration and social services for families denied their breadwinner. *Id.* at 27 (quoting a document submitted to the House of Representatives on behalf of the “inhabitants of the County of Norfolk” by Edgar K. Whitaker on February 17, 1845: “It will be readily seen, however, that a much larger sum has been saved, by so many intemperate persons having become useful citizens, instead of being shut up in prison at the public charge. To the towns in the country which occasionally receive large bills for the support of drunkards in the House of Correction in South Boston, this point is not unworthy of

substitution for incarceration through which the probation officer was envisioned as a “benevolent supervisor” who would guide straying defendants back to righteous and law-abiding behavior⁶²—first in two counties beginning in 1908 and then statewide in 1911.⁶³

Consistent with national trends, Chicago and Illinois more broadly were facing a jail and prison system filled with people incarcerated solely due to an inability to pay.⁶⁴ Between 1914 and 1917, over 75 percent of people

notice.”); *id.* at 85-88 (“I will mention one or two instances in which paupers are made so, from being sentenced to a period of time to Deer Island, or to the House of Correction. Families are thus broken up,—parents sentenced as common drunkards and the helpless children, of course, becoming at once a public charge.”). Further, significant pushback against Augustus’s probation program came from jailers, officers, and court clerks who lost income generated through the imposition of fees. *Id.* at 8-9 (“Frequently I suffered extreme inconvenience from the opposition of the police officers as well as the clerk of this court. I could not imagine the cause of this unfriendly spirit, until I learned that for every drunkard whom I bailed, the officer was actually losing seventy-five cents, to which he would have been entitled if the case had otherwise been disposed of; this in the aggregate, amounted to quite a sum”); *id.* at 19 (“I found that the reason for opposition in the Municipal Court was similar to that in the *court below*; their fees for serving a mittimus to jail, were sixty-two cents, and every person whom I bailed required no mittimus, and thus of course, in such cases there was no opportunity for earning the fee.”).

In addition, and though the details are scant, it also appears that Maryland courts could impose suspended sentences with the requirement of payment of costs as early as 1894. Charles L. Chute, *The Development of Probation in the United States*, in *PROBATION AND CRIMINAL JUSTICE: ESSAYS IN HONOR OF HERBERT C. PARSONS* 225, 230 (Sheldon Glueck ed., 1933). As of at least 1843, judges in New Hampshire were also allowed to release a person confined for unpaid fines and fees “upon terms and conditions.” *County of Strafford County v. Jackson*, 14 N.H. 16, 17-18 (1843). Further, some federal courts had been avoiding the imposition of lengthy prison terms and the imposition of fines by placing a case “on file” dating back to approximately 1860, or by imposing suspended sentences in the early 1900s, but these practices were stymied when the Supreme Court held that the courts had no authority to do so absent an act of Congress. *Ex parte United States*, 242 U.S. 27, 50-52 (1916); see also Frank W. Grinnell, *The Common Law History of Probation: An Illustration of the “Equitable” Growth of Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 15, 15-16 (1941) (discussing *Ex parte United States*).

⁶² Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 328-29 (2016).

⁶³ 3 NAT’L COMM’N ON L. OBSERVANCE & ENF’T, REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 153(1931); *Williams Appellant’s Brief*, *supra* note 15, at 30 n.24 (citing REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE, *supra* at 153); Cynthia Y. Cobbs & Michael J. Tardy, *The Journey to Evidence-Based Practices in Illinois Probation*, 100 ILL. BAR J. 154, 155 (2012) (noting that the counties of Kane and Peoria established a probation system in 1908).

⁶⁴ Illinois had a statute on the books that seemed to favor indigent defendants, providing that it was the “duty” of the court “to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs.” 30 ILL. COMP. STAT. § 241 (1827). But the Illinois Supreme Court had interpreted this statute to apply only to those unable to work and instead held that Illinois law authorized ongoing imprisonment while indigent defendants worked out their fines at a daily rate. *People ex. rel. Hoyne v. Windes*, 119 N.E. 297, 298 (Ill. 1918) (“[A] prisoner cannot be discharged, under the statute, if he is able to labor although unable to pay in money.”); see also *People v. Jaraslawski*, 98 N.E. 547, 547-48 (Ill. 1912) (affirming the continued imprisonment in the house of corrections of an indigent defendant while he worked out his \$561.55 in fines and costs at a rate of \$1.50 per day); *Berkenfield v. People*, 61 N.E.

incarcerated in the Chicago House of Corrections—more than 10,000 in all—were there for the failure to pay fines and fees.⁶⁵ The problem was shared across the state. A 1920 survey found that “[o]ne hundred and thirty-eight persons in Springfield[, Illinois] in 1913 went to jail because they were not able to pay their fines, in whole or in part,” out of a total of 302 people jailed in Springfield that year.⁶⁶

Recognition that the practice effectively punished people for their financial precarity grew and by 1914, Chicago’s reformers were on the hunt for alternatives to their system of incarceration for failure to pay.⁶⁷ Chicago’s City Council commissioned a report on the issue that was both narrow and broad. It was narrow in that, from the start, it focused only on one recommendation of the IPPC—namely, installment fines—and did *not* discuss the graduation of economic sanctions or alternatives to fines for people with no ability to pay.⁶⁸ Yet the report was broad in that it impressively surveyed the uses of installment fines that Progressive Era judges and lawmakers in other U.S. localities were beginning to develop, including in Kansas City, Buffalo, Cleveland, Indianapolis, Massachusetts, and New York.⁶⁹ Indeed, the Chicago Report was so well done that it would be cited by other reformers of the Era (and also, later, by an influential law review

96, 98 (Ill. 1901) (similar). For a broader account of how heavily nineteenth-century prisons and prison officials in the United States relied on providing prison labor to private contractors, see REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1941*, at 125-36 (2008).

⁶⁵ Edith Abbott, *Recent Statistics Relating to Crime in Chicago*, 13 J. AM. INST. CRIM. L. & CRIMINOLOGY 329, 346 (1922); *see also id.* at 349 (showing that for the year 1921, over half of the commitments for failure to pay fines involved fines of \$20 or less, while 7 percent of these commitments involved fines of over \$200).

⁶⁶ SHELBY M. HARRISON, *SOCIAL CONDITIONS IN AN AMERICAN CITY: A SUMMARY OF FINDINGS OF THE SPRINGFIELD SURVEY* 262 (1920) [hereinafter *SPRINGFIELD SURVEY*]; *see also id.* at 257-58, 262 (noting that fines were paid off at a rate of \$1 per day in jail; that the typical fine was \$3 but some were much larger; and that “[m]any of the largest fines were assessed against vagrants who had no money at all. In such cases fines result[ed] in nothing less than sending people to jail for being poor”).

⁶⁷ Concerns that people unable to pay were being punished for financial precarity were not universally held. *See Hart v. Norman*, 92 Misc. 185, 189 (N.Y. App. Term 1915) (“A fine is pecuniary punishment for the commission of a crime or misdemeanor; the provision that he stand committed until the fine is paid is not part of the punishment, but a means of compelling the defendant to pay the fine.”).

⁶⁸ *See generally 1914 Chicago Report*, *supra* note 15; *supra* notes 40-46 and accompanying text.

⁶⁹ *See 1914 Chicago Report*, *supra* note 15, at 6-19 (discussing each city or state’s use of installment fines); *see also* CITY OF CHICAGO, *REPORT OF THE COMMITTEE ON CRIME* 43-44 (1915) [hereinafter *1915 COMMITTEE ON CRIME REPORT*] (providing a general summary of various approaches to collecting unpaid installment fines).

piece that in turn would be heavily cited in the Supreme Court litigation described later in this Article).⁷⁰

One judge highlighted in the Chicago Report was Judge Ewing C. Bland of the Second Division of the Municipal Court of Kansas City, Missouri, who had become a major proponent of installment fines.⁷¹ In 1912, Judge Bland began a pilot project of permitting certain people to pay their fines by installments rather than be imprisoned.⁷² He saw this as a humane alternative—one that reduced the gap between rich and poor, minimized stigma, and allowed families to stay together. Judge Bland also celebrated his installment payment system as a mechanism for building character, by teaching “the improvident” about “the virtue of self-denial” and “to save his money and to adjust his affairs so that he will have the wherewithal to pay his installments.”⁷³

Judge Bland’s approach first involved selecting program participants, limiting eligibility to people who were first-time offenders, and conducting a “thorough investigation . . . in each case before the privilege of an installment fine [was] extended.”⁷⁴ He would then set each installment payment at what he considered a weekly payable amount, typically between fifty cents and five dollars (between \$15 and \$154 in 2023),⁷⁵ depending on the person’s particular circumstances.⁷⁶ Judge Bland also offered opportunities for post-imposition aid by allowing defendants to miss one payment for good cause and by forgiving fines after a certain number of regular payments were made when continued payment would have “extend[ed] over many months.”⁷⁷ Evaluating

⁷⁰ See, e.g., 1917 *Quakers Report*, *supra* note 44 (drawing heavily on the Chicago Report); Dorothy Jean Randall, *Possible Penalties for Crime—A Contribution to a Bibliography*, 20 J. AM. INST. CRIM. L. & CRIMINOLOGY 456, 459 (1929) (quoting from the Chicago Report); LOUIS N. ROBINSON, *PENOLOGY IN THE UNITED STATES* 273 (1923) (citing to the Chicago Report and concluding that “[t]he best suggestion yet made in regard to payment is that where a man is found to be unable to pay his fine at the time when it is imposed, he should be placed on probation and allowed to pay by installments”).

⁷¹ Judge Bland publicized his work through a short article in *The American City* (a leading magazine of urban planning) and by advising other reformers. See *Aid to Justice*, *supra* note 17, at 3-4 (reproducing Judge Bland’s letter to the publication); 1914 *Chicago Report*, *supra* note 15, at 3 (thanking Judge Bland in the acknowledgments). Bland himself was the son of a prominent Democrat, Richard P. Bland, a long-time member of the U.S. House of Representatives who came close to winning the 1896 Democratic presidential nomination. George H. Maitland, *A History of the Kansas City Court of Appeals*, 31 U. KAN. CITY L. REV. 215, 238 & n.189 (1963).

⁷² See *Aid to Justice*, *supra* note 17, at 3 (“A year of interesting experiment in applying the principle of the installment fine has been completed by Ewing C. Bland . . .”).

⁷³ *Id.* at 4.

⁷⁴ *Id.* at 3-4.

⁷⁵ Each adjustment for inflation in this Article was determined using U.S. Inflation Calculator, <https://www.usinflationcalculator.com/>.

⁷⁶ 1914 *Chicago Report*, *supra* note 15, at 12.

⁷⁷ *Id.* at 13. Judge Bland did not specifically discuss the range of durations of the installments, but it is clear from context that the outer range for most fines being paid off was approximately a

his program thirteen months in, Judge Bland declared it a great success. He reported that out of the 297 people ordered to make installment payments at some point during this period, only five had defaulted.⁷⁸

The other uses of installment fines described in the 1914 Chicago Report also yielded exciting and positive results. Buffalo recounted high rates of collections, Cleveland's juvenile court reported that it was "very seldom that a parole is broken," and in Indianapolis, out of 1,211 people placed on installment plans in 1912, 61 percent had paid in full, 15 percent were successfully continuing to pay, and the debt of an additional 2.7 percent had been forgiven.⁷⁹ Like Judge Bland's experiment, most, if not all, of these programs involved consideration of a person's financial circumstances to set the installment amount, rather than to reduce the fines and fees to be imposed in the first instance,⁸⁰ with the exception of Cleveland's juvenile court in which fines imposed for gambling were "proportioned to the boy's earning capacity."⁸¹ Also like Judge Bland, the Indianapolis program allowed opportunities for debt forgiveness in cases in which "the condition of the family was such that the court felt justified in withholding judgement."⁸²

Given the apparent success of these programs, the Report urged Chicago's lawmakers to follow suit⁸³—which the state of Illinois ultimately did.⁸⁴ The Report celebrated seven "salient benefits" that installment fines had to offer:

First—It permits a person who is poor to pay the fine in amounts adjusted in size to his financial circumstances and those of his family.

Second—It prevents imprisonment because of poverty.

year. See *Aid to Justice*, *supra* note 17, at 3 (reporting that of 297 defendants put on the installment plan, 221 had paid their fines off in full within thirteen months—a number that presumably included many defendants who were first put on installment payments well into this thirteen-month period).

⁷⁸ See *Aid to Justice*, *supra* note 17, at 3 (noting that of the other 292 persons, 221 paid in full, 50 had their fines suspended after paying in part, and 21 were still paying theirs off). In updated numbers provided some months later, Judge Bland noted that he imprisoned 7.6 percent of people placed on the installment system for defaulting. *1914 Chicago Report*, *supra* note 15, at 13.

⁷⁹ *1914 Chicago Report*, *supra* note 15, at 7, 11-12.

⁸⁰ See, e.g., *id.* at 6-7 (explaining that Buffalo courts set installment amounts at 50 cents to \$1 per week "depending upon the wages of the probationer and other circumstances, such as whether he has a large family to support"); *id.* at 11 (noting that defendants in Indianapolis were directed to pay "as much as can be spared out of the family exchequer each week until the total amount due the court in fines and costs is paid in full").

⁸¹ *Id.* at 10. Cleveland juvenile courts did appear to impose restitution without regard to the juvenile's ability to pay, using that information instead to fix the amount of the weekly installments. *Id.*

⁸² *Id.* at 11.

⁸³ *1914 Chicago Report*, *supra* note 15, at 5, 8-9 (discussing the potential benefits of using installment fines in Chicago); see also 1915 COMMITTEE ON CRIME REPORT, *supra* note 69, at 44 (referencing Judge Bland's findings).

⁸⁴ See *infra* note 110 and accompanying text.

Third—It reduces the liability of causing suffering among the members of the offender’s family and other innocent dependents.

Fourth—It requires the defendant to earn his own fine by honest labor.

Fifth—It increases the public revenues collected from fines, which, under the old method, are lost to the public treasury.

Sixth—The number of prisoners and the cost of their maintenance in institutions is reduced.

Seventh—It gives the defendant the benefit of the probation officer’s friendly influence and aid.⁸⁵

The Report’s reference to probation officers is unsurprising given that the use of installment fines overlapped closely with the development of probationary systems at the time.⁸⁶ Probation eased the path of installment fines both doctrinally and practically. Doctrinally, it normalized the concept of suspended sentences, which in turn could provide a legal hook for the use of installment payments.⁸⁷ Practically, the probation system created an infrastructure that could be used for monitoring and collecting installment payments. While Judge Bland relied on his clerk to supervise the collection process, probation officers were the preferred enforcers in many other locations.⁸⁸

Overall, with installment fines, reformers thought they had found their magic bullet.⁸⁹ They spent considerable time recounting its successes and

⁸⁵ 1914 *Chicago Report*, *supra* note 15, at 5. This list in turn appears to borrow in large part from an earlier New York manual for probation officers. STATE PROB. COMM’N, MANUAL FOR PROBATION OFFICERS IN NEW YORK STATE 44 (1913).

⁸⁶ See *supra* notes 61–63 and accompanying text.

⁸⁷ See, e.g., James A. Collins, *Speech on Child Welfare*, IND. BULL., Mar. 1914, at 183, 186 (“In 1907 the [Indiana] legislature placed upon the statute books a law giving judges of the circuit and criminal courts . . . the power to suspend sentence and withhold judgment in the cases of adults . . . [This law] made possible the system for the collection of money fines on installments.”). In addition, California amended its sentencing law in 1903 to authorize probation. Although not expressly mentioning installment payments, this law gave judges the power to suspend imprisonment for fines by placing defendants on probation “to the end that he may be given the opportunity to pay the fine.” 1903 Cal. Stat. 34–35; see also CAL. PENAL CODE § 1203 (West 2023) (describing current law in California, which no longer includes this language).

⁸⁸ See 1914 *Chicago Report*, *supra* note 15, at 6–15 (noting that Massachusetts and New York relied on collection by the probation officers and detailing how the probation officers would track collections in Boston and in Buffalo).

⁸⁹ While installment fines did not have a complete monopoly on reformist solutions to the problem of imprisonment for failure to pay fines in the United States, alternative approaches did not appear to generate the kind of detailed and publicized experiments that were produced with respect to installment fines. Some reformers did express skepticism about the use of fines more generally. The Springfield Survey—an enormous empirical project undertaken in Springfield, Illinois in 1913—found that fines rarely had deterrent effects and recommended that they be used far less frequently. SPRINGFIELD SURVEY, *supra* note 66, at 259–62, 272, 280. “Fines do not remove underlying causes,” the Springfield Survey’s summary placard read. *Id.* at 260 (emphasis added). “Petty fines will not stop[:] Gamblers from gambling[;] Drunkards from drinking[;] Vagrants from

relatively little time thinking about its limitations. The Chicago Report cited uncritically to Judge Bland and other proponents without considering how essential to the system was the selection of defendants who had a chance at paying and its application to only modest fines and fees—without late fees and interest charges—that typically *could* be paid over weeks or months rather than years. Nor did the Chicago Report emphasize the importance of the devoted oversight of a committed judge who could and would waive payment obligations and/or forgive fines where circumstances warranted—a factor that could not be reliably replicated where the installment payment system was imposed from the top down. Further, as detailed next, even with the meaningful relief provided to working people who would otherwise have been incarcerated, these experiments were far from a full panacea.

3. The Limitations of Early Installment Fines Experiments

A review of the Progressive Era experiments described in the 1914 Chicago Report reveals three inherent problems: (1) they did not address what to do with people at the lowest economic rungs of society who could not, even given time, pay fines; (2) they resulted in net-widening government interference into people's lives for even minor offenses, and only for those of limited means; and (3) they created a risk that the fiscal benefits of a shift to installment fines might create perverse incentives. Practically, these experiments also gave rise to a fourth—and very different—problem: how to get judges to implement them. We briefly describe each problem in turn.

First, the installment fines experiments were focused on those who could pay eventually, leaving those who could not subject to incarceration. Judge Bland's program did not cover all defendants—those that could not pay their fines immediately and did *not* receive the “privilege” of the installment plan payment would have been sent directly to jail.⁹⁰ His minimum weekly payment level of fifty cents could still have been out of reach for the poorest defendants, and the record is silent on whether or how race factored into his

begging[;] Immoral women from soliciting.” *Id.* The Springfield Survey also encouraged consideration of ability to pay when setting fines in the first instance. *Id.* at 261-62 (noting that without taking into account ability to pay, “[t]he offense may be the same and yet in the payment the poor man may suffer the rich man’s penalty many times over”); see also 1917 *Quakers Report*, *supra* note 44, at 14 (“The fine, as nearly as possible, should be in proportion to the prisoner’s ability to pay.”). Similarly, the Cleveland Municipal Court employed what was known as a “motion in mitigation,” a post-sentencing motion that provided the defendant time to pay a fine and “the court time to investigate the defendant to ascertain whether the fine imposed is a just one” or should be subject to remission. Reginald Heber Smith & Herbert B. Ehrmann, *The “Motion in Mitigation,” in CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF JUSTICE IN CLEVELAND, OHIO 285-86* (Roscoe Pound & Felix Frankfurter eds., 1922).

⁹⁰ Aid to Justice, *supra* note 17, at 3-4.

decisions. Similarly, the description of New York's approach explicitly indicates that people may have been excluded from the program if payments were likely to be made by "hard-working parents or wives" rather than the person placed on probation,⁹¹ and high collection rates in other jurisdictions suggest the programs benefitted only those with available income.⁹² And in encouraging Chicago lawmakers to adopt installment fines, the Chicago Report emphasized that the program would aid people with income streams that could be used to pay fines more quickly while also supporting their families, thereby avoiding "great economic waste."⁹³ The Report noted that those incarcerated for nonpayment in Chicago's House of Corrections included people with "an earning capacity" sufficient "to pay their fines within a comparatively short time" including:

167 bakers, 185 barbers, 98 bricklayers, 20 cabinet makers, 217 carpenters, 18 chair makers, 35 cigar makers, 346 cooks, 51 electricians, 72 engineers, 357 firemen, 280 machine hands, 163 machinists, 52 moulders, 417 painters, 21 paper hangers, 240 peddlers, 35 plasterers, 58 plumbers, 173 printers, 103 shoe makers, 88 steam fitters, 88 watchmen, 256 tailors, 837 teamsters, 65 tinsmiths, 289 waiters, and many others representing various branches of useful trade and industry.⁹⁴

This problem may have been ameliorated in part had reformers taken up the IPPC's recommendation that fines be graduated according to a person's ability to pay prior to imposition⁹⁵—which would expand the pool of those able to pay given time—or to develop other alternatives to incarceration for those with no meaningful ability to make payments. But instead, the programs reflected and entrenched what Willrich describes in a related context as "the lines between the 'respectable' and the 'rough,' the 'deserving' and the 'undeserving' poor."⁹⁶

Second, for those with sufficient funds to be selected into these programs, the result was expansive oversight by the court into one's social, fiscal, and familial lives. For example, in Judge Bland's program, at the time of the weekly payments, the judge or the clerk would:

⁹¹ 1914 *Chicago Report*, *supra* note 15, at 16; *see also id.* (noting that, in New York, "[p]reliminary investigations [were] made by probation officers to ascertain in advance" whether the defendant himself was capable of paying the fine to ensure that family members did not end up responsible for paying on the defendant's behalf).

⁹² *See supra* note 79 and accompanying text.

⁹³ *See 1914 Chicago Report*, *supra* note 15, at 9.

⁹⁴ *Id.*

⁹⁵ *See supra* notes 40–42 and accompanying text.

⁹⁶ WILLRICH, *supra* note 47, at 78–79.

[A]ttempt, if possible, to keep in touch with the deeds of each delinquent, such as knowing whether he is working, the kind of work he is doing, the character of his associates, his general habits, whether he is supporting his family if possessed of one, and his own personal views of the installment fine.⁹⁷

It is quite possible that defendants felt incentivized—or coerced—to express their “own personal views of the installment fine” in positive terms.⁹⁸ We are also unclear about just how much program participants benefitted from “the virtue of self-denial.”⁹⁹ Nor do we know, for Judge Bland did not discuss it, whether the need to show up with weekly payments interrupted other essential activities like work or child-rearing. Regardless, the net-widening effect of governmental interference was borne only by those in the program, not people of greater means who could pay off fines and fees in the first instance.

Third, reformers’ interest in pursuing installment payments appears closely tied to its potential for revenue generation, leaving open the risk that crime policy would be perverted by financial interests. There was sensitivity to this issue at the time, as one rationale for ending the use of justices of the peace involved concerns that court personnel were unduly influenced by their ability to benefit from fees.¹⁰⁰ And reformers did see installment payments both as a more humane method of punishing people of limited means than the practice of imprisoning them due to poverty and as providing the added rehabilitative benefit of teaching “the virtue of self-denial.”¹⁰¹ But what made the practice a win-win-win was the financial benefit to the government created by simultaneously collecting more money and spending less on incarceration.

Judge Bland frequently touted the fiscal benefits of his installment fines system. As noted in the 1914 Chicago Report, Judge Bland publicized how the use of installment payments had considerable financial benefits for his city:

⁹⁷ 1914 *Chicago Report*, *supra* note 15, at 13.

⁹⁸ *Id.*

⁹⁹ *Aid to Justice*, *supra* note 17, at 4.

¹⁰⁰ See WILLRICH, *supra* note 47, at 4-5, 12-28 (discussing how justices of the peace made their living off of fees they imposed on defendants in highly informal, often improper proceedings); see also SPRINGFIELD SURVEY, *supra* note 66, at 282 (recommending the abolition of “the current pernicious system by which the city magistrate and justices received their remuneration from the fees they were able to collect”); cf. Judge James A. Collins, *Ind. Mun. Ct., The Other Half*, (Oct. 18, 1914) (noting the “vicious” and “infamous” incentives that arise from the system of paying a sheriff a certain fixed sum per day per prisoner, from which that sheriff could profit personally), *in* *BD. OF STATE CHARITIES OF IND., THE IND. BULL.* 232, 237 (June 1915). For a broader account of the “profit motive” in prisons, see NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940*, at 295-306 (2013).

¹⁰¹ *Aid to Justice*, *supra* note 17, at 4.

Considering the amount of fines thus collected in installments . . . and the cost of the maintenance of these offenders had they served out their terms in prison, it has been shown that the installment fine system has earned for and saved to the city treasury the very substantial sum of \$16,639 in fifteen months.¹⁰²

Further, seeking to combat concerns that the use of installment fines was administratively costly, Judge Bland acknowledged that “it does add somewhat to the duties of the force in the clerk’s office” but hastened to add that he had not needed to hire additional staff.¹⁰³

Judge Bland was not alone. These fiscal upsides were also promoted by reformers pushing for the adoption of installment fines in Chicago and Pennsylvania. In addition to the savings and earnings of Judge Bland’s programs, both the 1914 Chicago Report and a 1917 report on Pennsylvania practice prepared for the Quakers emphasized how similar programs in Buffalo, Indianapolis, Massachusetts, and New York saved money that would be expended if nonpayment resulted in incarceration and the uptick in revenue coming in through the use of installment fines.¹⁰⁴ These reports also suggested that the expansion of installment fines could generate increasingly high revenues. In particular, when New York’s system began in 1909, it was used sparingly, resulting in collections of only \$814.75.¹⁰⁵ But as the 1914 Chicago Report noted with enthusiasm: “the sums thus collected have increased by leaps and bounds since the plan was placed in operation,” expanding significantly each year, and was over 16 times higher (\$13,672.22) within just four years.¹⁰⁶ And though the Chicago Report warned that “courts should not be used as a means of producing revenue for the city at the expense of the minor violators of the law,”¹⁰⁷ it emphasized these cost savings for taxpayers who otherwise would foot the bill for incarceration and the

¹⁰² 1914 *Chicago Report*, *supra* note 15, at 13; *see also New Fine System a Success*, PENN’S GROVE REC., May 16, 1913, at 4, <https://chroniclingamerica.loc.gov/lccn/sn85035524/1913-05-16/ed-1/seq-4/> [<https://perma.cc/VXB5-8KDR>] (noting that in the first six months, Judge Bland’s system had collected \$2,122, which was “money the city would not have gotten if there had been no installment fine plan”).

¹⁰³ *Aid to Justice*, *supra* note 17, at 4.

¹⁰⁴ *See 1914 Chicago Report*, *supra* note 15, at 7 (explaining that Buffalo netted \$17,061.22 by avoiding incarceration and through installment fines collections); *id.* at 11-12 (stating that \$34,014 had been paid in installment fines in Indianapolis in addition to the “increased saving in the cost of maintenance of this correctional institution to the county”); *id.* at 14 (noting the “large sums of money collected annually by probation officers” in Massachusetts and that the system “relieves the state and its municipalities of the cost of caring for offenders”); *id.* at 15 (listing New York’s increasing collections from defendants year-to-year); 1917 *Quakers Report*, *supra* note 44, at 7, 10-11 (discussing the savings incurred in several cities and states adopting installment fines systems).

¹⁰⁵ 1914 *Chicago Report*, *supra* note 15, at 15.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 8.

revenue-generating potential of increased collections as key reasons to adopt an installment fines system.¹⁰⁸

Fourth, and notwithstanding all the glowing accounts of its benefits, the uptake of installment fines was surprisingly slow. Not every judge was like Judge Bland. The 1917 report prepared for the Quakers regarding Pennsylvania practice noted that only one county had started to use installment fines—even though the Pennsylvania legislature had authorized doing so in 1909.¹⁰⁹ In 1923, the economist and reformer Edith Abbott raised a similar concern about Chicago. Abbott's earlier research on imprisonment for nonpayment had formed an important part of the efforts to adopt installment fines in Chicago—and indeed in 1915 a law had passed authorizing the use of installment payments administered through the probation department.¹¹⁰ Yet as Abbott reported in her 1923 article, “[r]ecent statistics show that the judges are making little use of the installment fine system.”¹¹¹ Each year from 1915 to 1921, more than 60 percent of the persons committed to the Chicago House of Correction were there due to failure to pay their fines.¹¹² Nationally, the number of imprisonments for failure to pay fines reported for 1923 by the Census Bureau were somewhat lower than in the 1910 Census, but still extremely high.¹¹³ In short, as the Progressive Era closed, incarceration due to inability to pay fines remained a widespread and appalling practice.

B. Depression Era to Mid-Century American Law Reform Efforts

As the twentieth century continued, American reformers returned again and again to the idea of installment payments as a solution to the problem of

¹⁰⁸ See *id.* at 5, 8-9 (noting that the system would increase public revenues that would otherwise have been “lost” due to costs of incarceration and explaining that 82 percent of people in Chicago’s jails were incarcerated for nonpayment, which at “46.2 cents per man per day” meant the “total cost of maintenance in 1913 was \$290,814.78”).

¹⁰⁹ 1917 *Quakers Report*, *supra* note 44, at 5 (noting that Mercer County was the exception).

¹¹⁰ 1914 *Chicago Report*, *supra* note 15, at 8-9 (citing Abbott’s research); Abbott, *supra* note 65, at 346 (describing Abbott’s research findings).

¹¹¹ Abbott, *supra* note 65, at 346 (showing only modest change in the percentage of persons in the Chicago House of Corrections for failure to pay fines).

¹¹² *Id.* Abbott went on to observe pointedly that recent legislation in England *required* judges to give convicted persons some time to pay their fines. *Id.* at 347 (adding that the act “contains the further humane provision that in imposing a fine the court is to take into consideration ‘the means of the offender so far as they appear or are known to the court’”).

¹¹³ See DEP’T OF COM., BUREAU OF THE CENSUS, PRISONERS: 1923, at 121, 152 (1926) (reporting about 78,000 commitments solely for nonpayment of fines in the first six months of 1923, which amounted to about 53 percent of all commitments to jails and workhouses). Unfortunately, the U.S. Bureau of the Budget announced that funding for the Census Bureau’s data collection and reporting of “Institutional Statistics” was eliminated in fiscal year 1943. *Current Notes*, 32 J. CRIM. L. & CRIMINOLOGY 561, 564 (1942).

incarceration for nonpayment. In what follows, we describe various efforts along these lines—efforts that would later be cited in the litigation record of the fines trio. We begin in the Great Depression, when a Virginia judge designed an experiment with many of the same hallmarks of the earlier models. We then turn to scholarly interventions and law reform efforts of the 1950s and 1960s as they related to economic sanctions and their collection, with a particular focus on the Model Penal Code.

1. The Depression Era: An Experiment in Virginia

In the midst of the Great Depression, Judge Francis Binford of Prince George County, Virginia, publicized results from his experiments with installment fines.¹¹⁴ Like his Progressive Era predecessors (although apparently with no knowledge of their efforts), Judge Binford was appalled at the practice of incarcerating people who could not immediately pay off their fines, referring to the practice as “needless and destructive.”¹¹⁵ He found it shocking that “nearly half of the commitments to jail, in Virginia, are for the non-payment of fines and court costs.”¹¹⁶ As he put it, “[t]he thought occurred to me that millions of American people today are paying for their furniture, automobiles, radio, insurance, education and practically all of the necessities of life on the installment plan,” so why not for fines too?¹¹⁷

Judge Binford’s installment fines program shared many of the characteristics of the early twentieth century experiments. His program centered around modest fines that could typically be paid off over a period of weeks or months—he reported an “average fine of \$16.46 collected per case” (around \$361 in 2023).¹¹⁸ He did not report imposing interest charges or late fees. And while he did use incarceration as a backstop, he proudly claimed that “we have to commit ultimately to jail for the non-payment of the fine and disobeying the court order only about *five per cent* of those who have been given this opportunity to pay.”¹¹⁹ This low number was also due to some opportunities for post-imposition relief: Judge Binford gave his clerk “blanket authority” to put off a particular payment “when a man reports to her and advises that he has had sickness in his family or some unforeseen circumstance has arisen.”¹²⁰

¹¹⁴ See generally Binford, *supra* note 16.

¹¹⁵ See *id.* at 16-17 (describing the practice further as “absurd,” and “a relic of medievalism”).

¹¹⁶ *Id.* at 16.

¹¹⁷ *Id.* at 17.

¹¹⁸ *Id.* at 42 (adding that it could take “fifteen or sixteen weeks to pay a small fine”).

¹¹⁹ *Id.* at 18.

¹²⁰ *Id.*

Judge Binford's program also replicated some of the limitations of the earlier Progressive-Era experiments. Here, too, who could participate in the program was limited and may have excluded people living in the greatest poverty. Judge Binford authorized only certain defendants to pay by installments and indeed emphasized that "[t]his system should not be used whenever the person is incorrigible or whenever his environment or previous record are such that the court believes he would not make good if given a chance."¹²¹ His program also focused on offering moral lessons to debtors, with the accompanying risk of net-widening and social control.¹²² And he promoted the "financial advantage" through increased revenue and decreased system costs to the government as a key component of the program.¹²³ Finally, like Progressive Era reformers, Judge Binford faced the challenge of getting other judges to adopt his approach. At the time, Virginia had not fully moved away from the fee system, and so compensated sheriffs from its treasury based on the number of people incarcerated in the county's jail; as those numbers rose, so too the sheriff's salary.¹²⁴ Other judges told Judge Binford that installment fines likely would not work in their counties without the support of their sheriffs, who would lose income should it prove successful.¹²⁵

The challenges faced by Judge Binford dovetailed with the slow adoption of probation across the country. A lengthy report in 1931 on probation by the presidentially established Wickersham Commission described some of the challenges.¹²⁶ Invoking rationales similar to those used by Judge Binford in promoting installment fines, the Wickersham Commission advocated for probation over incarceration in certain cases—both for fiscal reasons and to ensure that people who would otherwise be incarcerated could maintain employment and familial relationships.¹²⁷ The report also emphasized the role

121 *Id.* Binford did not discuss the role, if any, that race played in participant selection nor did he explain selection decisions in more detail. *Id.* He reported in 1937 that he allowed about 18 percent of defendants to use the installment plan system (and another 7 percent to 10 percent to defer their payments while still paying in a single lump sum). *Id.* at 42. He did not specify what percent of the remaining defendants were those able to pay their fines immediately as distinct from those unable to pay and incarcerated as too "incorrigible" to be put on an installment payment plan. *Id.* at 18.

122 *See id.* at 42 (expressing satisfaction that defendants "are continuously reminded of their misdeeds by their reporting to court").

123 *Id.* at 16, 42.

124 *Id.* at 18.

125 *Id.* Acknowledging this, Judge Binford expressed gratitude that his own court's sheriff, by contrast, cooperated because he "felt that the welfare of his fellow man is of greater importance than his own personal fortune." *Id.*

126 3 NATIONAL COMM'N ON L. OBSERVANCE AND ENF'T, REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE (1931). Colloquially named after its chair, George W. Wickersham, the commission was established by President Hoover in 1929 and tasked with investigating and recommending changes to the operation of criminal justice when enforcing Prohibition laws in the United States. *See id.* at 1.

127 *Id.* at 146-49, 168-69.

that probation officers could pay in “collect[ing] large sums of money, representing payments on fines owed, costs taxed, restitution ordered, etc.”¹²⁸ In Massachusetts, for example, “in 1926 probation officers collected \$1,828,111.28 . . . [which was] \$1,339,673 more than the cost of service.”¹²⁹ But the Commission reported that despite a majority of states adopting adult probation provisions, probation generally remained “inadequately financed and poorly staffed,” leaving probation officers “underpaid, untrained, and chosen with little eye to their fitness” or made up of volunteers.¹³⁰ Notably, judges often declined to use, or only “grudgingly” participated in probation systems, so that probation had “fallen short of its promise.”¹³¹

The slow growth of probation both illustrated and exacerbated the challenge of getting judges to move away from the practice of incarcerating people who were too poor to pay their fines. In the years ahead, reformers would continue to press for changes—and continue to face the challenge of getting judges to make these changes.

2. 1950s-1960s: Academic Engagement and Law Reform Projects

Over the next two decades, the problem of incarceration for non-payment of economic sanctions persisted. More and more states legislated to give courts discretion to use installment fines.¹³² Yet courts continued to fill jails with those who could not pay fines and fees.¹³³ This appears to have been driven, at least in part, by concerns over revenue structures and administrative hassle.¹³⁴

In the 1950s and 1960s, several scholarly articles took up the question of what to do about incarcerating those without the means to pay fines. This

¹²⁸ *Id.* at 169.

¹²⁹ *Id.*

¹³⁰ *Id.* at 186-87.

¹³¹ *Id.*

¹³² For the status of state legislation by 1970, see the appendix to *Williams v. Illinois*, 399 U.S. 235, 246-59 (1971) (providing a fifty-state summary).

¹³³ See *Fines and Fining*, *supra* note 15, at 1022 (“[I]t is noteworthy that of 4,140 commitments after sentence to Reed Street Prison, Philadelphia, from June 1, 1949, to May 31, 1950, 2,480 or 59.9 percent were for nonpayment of fines.”); Thomas E. Morris, *Installment Payments: A Solution to the Problem of Fining Indigents*, 24 U. FLA. L. REV. 166, 169 (1971) (noting that almost half of all confinements in New Jersey in 1969 were for nonpayment of fines).

¹³⁴ For example, a municipal judge in Wilmington, Delaware concerned about “[t]he thoughtless imprisonment of offenders” serving as “an injustice not only to the individual but also to society in general,” attempted to employ installment fines but found them to be too taxing for his staff and experienced a high rate of default and recidivism. Thomas Herlihy, *Sentencing the Misdemeanant*, 2 CRIME & DELINQ. 360, 363, 368 (1956). He concluded that the installment fine system “is workable only if the court has adequate personnel for bookkeeping and a sufficient number of probation workers trained in social casework and skilled in helping offenders who lack the ability to cope with their economic responsibilities.” *Id.* at 368.

uptick in attention followed on a series of decisions beginning with *Griffin v. Illinois* in 1956, in which the Warren Court held that the Equal Protection and Due Process Clauses, operating together, “call[ed] for procedures in criminal trials which allow no invidious discriminations” between people with wealth and those without.¹³⁵ *Griffin* struck down the withholding of trial transcripts necessary for appeal from defendants who lacked the funds to pay for them.¹³⁶ In sixteen cases in nearly as many years, the Court extended *Griffin*, prohibiting the use of “transcript fees as well as docket and filing fees, assessing the constitutionality of *in pauperis* application procedures, and requiring appointment of counsel in first appeals as of right.”¹³⁷ And while the Court had turned away from poverty-centered protections in other arenas, in doing so it reaffirmed the idea that the government could not, consistent with the Fourteenth Amendment, price people out of fair treatment in criminal legal systems.¹³⁸ Therefore, the *Griffin* line provided an opportunity to consider other ways in which people of limited means may be priced out of fair treatment in criminal proceedings, including through incarceration for nonpayment of fines.¹³⁹

Some of this scholarship considered options other than the use of installment payments,¹⁴⁰ particularly the means-based adjustment of fines and

135 *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (plurality opinion).

136 *Id.* at 19.

137 Colgan, *supra* note 7, at 117-18 (compiling cases).

138 For a discussion of the Court’s subjection of wealth-based claims in other contexts to rational basis review in contrast to its conception of a flat prohibition against pricing people out of fair treatment in criminal legal systems, see *id.* at 86-115. For further analyses on the mutually-reinforcing relationship between the Equal Protection and Due Process Clauses, see generally, for example, Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309 (2017); Michael Coenen, *Combining Constitutional Clauses*, 154 U. PA. L. REV. 1067 (2016); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002).

139 See, e.g., Robert E. Williams, Comment, *Equal Protection and the Use of Fines as Penalties for Criminal Offenses*, 1966 U. ILL. L.F. 460, 460-62 (describing *Griffin* and lower court cases relying upon it to posit that the constitutionality of incarcerating people for nonpayment should be reexamined); Tate v. Short, 401 U.S. 395, 400 n.5 (1971) (citing Williams, *supra*); Philip Fahringer, Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 396 & nn. 15-22 (1964) (describing how *Griffin* brought into question the constitutionality of “ten dollars or ten days” alternative sentences, monetary bail, and filing fees, among other practices, for indigent defendants); Williams Appellee’s Brief, *supra* note 15, at 17-18, 20 nn. 22, 24-25 (citing Fahringer, *supra*).

140 This included the idea of eliminating the use of fines altogether, though the notion was quickly rejected due to concerns that it would ultimately increase incarceration rates and result in punishment disproportionate to minor offenses for all and would cut off an important source of governmental revenue. See Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 448 (1967) [hereinafter Note, *Discriminations Against the Poor*] (describing how the abolishment of fines “in no way benefits the indigent and seems unfair to the man who could be adequately deterred”); Note, *The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines*, 64 MICH. L. REV. 938, 945-46 (1966) [hereinafter Note, *The Equal Protection*

fees prior to imposition or ability-to-pay determinations as a preclusion to incarceration for nonpayment. As to the former, a sizeable handful of individual authors urged U.S. jurisdictions to adopt systems for graduating economic sanctions such as the day fine system used in various European countries.¹⁴¹ There was good reason to do so. Graduation of fines prior to imposition was seen to improve system equity, to likely increase payments (read: revenues) while achieving the intended deterrent effect, and to standardize consideration of financial condition rather than leaving it to ad hoc hunches judges may employ even unconsciously.¹⁴² But discussions regarding consideration of financial condition were often cursory, noting that even graduated economic sanctions would be untenable for those without any means of paying.¹⁴³

Clause] (“[F]ines have become an important source of government revenue.”); *Tate v. Short*, 401 U.S. 395, 400 n.5 (1971) (citing Note, *The Equal Protection Clause*, *supra*); *Williams*, *supra* note 139, at 463-64 (declaring abolition of fines “no real solution” because it would merely harm those able to pay while “leaving the plight of indigents unchanged”). It also included consideration of providing an option to defendants between fines and incarceration, though that was rejected on the understanding that, for people of limited means, the choice would be illusory. See Arthur J. Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205, 221 (1964) (“The ‘choice’ of paying \$100 fine or spending 30 days in jail is really no choice at all to the person who cannot raise \$100.”); Brief of the National Legal Aid and Defender Association as Amicus Curiae at 16-17, *Williams v. Illinois*, 399 U.S. 255 (1970) (No. 1089), at 9 [hereinafter *Williams* NLADA Brief] (citing Goldberg, *supra*); Note, *The Equal Protection Clause*, *supra*, at 946 (“[S]uch an election might be rendered meaningless for the person who is so poor and unemployable that it would not conceivably be possible for him to satisfy the obligation of periodic payments.”).

¹⁴¹ See Charles H. Miller, *The Fine: Price Tag or Rehabilitative Force?*, 2 CRIME & DELINQ. 377, 380-81 (1956) (advocating for consideration of an offender’s economic status before deciding the fine amount); Westen, *supra* note 36, at 813-14 (same); Note, *Fines and Fining*, *supra* note 15, at 1024-26 (same); Paul M. Stein, Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution*, 22 VAND. L. REV. 611, 623-24 (1969) (same); *Tate*, 401 U.S. at 400 n.5 (citing Stein, Note, *supra*); see also Thorsten Sellin, *The Treatment of Offenders in Sweden*, 12 FED. PROB. 14, 16 (1948) (describing how the design of Sweden’s day fines system may “prove of interest to the American student”); Robert E. Barrett, *The Role of Fines in the Administration of Criminal Justice in Massachusetts*, 48 MASS. L. Q. 435, 445-46 (1963) (describing fining as more equitable if it takes wealth into account).

¹⁴² Note, *Fines and Fining*, *supra* note 15, at 1024-26; see also THORSTEN SELLIN, RECENT PENAL LEGISLATION IN SWEDEN 14-15 (1947) (describing how a drop in the non-payment of fines in Sweden was due to the reform of monetary penalties); *Tate*, 401 U.S. at 400 n.5 (citing SELLIN, RECENT PENAL LEGISLATION IN SWEDEN, *supra*); *Tate* Petitioner’s Brief, *supra* note 15, at 9 n.6 (describing how installment fines in several states have been “highly successful in practice”).

¹⁴³ See Note, *Discriminations Against the Poor*, *supra* note 140, at 448 (“[A graduated fine] leaves unresolved the question of the appropriate punishment for the very poor person who could not pay any fine.”). *But see Williams*, *supra* note 139, at 464-66 (proposing structural elements for a day fines-like system, including the use of federal income tax returns and financial condition affidavits to establish ability to pay, monetary minimum fines combined with opportunities to pay via community service to ensure no person was judgment proof, and the elimination of maximum fines to improve their deterrent effect on the wealthy).

In the main, legal scholars in the 1950s and 1960s were most receptive to the idea of delaying fines to be paid at a later date or through installment plans.¹⁴⁴ Much of this work cited to Judge Binford as evidence of the desirability and effectiveness of installment fines, and one influential piece cited back as well to the 1914 Chicago Report.¹⁴⁵ And though at least one scholar acknowledged that such reforms did little to help “the unemployed indigent” who may never be able to pay,¹⁴⁶ scholars generally treated installment fines as the most feasible and appropriate solution.

The focus on installment fines extended to law reform projects of the time, including the American Law Institute’s Model Penal Code (MPC) project. The MPC included provisions on fines (but not fees), although the legal elites who drafted it spent relatively little time deliberating over these provisions.¹⁴⁷ The official draft of 1962 embraced consideration of financial

¹⁴⁴ See, e.g., Miller, *supra* note 141, at 380; Sellin, *supra* note 141, at 16; Barrett, *supra* note 141, at 449; Westen, *supra* note 36, at 816-19; Note, *Fines and Fining*, *supra* note 15, at 1022-24; Stein, *supra* note 141, at 624-26; Note, *The Equal Protection Clause*, *supra* note 140, at 945-47; Fahringer, *supra* note 139, at 412-13.

¹⁴⁵ See Note, *Fines and Fining*, *supra* note 15, at 1023 & nn. 70, 78 (citing Judge Binford’s research on the beneficial results of installment fines in reducing incarceration, as well as the 1914 Chicago Report). For other sources citing Judge Binford, see MODEL PENAL CODE 142 (AM. L. INST., Discussion Draft No. 2, 1953) (quoting Judge Binford’s findings enthusiastically in championing the installment payment system as support for the claim that it is “[t]he easiest and most obvious solution to the problem of securing payment of fines by those who are unable to meet them at once”); Stein, *supra* note 141, at 625 (referencing Judge Binford via a cite to Note, *Fines and Fining*); SOL RUBIN, HENRY WEIHOFEN, GEORGE EDWARDS & SIMON ROSENWEIG, NAT’L COUNCIL ON CRIME & DELINQ., THE LAW OF CRIMINAL CORRECTION 256-57 (1963) (citing indirectly to Judge Binford’s 5 percent default rate); *Tate*, 401 U.S. at 400 n.5 (citing RUBIN ET. AL, *supra*); *Tate* Petitioner’s Brief, *supra* note 15, at 9 n.8; Brief of the National Legal Aid and Defender Association as Amicus Curiae at 14, *Tate v. Short*, 401 U.S. 395 (1970) (No. 324) [hereinafter *Tate* NLADA Brief]; *Williams* Appellant’s Brief, *supra* note 15, at 15; *Williams* NLADA Brief, *supra* note 140, at 16; Westen, *supra* note 36, at 817 n.253 (citing to Judge Binford).

¹⁴⁶ Note, *Discriminations Against the Poor*, *supra* note 140, at 448.

¹⁴⁷ Law professors Paul Tappan and Herbert Wechsler (the Reporter) produced an initial memorandum on sentencing, which emphasized that “in cases of financial hardship fines should be fixed lower and/or should be paid by installments, or a suspended sentence with or without probation should be used.” MODEL PENAL CODE 41-42 (AM. L. INST., Discussion Draft No. 1, 1952). As the drafting continued, the provisions proposed by the drafters with respect to fines tended to get approved without substantive changes. See *infra* notes 148–149 (noting that the proposed language matched the final language). By contrast, the drafters spent a great deal of time discussing issues like the insanity defense. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 338-39 (2007) (“The Model Penal Code drafters devoted almost an entire article to the problem of legal insanity.”). In 2017, the American Law Institute adopted an updated Model Penal Code with respect to sentencing, in which the drafters took a much more poverty-conscious approach to economic sanctions, including by encouraging the use of means-based fines like day fines. MODEL PENAL CODE: SENTENCING § 6.08 (AM. L. INST., 2017). The new Code called for the abolition of costs, fees, and assessments, while also including a more limited alternative that would limit the level of costs, fees, and assessments to the actual expenditures in a defendant’s case. *Id.* § 6.10, Alternative § 6.10; see also Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735,

resources at two post-conviction stages and emphasized the role of installment payments at both stages.

First, the MPC stated that the person's financial condition should be relevant at sentencing. MPC Section 7.02(3) provided that "The Court shall not sentence a defendant to pay a fine unless . . . the defendant *is or will be* able to pay the fine" and this "will not prevent the defendant from making restitution . . . to the victim."¹⁴⁸ Section 7.02(4) then specified that "[i]n determining *the amount and method* of payment of a fine, the Court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose."¹⁴⁹ This language contemplated the relevance of a person's ability to pay at the sentencing stage itself. Yet the comments to this section did not urge the graduation of economic sanctions or broad forgiveness for the indigent, but rather linked ability to pay to installment fines. These comments specified that "[i]n installment payment is, however, contemplated and provision for such payment will be made in Article 302."¹⁵⁰ Section 302.1 in turn said explicitly that "the Court may grant permission for the payment" of fines "to be made within a specified period of time or in specified installments."¹⁵¹

Second, a person's financial resources were relevant to relief during the period of collections through installment plans. Section 302.2 authorized courts to imprison people who missed payments unless they could show cause that their default was not willful.¹⁵² For those who did not willfully miss their payments, "the Court may make an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment, or

1751-66 (2015) (discussing, with respect to provisions then in draft form, the importance of the MPC's "reasonable financial subsistence" principle to improve defendants' prospects of rehabilitation and reintegration, while acknowledging the difficulty in administering case-specific inquiries into each defendant's finances).

¹⁴⁸ MODEL PENAL CODE § 7.02(3) (AM. L. INST., 1962) (emphasis added). A separate section, Section 6.03, proposed overall maximum caps for fines, including \$500 for a petty misdemeanor and \$1000 for a misdemeanor, but weakened these caps with a proviso that legislatures could specify higher amounts. *Id.* § 6.03.

¹⁴⁹ *Id.* § 7.02(4) (emphasis added). This language tracks the 1954 tentative draft (as does the earlier quoted language of Section 7.02(3)). MODEL PENAL CODE §§ 7.02(3)-(4) (AM. L. INST., Tentative Draft No. 2, 1954) [hereinafter MODEL PENAL CODE Tentative Draft No. 2].

¹⁵⁰ MODEL PENAL CODE Tentative Draft No. 2, *supra* note 149, at § 7.02 cmt. (AM. L. INST. 1954) (detailing comments that were incorporated by reference into the 1962 draft). The comments to Section 7.02 further stated that "since so large a number of jail inmates are incarcerated merely for non-payment of their fines, the section seeks to outlaw fines that the defendant can not pay." *Id.*

¹⁵¹ MODEL PENAL CODE § 302.1 (AM. L. INST., Proposed Official Draft 1962). This provision also states that fines should be paid to the general state treasury—presumably to reduce incentives to use fines for local revenue-raising—but weakens this mandate by adding "[u]nless otherwise provided by law." *Id.*

¹⁵² *Id.* § 302.2(1) (capping imprisonment "for such contumacious non-payment" to a month for failure to pay fines for petty misdemeanors and to a year for other kinds of fines).

revoking the fine or the unpaid portion thereof in whole or in part.”¹⁵³ Yet another section affirmatively authorized people to petition the court for the reduction or revocation of their fines.¹⁵⁴ The ultimate effect of the MPC’s approach was recognition that financial precarity made it difficult for many people to pay, but an apparent presumption that this could mostly be worked out through the use of installment fines.¹⁵⁵

Other law reform projects of the era also embraced installment fines with enthusiasm. The 1967 task force report of the President’s Commission on Law Enforcement and the Administration of Justice cited approvingly to the MPC’s call for installment payments as a way to reduce imprisonment for failure to pay fines.¹⁵⁶ The American Bar Association put out a 1968 report emphasizing that “[t]he court should be explicitly authorized to permit installment payments of any imposed fine, on conditions tailored to the means of the particular offender.”¹⁵⁷ A 1971 report by the National Commission on Reform of Federal Criminal Laws, which was proposing a new federal criminal code, suggested a provision that “the court may provide for the payment to be made . . . in specified installments.”¹⁵⁸

In contrast to their unified embrace of installment fines, these sources had far more variation in discussing other potential reforms. Notably, most did

¹⁵³ *Id.*

¹⁵⁴ *Id.* § 302.3 (“A defendant who has been sentenced to pay a fine and who is not in contemptuous default in the payment thereof may at any time petition the Court which sentenced him for a revocation of the fine or of any unpaid portion thereof.”).

¹⁵⁵ Notably, the MPC’s sections on fines did not envision that the courts would impose collection costs or discuss how fines would interact with fees or surcharges (although it did discuss restitution). Nor did it ask whether its proposed approach could be accomplished given other systemic constraints—including an absence of defense counsel for low-level offenses and under resourced court systems.

¹⁵⁶ PRESIDENT’S COMM’N ON L. ENF’T. & ADMIN. OF JUST., TASK FORCE REPORT: THE COURTS 18 (1967) [hereinafter TASK FORCE REPORT]; *Tate*, 401 U.S. at 400 n.5 (citing TASK FORCE REPORT, *supra*); *Tate* Petitioner’s Brief, *supra* note 15, at 8-9 nn. 5, 7-8, 10; *Williams* Appellant’s Brief, *supra* note 15, at 16, 30 n.24; *Williams* NLADA Brief, *supra* note 140, at 2; Brief of the City of Chicago as Amicus Curiae at 6, *Williams v. Illinois*, 399 U.S. 255 (1970) (No. 1089) [hereinafter *Williams* City of Chicago Brief]. The President’s Commission also noted that “a method of civil attachment and execution for the collection of unpaid fines is also available,” but provided no further detail. TASK FORCE REPORT, *supra*, at 18.

¹⁵⁷ STANDARDS RELATED TO SENTENCING ALTERNATIVES AND PROCEDURES 117 (AM. BAR ASS’N, Approved Draft, 1968) [hereinafter ABA REPORT]; *Tate*, 401 U.S. at 400 n.5 (citing ABA REPORT, *supra*); *Tate* Petitioner’s Brief, *supra* note 15, at 9 n.7; *Williams* NLADA Brief, *supra* note 140, at 6, 15. A tentative draft of this report was cited in *Williams v. Illinois*, 399 U.S. 235, 245 n.21 (1970), and in *Williams* Appellee’s Brief, *supra* note 15, at 7 n.15.

¹⁵⁸ NAT’L COMM’N ON REFORM OF FED. CRIM. L., FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (TITLE 18, UNITED STATES CODE) § 3302(2) (1971) [hereinafter NATIONAL COMMISSION REPORT]; *Tate*, 401 U.S. 400 n.5 (citing NATIONAL COMMISSION REPORT, *supra*). The final version of this report came out around the time that *Tate* was argued, but an earlier version was cited in *Tate* Petitioner’s Brief, *supra* note 15, at 8 n.4.

explicitly call for consideration of ability to pay.¹⁵⁹ But they differed starkly in how they operationalized this concept. As noted above, the MPC offered little specific guidance for how ability to pay was to affect the initial amount of a fine. By contrast, the American Bar Association's report clearly emphasized that installment fines would not solve all the problems of ability to pay.¹⁶⁰ It stressed the need for fines to be set initially "with due regard to [the person's] other obligations."¹⁶¹ The report went so far as to hint that legislatures "should consider the feasibility of employing an index" for setting some fines in order to "assure a reasonably even impact of the fine on defendants of variant means," but it did not call clearly for the adoption of a system for graduating economic sanctions.¹⁶² The National Commission on Reform of Federal Criminal Laws similarly proposed that courts "shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of the defendant."¹⁶³ Finally, beyond considerations of ability to pay, the MPC, the ABA, and the National Commission all recommended the creation of opportunities for downstream relief, through the reduction or forgiveness of imposed fines.¹⁶⁴

These reports and law review articles developed outside the realm of litigation, as did the legislative changes and judicial experimentation discussed earlier. Yet, as the next Part discusses, their emphasis on installment fines would prove significant to constitutional litigation challenging the imprisonment of the indigent for failure to pay fines.

¹⁵⁹ See MODEL PENAL CODE § 7.02(3) (AM. L. INST., Proposed Official Draft 1962); ABA REPORT, *supra* note 157, at 117; NATIONAL COMMISSION REPORT, *supra* note 158, at § 3302(1). An exception is the 1967 TASK FORCE REPORT, *supra* note 156, which discussed fines only briefly and did not address how ability to pay should affect the initial fine imposed.

¹⁶⁰ See ABA REPORT, *supra* note 157, at 117-18 (making clear that other factors beyond the installment fine system are important); *id.* at 121-23 (emphasizing that the installment fine system is one solution but "the most important suggestion . . . is that fines be imposed only on those who are likely to be able to pay them").

¹⁶¹ *Id.* at 117.

¹⁶² *Id.* at 118 (giving examples as to how maximum fines should be set for business or antitrust crimes); see also *id.* at 128-29 (noting the day fine approach taken in some other countries and suggesting that "[p]erhaps" such a system "would be more equally felt by those who were subject to it").

¹⁶³ NATIONAL COMMISSION REPORT, *supra* note 158, at § 3302(1) (also opposing fines that would "prevent [the defendant] from making restitution or reparation to the victim of the offense, or which the court is not satisfied that the defendant can pay in full within a reasonable time").

¹⁶⁴ See MODEL PENAL CODE § 302.2 (AM. L. INST., Proposed Official Draft 1962); ABA REPORT, *supra* note 157, at 284-85; National Commission Report, *supra* note 158, at §§ 3303-3304.

II. THE OVER-OPTIMISTIC EMBRACE OF INSTALLMENT FINES IN FOURTEENTH AMENDMENT LITIGATION AND ITS AFTERMATH

Coming into the 1970s, advocates seeking to end the incarceration of those who lacked the money to pay economic sanctions turned to constitutional litigation. Building on the equal protection and due process jurisprudence of the Warren Court era, litigators achieved success in a trio of Burger Court decisions limiting the power of courts to imprison people for inability to pay economic sanctions: *Williams v. Illinois*¹⁶⁵ in 1970, *Tate v. Short*¹⁶⁶ the following year, and *Bearden v. Georgia*¹⁶⁷ in 1983.¹⁶⁸

The resulting decisions brought constitutional relief to those incarcerated for inability to pay economic sanctions. But they also embraced the idea of installment fines, thereby giving constitutional pride of place to systems that in operation can be devastating to people of limited means. As detailed below, litigants and the Court took an optimistic view of installment fines while ignoring the importance of certain features that contributed to the success of the early programs—including their application to relatively modest fines and fees that a person selected into the program had a realistic chance of paying, the brief periods of time over which installment payments were required, and robust opportunities for debt forgiveness.¹⁶⁹ In the wake of *Williams* and its progeny, installment fines moved from being an option for particularly reformist judges to employ to being a widely embraced feature within the criminal justice bureaucracy. This mandate in turn became deeply oppressive to people of limited means.

A. *The Fines Trio: A Focus on Formalism*

By 1970, the Equal Protection and Due Process Clauses of the Fourteenth Amendment were the most salient tools for litigators seeking to end

¹⁶⁵ 399 U.S. 235 (1970).

¹⁶⁶ 401 U.S. 395 (1971).

¹⁶⁷ 461 U.S. 660 (1983).

¹⁶⁸ This trio of cases was not the first time the Court considered a question related to incarceration in lieu of payment. In 1936, the Court held that the portion of a judgment and sentence, in which a clerk rather than a judge inserted language ordering a person “stand further committed until the payment of said fines and costs or until discharged by due process of law,” was void despite the longstanding practice of such commitments in Maryland. *Hill v. U.S. ex rel. Wampler*, 298 U.S. 460, 462, 465-66 (1936). See also *Ex parte Jackson*, 96 U.S. 727, 736-37 (1878) (upholding a statute prohibiting the use of the mail in relation to lotteries and noting that “[t]he commitment of the petitioner to the county jail, until his fine was paid, was within the discretion of the court under the statute.”).

¹⁶⁹ The other two shortcomings of the early installment fines experiments—the intrusiveness of the program into people’s private lives and the potentially perverse fiscal incentives of the program, see *supra* notes 97–108 and accompanying text—are particularly significant for challenges under the Excessive Fines Clause and policy solutions discussed in Part III.

imprisonment due to inability to pay fines. The constitutional provision most obviously associated with economic sanctions—the Eighth Amendment’s Excessive Fines Clause—had largely sat dormant and would do so for two more decades.¹⁷⁰ But the *Griffin* line of cases, in which the Equal Protection and Due Process Clauses of the Fourteenth Amendment were employed to provide protections for indigent criminal defendants, provided a strong hook for challenging the practice of imprisoning people unable to pay economic sanctions.¹⁷¹ Just as it was unequal and unfair for people to be unable to mount effective appeals because their poverty prevented them from obtaining trial transcripts or meeting other qualifications, so too it was unequal and unfair for people to be imprisoned because their poverty prevented them from paying economic sanctions. As noted above, numerous commentators recognized the applicability of *Griffin* to imprisonment for inability to pay and urged challenges based on the Equal Protection Clause, the Due Process Clause, or both.¹⁷²

¹⁷⁰ Excessive fines challenges were occasionally seen in this era in the lower courts. *See, e.g.,* *Morris v. Schoonfield*, 301 F. Supp. 158, 160-61, 165 (D. Md. 1969) (addressing only equal protection and due process arguments and stating, without analysis, that “[t]here is no merit in the points raised by plaintiffs based upon the Eighth Amendment or the Thirteenth Amendment”); *U.S. ex rel. Privitera v. Kross*, 239 F. Supp. 118, 119-21 (S.D.N.Y. 1965) (upholding imprisonment for nonpayment as consistent with the Excessive Fines Clause and Equal Protection Clause); *People v. Saffore*, 218 N.E. 2d 686, 688 (N.Y. 1966) (finding that imprisonment for inability to pay a fine violated equal protection, due process, and the Excessive Fines Clause); *cf. People v. Collins*, 47 Misc. 2d 210, 211-13 (N.Y. Cnty. Ct. 1965) (rejecting a claim brought under the Eighth Amendment’s Cruel and Unusual Punishment Clause challenging incarceration for nonpayment of fines, but striking down the practice on Fourteenth Amendment grounds). But the Supreme Court’s first interpretation of the Excessive Fines Clause did not occur until 1989. *See Browning-Ferris Indus. V. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (holding that punitive damages in civil cases between private parties did not constitute fines subject to the Excessive Fines Clause); *see also* Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People’s ‘Ruin,’* *YALE L.J.F.* 365, 370-75, 386 (2020) (positing that the lag in the development of the Excessive Fines Clause was due to delays in incorporating the provisions of the Eighth Amendment against the states, a lack of rights recognition for people convicted of crimes generally, and a lack of resources among those who might have brought claims); *id.* at 386-95 (discussing the relationship between the fines trio and the Excessive Fines Clause). In the years leading up to *Williams*, some commentators did raise the prospect of the Excessive Fines Clause as a constitutional hook. *See, e.g.,* Westen, *supra* note 36, at 803-07 (suggesting challenges based on the Cruel and Unusual Punishment Clause, the Excessive Fines Clause, and state constitutional limits on debtors’ prisons); Stein, *supra* note 141, at 634-41 (suggesting the same challenges and also one based on involuntary servitude). Interestingly, Virginia’s Judge Binford spotted the possibility of Eighth Amendment issues with respect to incarcerating people for nonpayment in the early 1930s. *See Binford, supra* note 16, at 17 (noting that the system of incarcerating defendants for inability to pay fines was “a perfect example” of the cruel and unusual punishment prohibited by the Eighth Amendment).

¹⁷¹ *See supra* notes 135-139 and accompanying text (describing the holding in *Griffin* and its progeny).

¹⁷² *See supra* notes 140-146 and accompanying text; *see also* Westen, *supra* note 36, at 796-803; Stein, *supra* note 141, at 628-34, 641-43; Note, *The Equal Protection Clause, supra* note 140, at 941-42. This focus on the Fourteenth Amendment is even more apparent when one looks at scholarship

But litigators also had to contend with a concern shared by some justices that taken too far, the *Griffin* line could result in inverse discrimination or, worse yet, create a constitutional obligation on the government to equalize wealth. The most ardent proponent of these concerns was Justice Harlan, who objected in his *Griffin* dissent that the majority effectively “imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances.”¹⁷³ Later, dissenting from the Court’s decision to afford a right to counsel to indigents on first appeals as of right, he worried about the Equal Protection Clause leading to “mischievous results,” stating: “I take it that no one would dispute the constitutional power . . . to impose a standard fine for criminal violations.”¹⁷⁴

Installment fines would offer litigators, and ultimately the Court, a seeming way around this concern. Citing to many of the sources discussed in Part I, the litigants in *Williams* and *Tate* presented installment fines to the Court as *the* best alternative to imprisonment due to inability to pay fines. With installment fines, the state could ultimately collect the same dollar amount from people regardless of their financial circumstances, thus removing concerns about inverse discrimination and steering far from anything resembling a mandate to equalize wealth. By the time of *Bearden*, the Court recognized that installment fines would not always be successful, but it did not roll back its support of this system as the first best alternative.

1. *Williams v. Illinois*

The first case in the fines trio came out of Chicago. Willie Williams had been convicted of a petty theft, and the court sentenced him to serve the statutory maximum of one year in jail and to pay a \$500 fine along with \$5 in court costs.¹⁷⁵ What happened next showed just how little Chicago judges had internalized earlier efforts to end imprisonment for inability to pay fines. Williams’s sentencing judge ordered that after the one-year sentence had run, he should remain committed until either he had paid off these financial

focused more broadly on the relationship between constitutional rights, equality, and poverty. See, e.g., Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 27 n.64 (1969) (concluding that the availability of alternative remedies like scaling ability to pay or installment payments makes imprisonment for inability to pay fines a due process violation); Goldberg, *supra* note 140, at 218-21 (hinting at equal protection limits on imprisonment for inability to pay fines). By contrast, the *University of Pennsylvania Law Review* note on fines published in 1953—before the Warren Court—mentioned only the Excessive Fines Clause as a constitutional limit on fines. Note, *Fines & Fining*, *supra* note 15, at 1024.

¹⁷³ *Griffin v. Illinois*, 351 U.S. 12, 34-35 (1956) (Harlan, J., dissenting).

¹⁷⁴ *Douglas v. California*, 372 U.S. 353, 360-62 (1963) (Harlan, J., dissenting). This may, of course, be challengeable under the Excessive Fines Clause, as discussed *infra* Part III.A.

¹⁷⁵ *Williams v. Illinois*, 399 U.S. 235, 236 (1970).

penalties or he had satisfied them at Illinois's going rate of \$5 per day.¹⁷⁶ Williams had no ability to pay and therefore faced the prospect of an extra 101 days in jail.¹⁷⁷

At the time, the incarceration of people unable to pay economic sanctions remained extraordinarily high. To give a few jurisdiction-specific examples from the prior decade, over 26,000 people were incarcerated for nonpayment in New York City in 1960,¹⁷⁸ and in 1969 roughly 46 percent of commitments in New Jersey were for failure to pay fines.¹⁷⁹ In light of the importance of the issue, the University of Chicago's legal aid clinic took up the case but lost in the Illinois Supreme Court.¹⁸⁰ Gathering a star-studded list of co-counsel—including the lead NAACP Legal Defense Fund lawyers and Anthony Amsterdam¹⁸¹—the clinic appealed the case to the U.S. Supreme Court.

Throughout the Supreme Court litigation, the attorneys for Williams emphasized the installment payment system as the best alternative to imprisoning persons too poor to pay their fines and fees. In their brief, they noted that many states did—and all states could—permit the use of installment payments.¹⁸² They claimed that the “experience of states and foreign countries with such a system has been successful” and cited to Virginia Judge Binford's impressive finding that “only 5 percent of persons allowed to pay by installments needed to be committed.”¹⁸³ Asked at oral argument about alternatives to imprisonment, counsel for Williams similarly stressed that “[t]he alternatives that we would suggest would be, first, straight installment payments.”¹⁸⁴ This answer sounded all the more compelling because Illinois offered no meaningful practical arguments against the use of installment payments. Instead, Illinois noted the importance of fines as revenue for local

¹⁷⁶ *Id.* The Court treated the costs as equivalent to the fine for purposes of its analysis. *Id.* at 244 n.20.

¹⁷⁷ *Id.* at 236-37.

¹⁷⁸ RUBIN ET. AL, *supra* note 145, at 253.

¹⁷⁹ Morris, *supra* note 133, at 169 (noting a similar percentage for Miami); *see also* Westen, *supra* note 36, at 788 (stating that, in 1969, the available data “suggest[ed] that in the United States today possibly as many as 40 to 60 percent of all individuals confined in county jails are imprisoned for inability to pay their fines”).

¹⁸⁰ *See* Resnick, *supra* note 170, at 386.

¹⁸¹ Williams Appellant's Brief, *supra* note 15, at 33.

¹⁸² *Id.* at 20.

¹⁸³ *Id.* (citing Note, *Fines and Fining*, *supra* note 15, at 1023, which in turn summarized and cited to Judge Binford's reported findings).

¹⁸⁴ Transcript of Williams Oral Argument, *supra* note 21, at 12 (listing garnishment and a public work requirement as other alternatives).

courts and simply denied that it had a constitutional obligation to consider installment payments or any other alternative.¹⁸⁵

Notably, the lawyers for Williams steered far away from arguing that Illinois should fine poor people less at the front end, focusing instead on the collection process. They did suggest some other alternatives besides installment payments, such as execution through liens, garnishment of wages, and having poor people pay their fines through non-incarcerative work programs.¹⁸⁶ But they never mentioned the possibility of scaling fines in accordance to income, and the amicus brief on their side made only the faintest of gestures in this direction.¹⁸⁷ To the contrary, counsel for Williams avoided anything that might seem to hint that people of limited means would receive better formal treatment than those who could pay immediately. They stressed that their argument was “not . . . that a non-indigent can be fined and an indigent cannot, thus perhaps raising some questions of discrimination against non-indigents.”¹⁸⁸

Williams won his case unanimously in the spring of 1970. Chief Justice Burger’s opinion for the Court cited *Griffin* and held that imprisoning a person for inability to pay fines and fees when that person had already served the statutory maximum amounted to “impermissible discrimination” under the Equal Protection Clause.¹⁸⁹ Justice Harlan concurred in the judgment on due process grounds.¹⁹⁰ Although the Court’s formal holding was narrow—focused only on those who had served the statutory maximum—it opened the door to broader challenges to imprisonment for inability to pay.

For the most part, the Court’s opinion tracked Williams’s arguments. The Court emphasized that “[t]he State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would

185 *Williams* Appellee’s Brief, *supra* note 15, at 8, 14 (noting that “many of the local courts across the country are supported almost entirely by revenue derived from the imposition of fines and costs in misdemeanor cases” and stating tepidly that “perhaps” the use of installment payments or a public works alternative “would signal a wiser, fairer administration of the penal laws; perhaps not”).

186 *Williams* Appellant’s Brief, *supra* note 15, at 20; Transcript of *Williams* Oral Argument, *supra* note 21, at 12.

187 *Williams* NLADA Brief, *supra* note 140, at 15 (“[T]he fear . . . that indigents . . . will go unpunished for their crimes . . . might be put to rest by instituting a scheme allowing installment payments.”) The brief then cited to the ABA’s 1968 report for its support of installment payments. *Id.* The brief also mentioned in passing that the ABA’s report had “further recommended that fines not be imposed at all in cases where the court knows that the defendant will not be able to pay them” and instead suggested a “directly imposed jail sentence or some form of limited confinement” in such circumstances. *Id.*

188 *Williams* Appellant’s Brief, *supra* note 15, at 19.

189 *Williams*, 399 U.S. at 240-41.

190 *Id.* at 259 (Harlan, J., concurring in the judgment). For a description of the debate amongst the justices regarding the constitutional grounding for this line of decisions, see Colgan, *supra* note 7, at 100-104.

amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment.”¹⁹¹ The Court stated that it was “unnecessary . . . to canvas the numerous alternatives” available to states—and then promptly dropped a substantial footnote doing exactly that.¹⁹² The footnote observed that “[a]ppellant has suggested that the fine and costs could be collected through an installment plan as is currently used in several States.”¹⁹³ It also noted that counsel for Williams had suggested a work requirement.¹⁹⁴

Yet the Court’s opinion also contained a hint—albeit faint—that perhaps the solution might lie with imposing reduced economic sanctions on poor people in the first place. At the end of the footnote mentioning installment payments and a work requirement, the Court added without explanation: “See also Model Penal Code § 7.02(3)(a) (Proposed Official Draft 1962).”¹⁹⁵ This citation is fascinating because Section 7.02(3)(a) relates to the imposition of fines, rather than their collection, and had *not* been cited by the parties. It is the section of the Model Penal Code that provides that a court “shall not sentence a defendant to pay a fine unless: (a) the defendant is or will be able to pay the fine.”¹⁹⁶ We do not know why Chief Justice Burger added this citation, which he included in his first circulated draft and which was accepted without comment by the justices joining the opinion.¹⁹⁷

Justice Harlan’s separate opinion engaged more directly with the alternatives to imprisoning people for poverty. He did consider the prospect of scaling fines to income—and expressed strong distaste for this approach. He worried that the result would subject people with means to “a harsher penalty” than those without and warned that if the “equal protection implications of the Court’s opinion were to be fully realized, . . . the State would be forced to embark on the impossible task of developing a system of individualized fines.”¹⁹⁸ By contrast, he was enthusiastic about installment fines. He thought that requiring a single lump sum payment, rather than installments, had no rational justification precisely because the amount could

¹⁹¹ *Williams*, 399 U.S. at 244.

¹⁹² *Id.* at 244-45 n.21.

¹⁹³ *Id.* (citing to several state statutes and to the ABA’s 1968 report).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ MODEL PENAL CODE § 7.02(3) (AM. L. INST., Proposed Official Draft 1962).

¹⁹⁷ See generally Case File of Justice Thurgood Marshall in *Williams v. Illinois*, 399 U.S. 255 (1970) (No. 1089) (on file with authors, original records available in Box 62, Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington, D.C.) [hereinafter Justice Marshall Case File] (showing that this language was in the originally circulated draft of June 9, 1970, the recirculated draft of June 16, and the opinion issued by the Court on June 29).

¹⁹⁸ *Williams*, 399 U.S. at 261 (Harlan, J., concurring in the judgment).

instead be paid “over a term” and because “the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment.”¹⁹⁹

The *Williams* litigation left open several practical questions about the operation of installment fines, thereby providing a tenuous foundation for policymakers who would go on to adopt the practice. Take, for example, the issue of system feasibility as it relates to the dollar value of fines and fees. Counsel for *Williams* had cited to Judge Binford’s success rates without any discussion of whether the situations he was dealing with were really comparable to those of *Williams* or similarly situated defendants. Would a 95 percent success rate for fines averaging about \$361 in 2023 dollars (\$16.46 in the 1930s) really be achievable for fines and fees like those imposed on *Williams*, which amounted to about \$3,966 in 2023 dollars (\$505 in 1970)? Lawmakers looking to the Court for guidance on the feasibility of using installment fines when the dollar amounts involved increased—as they were soon to do—would not find it here.

Relatedly, the Court did not consider how long it might take *Williams* to complete payment through installments. For example, Judge Binford’s explanation of his installment fines system in the 1930s referenced completion of payment within approximately four months.²⁰⁰ Again, there was no discussion as to whether *Williams* had the financial resources that would allow him to make high enough payments to complete full payment within a similar time frame—which would necessitate payments of approximately \$126 per month at the time (over \$989 a month in 2023)—or whether that loss of funds would undermine his ability to meet basic human needs such as food and housing.

Take also the importance of humane administration in the early experiments. The Court did not consider whether a reasonable installment fines system must include opportunities for downstream relief, such as the debt forgiveness offered by the Kansas City and Indianapolis programs or the periodic payment relief offered by Virginia’s Judge Binford. This was a central feature of early models, where relief would frequently follow from a practice of good faith payments or from sincerely demonstrated hardship,²⁰¹ but the importance of those practices would not be evident to policymakers relying on the *Williams* opinion.

Finally, neither the litigants nor the Court grappled with the question of what would happen if *Williams* proved unable to pay by installment.²⁰² In

¹⁹⁹ *Id.* at 264–65.

²⁰⁰ *See supra* note 118 and accompanying text.

²⁰¹ *See supra* notes 77, 82, 120 and accompanying text.

²⁰² *Williams* also left open the question of whether its reasoning applied not only to those who had already served the statutory maximum, but also to other circumstances where courts incarcerated those unable to pay. A companion case presented this issue, but the Court did not issue

fact, the record is devoid of evidence of his financial circumstances—there is no reference to his income, if any, or other obligations such as monthly food and housing costs for himself or any dependents.²⁰³ To be clear, the issue did not go entirely unrecognized; a short memorandum to Justice Marshall from his law clerk reflected concern about the “open [question] whether one who cannot make installments goes to jail.”²⁰⁴ But the Court undertook no assessment of whether a person described to it as indigent would have the ability to pay in installments the \$505 in fines and fees owed.

By avoiding these questions, the Court was able to embrace the seemingly formal equality offered by installment fines, rather than take up consideration of whether substantive equality more directly aligns with the principles underlying equal protection and due process. The formal approach is satisfied in theory by allowing courts to impose the same fines and fees on both a person with the means to pay immediately and Williams by simply allowing him to pay over a period of time. An approach based on substantive equality would instead ask whether Justice Harlan’s pinch on the purse between a person of means and Williams was truly equal, or whether the act of reaching into the purses of Williams or those like him month after month with no avenue for relief served as a distinct punishment reserved only for people of limited means.

2. *Tate v. Short*

The Supreme Court’s signal of support for installment fines in *Williams* became a full-throated endorsement in the second case in the fines trio. *Tate*

a full opinion in that case for procedural reasons. *Morris v. Schoonfield*, 399 U.S. 508 (1970) (per curiam) (vacating the judgment below in light of *Williams* and recent changes to Maryland law). Justice White wrote separately, joined by Justices Douglas, Brennan, and Marshall, to signal that he viewed the reasoning in *Williams* as applicable to all situations where a fine is converted to a jail sentence “solely because the defendant is indigent and cannot forthwith pay the fine in full.” *Id.* at 509 (White, J., concurring). The Court would take up the question in *Tate v. Short* the following year. 401 U.S. 395 (1971).

²⁰³ All the record contains is a statement submitted to the trial court that Williams “has no estate, funds, or valuable property whatsoever” and that he “will be able to get a job and earn funds to pay the fines and costs, if he is released from jail.” Appendix at 12-13, *Williams v. Illinois*, 399 U.S. 255 (1970) (No. 1089).

²⁰⁴ Memorandum from GDW (Gary D. Wilson), Law Clerk, to Justice Thurgood Marshall (June 23, 1970), in Case File of Justice Marshall, *supra* note 197 (advising that “[u]nless you want to answer that question I see no reason” for writing a separate concurrence). In a civil case a few years later involving a bankruptcy filing fee, Justice Marshall would discuss how challenging making any installment payments can be for the very poor. *See United States v. Kras*, 409 U.S. 434, 459 (1973) (Marshall, J., dissenting) (“I cannot agree with the majority that it is so easy for the desperately poor to save \$1.92 each week over the course of six months.”). For a discussion of due process principles as they related to civil debt in this era, see ANNE FLEMING, *CITY OF DEBTORS* 195-200 (2018).

v. Short was decided by the Court in 1971, less than a year after *Williams*.²⁰⁵ Its constitutional holding extended *Williams* into a general ban on imprisonment due to immediate inability to pay.²⁰⁶ Both the briefing and the Court's opinion treated installment fines as *the* key alternative to imprisonment in such circumstances.

Tate v. Short came out of Texas, where Preston Tate had been fined \$425 for a series of traffic violations and then imprisoned when he could not pay.²⁰⁷ As acknowledged by counsel for Texas,²⁰⁸ Tate was "poverty stricken, and . . . his whole family has been for all periods of time therein, and probably always will be."²⁰⁹ Tate's total monthly income consisted of a \$104 veteran's benefit and approximately \$100 to \$240 earned from "casual employment," from which he had to meet his own basic needs as well as those of his wife and children.²¹⁰ Even assuming Tate could pay a minimal amount—say \$10 per month—it would take him over three and a half years to pay off his traffic tickets.

Given Tate's financial precarity, his case provided an appropriate vehicle to engage with whether a reduction in the amount imposed—or at a minimum a post-imposition opportunity for forgiveness—might be crucial in some cases. Perhaps given that some members of the Court had expressed resistance to anything hinting at inverse wealth discrimination in earlier cases in the *Griffin* line,²¹¹ Tate's counsel focused instead on installment fines as the "most promising alternative."²¹² They cited to the law review articles and law reform projects discussed earlier in claiming that installment fines were "widely endorsed and ha[ve] been highly successful in practice" while also saving the state money.²¹³ They cited Judge Binford but, like counsel for *Williams*, they did not discuss what preconditions were necessary to make his use of installment plans successful.²¹⁴ At oral argument, Tate's counsel

²⁰⁵ 401 U.S. 395 (1971).

²⁰⁶ *Id.* at 397-99. A few courts initially read *Tate* more narrowly to apply only to situations where imprisonment was not a statutorily available punishment in the first place. See Fred Lautz, Note, *Equal Protection and Revocation of an Indigent's Probation for Failure to Meet Monetary Conditions: Bearden v. Georgia*, 1985 WIS. L. REV. 121, 132-34, 132 n.61.

²⁰⁷ *Tate*, 401 U.S. at 396.

²⁰⁸ The appeal was instituted against both the City of Houston and the State of Texas. *Ex Parte Tate*, 445 S.W.2d 210, 210-11 (Tex. Crim. App. 1969). For ease of reference we refer to both herein as "Texas."

²⁰⁹ *Tate*, 401 U.S. at 396 n.1.

²¹⁰ *Id.*

²¹¹ See *supra* notes 173-174, 191, 198-199 and accompanying text.

²¹² *Tate* Petitioner's Brief, *supra* note 15, at 8. Tate was represented by NYU law professor Norman Dorsen and numerous co-counsel, including the lead counsel from *Williams*. *Id.* at 20.

²¹³ *Id.* at 8-9 & nn.6-8 (citing to law reform projects described in Part I and to several other sources referred to in Note, *Fines and Fining*, *supra* note 15).

²¹⁴ *Id.* at 9 & n.6.

similarly emphasized installment fines as the first best solution to imprisonment for inability to pay.²¹⁵

Interestingly, counsel for Texas did push the Court for answers to the deeper questions of equality and fairness underlying the case. In its briefing to the Court, Texas asked: “What would be the disposition of a case where a habitual misdemeanant also qualifies as an indigent? In other words, would there be a certain net worth, below which a person would be exempt from all penal responsibility?”²¹⁶ Counsel for Texas also asked for guidance about “how to work” installment plans, noting that it was “human nature” for people to fall behind on their payments.²¹⁷

But ultimately, the Court declined to take the questions up, and without counsel for Tate pushing the Court to go beyond *Williams*, it made no deeper inquiry into substantive equality. Not long after the argument, Justice Brennan circulated an internal “memorandum” to the other justices that served as a draft opinion.²¹⁸ It applied the equal protection analysis of *Williams* to Tate’s situation and reiterated the availability of alternatives to imprisonment. Most of the other justices quickly signed on, although Justice Harlan concurred only in the result, preferring to base the relief solely on due process grounds.²¹⁹

As in *Williams*, the Court dropped a footnote about alternatives to imprisonment. But unlike in *Williams*, the Court mentioned only one alternative in this footnote: the “procedure for paying fines in installments.”²²⁰ “This procedure,” the Court stated, “has been widely endorsed as effective not only to collect the fine but also to save the expense of maintaining a prisoner and avoid the necessity of supporting his family under the state welfare program while he is confined.”²²¹ The Court then included a lengthy string cite to sources supporting the use of installment

²¹⁵ Transcript of Oral Argument at 9, *Tate v. Short*, 401 U.S. 395 (1970) (No. 324) [hereinafter Transcript of *Tate* Oral Argument] (“The first thing that they can try to do is use the installment method [and then consider work requirements] if that doesn’t work . . .”).

²¹⁶ Brief of Respondent at 28, *Tate v. Short*, 401 U.S. 395 (1970) (No. 324) [hereinafter *Tate* Respondent’s Brief].

²¹⁷ Transcript of *Tate* Oral Argument, *supra* note 215, at 33-34.

²¹⁸ Memorandum from Justice William Brennan to the Conference, U.S. Supreme Court (Feb. 3, 1971) [hereinafter Justice Brennan Memorandum], in Case File of Justice William Brennan, *Tate v. Short*, 401 U.S. 395 (1970) (No. 324) (on file with authors, original records available in Box I:244, William J. Brennan Papers, Manuscript Division, Library of Congress, Washington, D.C.) [hereinafter *Tate* Case File of Justice Brennan] (noting that no vote had been taken at the post-argument conference).

²¹⁹ See generally *Tate* Case File of Justice Brennan, *supra* note 218 (containing this correspondence); see also *Tate*, 401 U.S. at 401 (noting further that Justice Black concurred in the result without opinion and including a short concurrence by Justice Blackmun).

²²⁰ *Tate*, 401 U.S. at 400 n.5.

²²¹ *Id.*

payments, including four law reform projects and seven law review articles or books mentioned earlier in this Article.²²² Its use of sources closely tracked those used in the opening brief for *Tate*, although without citing directly to Judge Binford.²²³ Like the briefing before it, the *Tate* opinion does not express any concern that the sources it was citing might have involved very specific practices applied to modest economic sanctions payable in short order with opportunities for downstream relief and that even those conditions did not work for people in the most dire straits.

By referencing only installment payments, the *Tate* Court gave them pride of place for solving the problem of imprisonment for failure to pay fines. The Court did not repeat the suggestion made in *Williams* about work requirements, nor did it reiterate *Williams*'s subtle gesture towards scaling fines in the first place. But the Court's celebration of installment fines came with little in the way of concrete guidance. The Court did not take Texas up on its request to explain how to implement this system or what to do with people who could not pay. Whether imprisonment was permissible "when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means" was an issue the Court explicitly left for "the presentation of a concrete case."²²⁴ That case became the final part of the fines trio.

3. *Bearden v. Georgia*

The final case in the fines trio—*Bearden v. Georgia*—was decided in 1983, more than a decade later.²²⁵ In the intervening years, it appears that Georgia

²²² *Id.* The Court only cited to section numbers of law reform projects that dealt with installment payments—it did not, for example, cite to the section numbers of these projects that proposed scaling the overall amount of imposed fines to the financial resources of defendants. *Id.* (citing to Model Penal Code § 303.1(1) but not to § 7.02; citing to National Commission Report § 3302(2), but not § 3302(1); citing to ABA Report § 2.7(b), but not § 2.7(c)). In addition, the *Tate* Court cited to a book setting out the history of various forms of punishment. *Id.* (citing EDWIN H. SUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY (1960)). The book mentioned the use of incarceration to enforce fines, the use of installment payments, particularly "in connection with probation," and noting that fines "can be adjusted to . . . the wealth of the offender." SUTHERLAND & CRESSEY, *supra*, at 276-77.

²²³ Compare *Tate*, 401 U.S. at 400 n.5, with *Tate* Petitioner's Brief, *supra* note 15, at 8-9 nn.5-10. Justice Brennan's initial draft cited twice to an article by Judge Binford, but both references were removed in the published opinion. Compare Justice Brennan Memorandum, *supra* note 218, Appended Draft at 5-6 n.5, with *Tate*, 401 U.S. at 400 n.5. This change appears to have originated from within Justice Brennan's chambers, as no circulated memoranda discuss this issue.

²²⁴ *Tate*, 401 U.S. at 401.

²²⁵ 461 U.S. 660 (1983). In the years between *Tate* and *Bearden*, the Court upheld the imposition of the payment of fines and restitution as conditions of probation for 18 to 22-year-olds sentenced pursuant to the Federal Youth Corrections Act, rejecting the argument that doing so was inconsistent with the Act's rehabilitative goals. See *Durst v. United States*, 434 U.S. 542, 553-54

sought a workaround of the prohibitions on immediate substitution of jail for fines in *Williams* and *Tate* by shifting the collection of economic sanctions to the probation setting, whereby payment would be imposed as a probation condition, giving the state the ability to revoke probation, and thus incarcerate people, for nonpayment.²²⁶ When Danny Bearden pled guilty to burglary and theft, the trial court sentenced him to probation, conditional on his immediately paying \$200 in fines and restitution and paying \$550 more within four months.²²⁷ He made the initial payment by borrowing from his parents, but he was later laid off from his job, his parents lacked the means to help further, and he could not and did not pay the remainder.²²⁸ The Georgia trial court found that his failure to pay was a probation violation, revoked his probation, and sentenced him to three years in prison.²²⁹ The Georgia courts rejected his argument that he could not be constitutionally imprisoned due to his inability to pay, and a young lawyer took the case up to the U.S. Supreme Court.²³⁰

Unlike the cases before it, the parties litigating *Bearden* had to shift tactics in meaningful ways. In the years between the cases, the Burger Court had more fully embraced the concerns of some justices that affording protections for wealth-based discrimination under the Equal Protection Clause could lead to the notion that the government had an obligation to eliminate wealth-based disparities.²³¹ Two years after *Tate*, in *San Antonio Independent School District v. Rodriguez*, the Court made clear that wealth-based claims—in that case a challenge to school district funding based on local tax revenue—would

(1978). Though in theory these sentences may have operated as installment fines, the Court did not address the possibility of revocation of probation for failure to pay. *Id.*

226 SALLY T. HILLSMAN, JOYCE L. SICHEL & BARRY MAHONEY, VERA INST. OF JUST., FINES IN SENTENCING: A STUDY OF THE USE OF THE FINE AS A CRIMINAL SANCTION 118 (1984) (“A probation official in Georgia expressed to us the opinion that the practice of making fine payments a condition of probation in that state’s courts was a way around ‘the Supreme Court’s prohibition on fining indigents.’”).

227 *Bearden*, 461 U.S. at 662.

228 *Id.* at 662-63. For further details regarding Bearden’s revocation hearing, see Colgan, *supra* note 7, at 93 & n.185.

229 *Bearden*, 461 U.S. at 663. Several years earlier, the Court had the same issue presented to it, but it decided that case on a different ground. *See Wood v. Georgia*, 450 U.S. 261, 262-63 (1981) (declining to reach the equal protection question and remanding for inquiry into counsel’s conflict of interest).

230 There was no amicus in the case and the lawyer, James Lohr, was so junior that he had to be admitted pro hac vice. *See Bearden*, 461 U.S. at 661; *see also* Morning Edition, *Unpaid Court Fees Land the Poor in 21st Century Debtors’ Prisons*, NPR, at 1:05 (May 20, 2014), <https://www.npr.org/transcripts/314138887> [<https://perma.cc/7ZZD-SBWL>] (noting that Lohr was “just out of law school” and spent “long hours in the county law library” on the case).

231 For a fuller analysis of the development of these concerns and its repercussions, see Colgan, *supra* note 7, at 86-100.

be subject only to rational basis review.²³² In doing so, however, the Court preserved the *Griffin* line, creating confusion as to how (or whether) the tiers of scrutiny applied to wealth-based claims in the criminal context.²³³ Unsurprisingly, then, the bulk of the briefing and oral argument in *Bearden* involved an attempt to shoehorn the case into the questions of whether strict scrutiny or rational basis review applied and the nature of the government interest at stake²³⁴—questions the *Bearden* Court declined to answer.²³⁵

As a factual matter, the litigants were also forced to shift tactics because the promise of installment fines embraced by the *Williams* and *Tate* Court had not come to fruition; *Bearden* could not pay, even on an installment plan. Unsurprisingly, the focus of the briefing and argument necessarily shifted away from the success stories of the early installment fines experiments. No longer able to kick the can down the road, the litigants and the Court were pressed to grapple (a bit) more fully with what must happen in such circumstances.

Importantly, the specter of inverse discrimination loomed in *Bearden* as it had done in the earlier cases.²³⁶ Counsel for Georgia pointed to the *Williams* opinion's reference to inverse discrimination should the government be precluded from enforcing fines against people of limited means, and noted that the *Williams* Court had signaled approval of incarceration for nonpayment by citing to California, Michigan, and Pennsylvania statutes which allowed such an outcome.²³⁷ The *Bearden* majority agreed, writing: "The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment."²³⁸ Ultimately, writing for the five-justice majority, Justice O'Connor drew upon both the Equal Protection and the Due Process Clauses in concluding that it was unfair to automatically revoke probation due to inability to pay financial penalties.²³⁹ Instead, courts must offer a hearing to determine whether the failure to pay was willful or

232 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17-29 (1973).

233 See Colgan, *supra* note 7, at 95-115 (positing that in the *Griffin* line of cases, the Court did not employ the tiers of scrutiny approach, opting instead for a flat prohibition against pricing people out of fair treatment in criminal legal systems).

234 See Brief for Petitioner, *Bearden v. Georgia*, 461 U.S. 660 (1983) (No. 81-6633); Brief for Respondent, *Bearden v. Georgia*, 461 U.S. 660 (1983) (No. 81-6633) [hereinafter *Bearden* Respondent's Brief]; Petitioner's Reply Brief, *Bearden v. Georgia*, 461 U.S. 660 (1983) (No. 81-6633); Transcript of Oral Argument, *Bearden v. Georgia*, 461 U.S. 660 (1983) (No. 81-6633).

235 *Bearden*, 461 U.S. at 664-67.

236 See *supra* notes 173-174, 191, 198-199, 211 and accompanying text.

237 *Bearden* Respondent's Brief, *supra* note 234, at 29 (citing *Williams v. Illinois*, 399 U.S. 235, 244 (1970)).

238 *Bearden*, 461 U.S. at 669.

239 *Id.* at 665-66, 672-73.

due instead to the person's poverty.²⁴⁰ If willful, incarceration for nonpayment would be constitutional, but if not, courts were prohibited from imposing a term of incarceration unless no other alternative punishment would satisfy the state's penal interests.²⁴¹

The question then became, what alternative responses to nonpayment of economic sanctions were sufficiently equal to the imposition of the economic sanctions in the first instance. In a concurring opinion, Justice White, joined by Chief Justice Burger and Justices Powell and Rehnquist, offered up the idea that a jail term could be "roughly equivalent to the fine and restitution that the defendant failed to pay."²⁴² Justice O'Connor, writing for the majority, also offered solutions sounding in formal equality. She suggested substituting public labor to pay down the debt, though without considering the ways in which mandated labor may be more punitive than payment in its own right.²⁴³ She further offered that "the sentencing court could extend the time for making payments," thereby maintaining the formal equivalency by which people of means and those without would ultimately pay the same dollar amount.²⁴⁴ Importantly, the opinion appears to contemplate only an extension of the payment period and not other probation conditions that may serve as punishment in their own right.²⁴⁵

In addition to various solutions presented as consistent with a vision of formal equality, the majority opinion also offered up an additional solution: "reduce the fine."²⁴⁶ The opinion spoke of "general flexibility of tailoring fines to the resources of a defendant"—without making any references to inverse discrimination.²⁴⁷ In other words, the Court opened a back door to forgiveness, although one that would come only after a failure to meet

²⁴⁰ *Id.* at 672.

²⁴¹ *Id.*

²⁴² *Id.* at 675 (White, J., concurring in the judgment). The justices' private papers reveal that Justice Rehnquist had initially planned to dissent but changed his vote to join Justice White's concurrence. Notes from Conference of Jan. 14, 1983, in Case File of Justice Lewis F. Powell, *Bearden v. Georgia*, 461 U.S. 600 (1983) (No. 81-6633), available at <https://scholarlycommons.law.wlu.edu/casefiles/442/> [<https://perma.cc/AQR6-EJSC>].

²⁴³ *Bearden*, 461 U.S. at 672. For a discussion of the punitive nature of community service as a substitute for economic sanctions, see Lucero Herrera, Tia Koonse, Melanie Sonsteng-Person, & Noah Zatz, *Work, Pay, or Go to Jail: Court-Ordered Community Service in Los Angeles*, UCLA LAB. CTR. & UCLA SCH. OF L. (Oct. 2019), https://www.labor.ucla.edu/wp-content/uploads/2019/10/UCLA_CommunityServiceReport_Final_1016.pdf [<https://perma.cc/G364-CPGZ>].

²⁴⁴ *Bearden*, 461 U.S. at 672.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*; see also *id.* ("[Trial courts] can often establish a reduced fine . . . given the defendant's diminished financial resources.").

existing obligations set through an installment plan. As detailed below, however, lawmakers and courts largely ignored that option.

B. Installment Fines Become Bureaucratized and Increasingly Oppressive

Williams, *Tate*, and *Bearden* were victories for people of limited means, but they came with their own unforeseen price. *Williams* and *Tate* had presumed that installment fines were a benign and just alternative to imprisonment due to inability to pay. The prior empirical work that was cited in the briefing suggested as much, and both the victorious litigants and the Supreme Court justices overlooked just how much this earlier practice rested on the imposition of low fines by committed judges that could be paid off within a relatively short period of time (and which provided opportunities for downstream relief). But as detailed below, in the aftermath of the fines trio, as installment fines became entrenched in more and more jurisdictions, those features were disregarded, with lawmakers and courts imposing ever higher dollar amounts and abandoning opportunities for relief in favor of harsh penalties for nonpayment. Further, like Judge Bland, Judge Binford, and other reformers, lawmakers, and courts paid relatively little attention to the additional reforms identified by the IPPC and by legal scholars in the 1950s and 1960s: graduation of economic sanctions to ability to pay prior to imposition, and the need to avoid economic sanctions for those with no meaningful ability to pay.²⁴⁸

To be sure, installment fines were not the only approach to addressing economic sanctions in the wake of the fines trio. Some jurisdictions provided the option of delayed payments, in which a lump sum payment would be required, but at a later date to allow the person upon whom the sanctions were imposed time to gather necessary funds.²⁴⁹ Post-imposition remission of fines was allowed in some jurisdictions.²⁵⁰ There is also evidence that some courts took into account the ability to pay when setting the fine amount, or deciding whether to impose fines at all, though these attempts at scaling fines were likely haphazard.²⁵¹ Finally, six local jurisdictions experimented with day fines in the late 1980s and early 1990s.²⁵² But these projects faltered due to design flaws, staffing and training issues, technology concerns, and the

²⁴⁸ See *supra* notes 40, 141–143, 160–164 and accompanying text.

²⁴⁹ See, e.g., HILLSMAN, SICHEL, & MAHONEY, *supra* note 226, at 88.

²⁵⁰ *Id.* at 242 app. A tbl. A-5 (noting 16 states had statutory provisions allowing fines to be remitted if the person was indigent).

²⁵¹ See *id.* (noting that 10 states codified graduation of economic sanctions according to ability to pay “within statutory ranges”).

²⁵² Colgan, *supra* note 42, at 57.

significant uptick in the types and dollar values of economic sanctions adopted to fund tough-on-crime era policies.²⁵³

But overall, the uptake of installment fines was widespread. Some jurisdictions already allowed for installment fines before the fines trio,²⁵⁴ but the embrace of installment fines significantly expanded following *Williams* and *Tate*. For example, in short order the Oklahoma Court of Criminal Appeals issued rules making clear that installment payments were the preferred solution.²⁵⁵ The Alaska Supreme Court observed that while “day fines” had been “suggested” by various scholars and law reform projects, “the payment of fines by an installment method is a system most likely to assure the achievement of the penological objective in the usual case.”²⁵⁶ The office of the Alabama Attorney General instructed a confused circuit court clerk that, since *Williams*, “the courts of Alabama have ordered and accepted partial payments when necessary.”²⁵⁷ And other jurisdictions similarly signaled swift support for installment payments.²⁵⁸ Some did so in the course of adopting broader law reform proposals, such as legislation passed in 1972 in Illinois that drew heavily on the Model Penal Code.²⁵⁹ By the time *Bearden* reached the Court, 35 states had codified either delayed payment or installment fines, with many courts turning to installment fines and deferrals as a “first response” when people were unable to pay immediately.²⁶⁰

²⁵³ *Id.* at 104-11.

²⁵⁴ *See, e.g.*, CAL. PENAL CODE § 1205 (West 1947); MD. CODE ANN. art. 52, § 17 (1951); MASS. GEN. LAWS, ch. 279, § 1 (1932); MICH. COMP. LAWS § 769.3 (1948); S.C. CODE ANN. § 55-593 (1952); WASH. REV. CODE § 9.92.070 (1951).

²⁵⁵ *Rutledge v. Turner*, 495 P.2d 119, 122-24 (Okla. Crim. App. 1972); *see also* OKLA. STAT. tit. 22, § 983 (1971) (providing for installment payments).

²⁵⁶ *Hood v. Smedley*, 498 P.2d 120, 122-23 (Alaska 1972) (citing to some of the sources referenced *supra* in Part I).

²⁵⁷ Letter from Charles A. Graddick, Ala. Att’y Gen., to Hon. Forrest Dobbins, Calhoun Cnty. Cir. Ct. Clerk, (Jan. 29, 1980) (on file with authors); *see also* *Eldridge v. State*, 418 So. 2d 203, 207 (Ala. Crim. App. 1982) (“There are other alternatives to which the state may resort to serve its concededly valid interest in enforcing payment of fines, e.g., paying fines in installments.” (citing *Williams* and *Tate*)).

²⁵⁸ *See, e.g.*, *State v. De Bonis*, 276 A. 2d 137, 147 (N.J. 1971); *Ex parte Tate*, 471 S.W.2d 404, 406 (Tex. Crim. App. 1971) (referencing Texas legislation passed to implement installment payments after *Williams*); *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973).

²⁵⁹ *See* 1972 Ill. Laws 833 (adding §§ 5-9-1, 5-9-2) (drawing on language from the Model Penal Code to provide that the court shall consider the “financial resources” of a defendant in setting the “amount and method of payment of a fine,” specifying that installment payments can be used, and providing for revocation on good cause); *see also* 42 PA. CONS. STAT. § 9726 (1974) (taking a similar approach in Pennsylvania). As another example of considering the ability to pay beyond the use of installments, the Oklahoma Court of Criminal Appeals specified that where the court found a defendant had no present or future ability to pay a fine, it should either not impose the fine or require the defendant to report periodically to see if circumstances had changed. *Rutledge*, 495 P.2d at 122-24.

²⁶⁰ HILLSMAN, SICHEL, & MAHONEY, *supra* note 226, at 88, 106.

As its use expanded, installment fines practices changed. It had once been a permissive alternative to incarceration, applied by committed judges for some fortunate defendants. Now it transformed into a perceived blanket requirement for the judicial bureaucracy.

With this increasing bureaucratization came increasing oppressiveness. The tough-on-crime movement gained significant traction by the early 1980s, carrying with it the need to fund ever more expansive systems of law enforcement, incarceration, probation, and courts.²⁶¹ Yet state lawmakers were increasingly loathe to fund public projects through tax dollars.²⁶² The concept of “offender-funded justice,” by which people embroiled in a criminal legal system would be mandated to pay for its expense, offered state lawmakers an opportunity to simultaneously appear tough-on-crime and anti-tax.²⁶³

The result is one of too often overbearing financial penalties imposed through installments. Below, we briefly describe some common features of today’s installment fines practices, including: the use of fees and surcharges; the frequently added sanction of restitution; the rise of collection costs and interest; and the punitive responses to non-payment. These features lead to long-term cycles of debt, with people struggling for many years to get past even minor offenses.²⁶⁴

²⁶¹ Cf. Joshua Page & Joe Soss, *The Predatory Dimensions of Criminal Justice*, 374 SCIENCE 291, 292 (2021) (describing the conjunction of tough-on-crime politics and local fiscal pressures).

²⁶² In the late 1970s, a successful movement to expand tax prohibition laws constrained state and local lawmakers from raising revenue through property and other forms of taxes. See, e.g., MARK BALDASSARE, DEAN BONNER, ALYSSA DYKMAN & LUNNA LOPES, PROPOSITION 13: 40 YEARS LATER 1 (2018) <https://www.ppic.org/wp-content/uploads/jtf-proposition-13-40-years-later-1.pdf> [<https://perma.cc/YUT4-CEFN>] (regarding limitations placed on state and local property taxes in 1978). These restrictions increased pressure on courts to produce some of their own revenue. See, e.g., ANTHONY J. RAGONA, MALCOLM RICH, & JOHN PAUL RYAN, SENTENCING IN THE MISDEMEANOR COURTS: THE CHOICE OF SANCTIONS 21-24 (1981), <https://www.ojp.gov/pdffiles1/Digitization/88204NCJRS.pdf> [<https://perma.cc/6V5U-XLL7>] (describing the ethical concerns raised by funding courts through economic sanction revenues as becoming more critical “as Proposition 13 fever sweeps the country”).

²⁶³ See, e.g., Peter Finn & Dale Parent, *Texas Requires Probationers to Pay for Their Own Supervision*, NAT’L INST. OF JUST.: PROGRAM FOCUS (Oct. 1992). Texas continued to impose and collect supervision fees along with other fines and fees. As of fiscal years 2015 and 2016, monthly fees of \$60—imposed without any formal assessment of the person’s financial circumstances—covered 30 percent of one county probation department’s operating budget, totaling \$1.2 million dollars. Ebony Ruhland, Bryan Holmes & Amber Petkus, *The Role of Fines and Fees on Probation Outcomes*, 47 CRIM. JUST. & BEHAV. 1244, 1248 (2020).

²⁶⁴ See Ward & Link, *supra* note 11, at 168-69 (finding that the “typical” public defense client—an indicator of indigency—had “an outstanding balance on cases that were disposed ten years ago,” whether the amount initially imposed constituted fines, fees, or restitution); see also, e.g., ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 2 (2012) (describing the case of a 58-year-old veteran living on Supplemental Security Income disability payments who had been attempting to pay off court fees for over 30 years); Emily

Fees and Surcharges. One way in which installment fines have become harsher is through the rise in fees and surcharges. Though lawmakers have long used fees to backfill the costs of criminal legal systems,²⁶⁵ in the years following the fines trio, lawmakers and courts significantly expanded the use of fees as well as surcharges to fund courts, law enforcement, jails and prisons, probation, and other public works projects unrelated to penal systems—essentially piling fines on top of fines.²⁶⁶

One study published three years after the Court decided *Bearden* illustrates this rise in fees, finding that nearly all states were charging fees in felony, misdemeanor, and traffic courts.²⁶⁷ Though there were variations amongst the jurisdictions, fees were imposed for a wide variety of activities and processes, including paper processing, indigent defense representation, prosecution costs, trial-related expenses, and more.²⁶⁸ In addition, a majority of jurisdictions—36 in relation to criminal courts and a majority of respondents regarding traffic courts—were imposing surcharges on top of fines ranging between \$1 and \$100 or more per count.²⁶⁹ Revenues from surcharges were used for a variety of purposes in different jurisdictions, including judicial retirement funds, education programs, victim services, and various other public works.²⁷⁰ Today, fees and surcharges are commonly used nationwide,²⁷¹ and may function to expand net-widening and lead to extensive

Reina Dindial & Ronald J. Lampard, *When a Traffic Ticket Costs \$13,000*, N.Y. TIMES (May 27, 2019), <https://www.nytimes.com/2019/05/27/opinion/drivers-license-suspension-fees.html> [<https://perma.cc/S3PD-TVGQ>] (describing how collections related fees and penalties turned a \$135 ticket into \$13,000 of debt).

²⁶⁵ See, e.g., Gabriela Kirk, April Fernandes & Brittany Friedman, *Who Pays for the Welfare State? Austerity Politics and the Origin of Pay-to-Stay Fees as Revenue Generation*, 63 SOCIO. PERSPS. 921, 925-27 (2020) (describing the adoption of fees imposed to capture incarceration costs in Depression Era Michigan); see also Brittany Friedman, *Unveiling the Necrocapitalist Dimensions of the Shadow Carceral State: On Pay-to-Stay to Recoup the Cost of Incarceration*, 37 J. CONTEMP. CRIM. JUST. 66, 71-74 (2021) (“[As of 2021,] forty-nine states have what are known as ‘inmate reimbursement’ statutes.”).

²⁶⁶ See STANDARDS RELATING TO CT. ORG. § 1.53 cmt. at 119 (AM. BAR ASS’N 1990) (“In the past decade, the increased level of surcharges and user fees in civil and criminal cases has become a prevalent practice in a growing number of states These surcharges and fees are used for such things as county jail additions or remodeling, domestic violence centers, forensic laboratories, and training programs for law enforcement officers and prosecutors.”).

²⁶⁷ STANDARDS RELATING TO CT. COSTS: FEES, MISCELLANEOUS CHARGES & SURCHARGES & A NAT’L SURV. OF PRAC. at 29-30 (CONF. OF STATE CT. ADM’RS 1986) [hereinafter STANDARDS RELATING TO COURT COSTS] A separate survey in roughly the same period had slightly different results, though still suggested that a majority of courts were employing fees. HILLSMAN, SICHEL & MAHONEY, *supra* note 226, at 151 & n.6, 187-88.

²⁶⁸ STANDARDS RELATING TO COURT COSTS, *supra* note 267, at 21, 24, 31-32.

²⁶⁹ *Id.* at 25-27, 33-34.

²⁷⁰ *Id.* at 28, 35.

²⁷¹ See HARV. L. SCH., CRIM. JUST. POL’Y PROGRAM, *50-State Criminal Justice Debt Reform Builder*, <https://cjdebtreform.org/national-comparison> [<https://perma.cc/YZF6-MQRQ>] (last

surveillance of debtors, including those placed on probation as a method of collection and forced to adhere to and pay for conditions unrelated to or justified by their offenses, such as drug testing and electronic monitoring.²⁷²

One particular area of increased use of fees, which developed hand in hand with installment fines, are those associated with probation or other forms of community supervision, like parole. As detailed above, several jurisdictions experimenting with installment fines at the turn of the century employed probation officers to manage those required to make installment payments on fines and fees imposed at sentencing.²⁷³ There is no indication in the record that probation departments charged fees for collection or supervision writ large. Over time, however, the use of probation and parole expanded significantly.²⁷⁴ As community supervision boomed, the demand to fund its skyrocketing costs without increasing tax dollars became a need in addition to, and compatible with, the role of probation and parole officers as collection agents for other forms of economic sanction.²⁷⁵ In the 1930s, only two states—Colorado and Michigan—imposed probation fees.²⁷⁶ By 1992, more than half of the states permitted monthly probation fees.²⁷⁷ As of December 2021, almost all states were doing so.²⁷⁸ In some jurisdictions, the sole reason a

visited Oct. 25, 2023) (providing an interactive map listing the number of fees and surcharges each state imposes).

²⁷² See generally HUMAN RIGHTS WATCH, *supra* note 6.

²⁷³ 1914 *Chicago Report*, *supra* note 15, at 6-7, 11-12, 14-16 (regarding programs in Indiana, Massachusetts, and New York).

²⁷⁴ The number of people serving probation and parole prior to 1979 are difficult to discern due to data collection issues. See NAT'L COUNCIL ON CRIME & DELINQ., NAT'L PROB. REPS., PROBATION IN THE UNITED STATES: 1979, at 8 (1981), <https://bjs.ojp.gov/content/pub/pdf/prou79.pdf> [<https://perma.cc/6MRC-T8LC>] (discussing the effect of increased reporting on data). In 1981, 1,445,800 adults were serving probation or parole. U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., PROBATION AND PAROLE 1981, at 1 (1982), <https://bjs.ojp.gov/content/pub/pdf/pp81.pdf> [<https://perma.cc/7KQN-FRNA>]. By 2019, that number was 4,357,700. BARBARA OUDEKERK & DANIELLE KAEBLE, PROBATION AND PAROLE IN THE UNITED STATES, 2019, at 1 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus19.pdf> [<https://perma.cc/W7DV-4N3L>]. In addition, as of 2014, 383,000 juveniles were subject to community supervision. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT 5 (2018), <https://assets.aecf.org/m/resourcedoc/aecf-transformingjuvenileprobation-2018.pdf> [<https://perma.cc/MM5F-7TSD>]. Many of them likely were required to pay economic sanctions via installment. *Cf. id.* at 14-15 (noting youth on probation are often required to pay fines and fees).

²⁷⁵ Finn & Parent, *supra* note 263, at 2.

²⁷⁶ Jordan Zvonkovich, Stacy H. Haynes & R. Barry Ruback, *A Continuum of Coercive Costs: A State-Level Analysis of the Imposition and Payment Enforcement of Statutory Fees*, 34 FED. SENT'G. REP. 113, 114 (2022).

²⁷⁷ Finn & Parent, *supra* note 263, at 2.

²⁷⁸ FINES & FEES JUST. CTR. & REFORM ALL., 50 STATE SURVEY: PROBATION AND PAROLE FEES 5 (2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/05/Probation-and-Parole-Fees-Survey-Final-2022-.pdf> [<https://perma.cc/9V3X-F7BB>] (reporting 38 states

person is sentenced to probation is because of outstanding economic sanctions.²⁷⁹ And as the scope of probation and parole has expanded, so have the types of fees imposed. Beyond monthly fees, people on probation may be charged fees related to other probation conditions, such as mandatory drug testing or treatment services, even when the underlying case had no connection to drug use or other treatment needs.²⁸⁰ In recent years, that has included electronic monitoring fees in many states, which could range between \$2,800 to \$5,000 per year alone.²⁸¹

Surcharge use has also grown exponentially.²⁸² A recent national survey shows that at least 48 states and the District of Columbia impose surcharges to generally fund criminal justice systems—courts, law enforcement, prosecution, indigent defense, and more—and to fund a wide variety of public services not even tangentially related to the processing of a given case.²⁸³ For example, in the years following the fines trio, Illinois lawmakers created a \$15 surcharge for every \$40 in traffic fines, a \$2 “access to justice” surcharge, and a \$5 surcharge to fund spinal cord injury research, while the counties could add on a surcharge of \$5 to \$100 dollars for a finding of guilt as well as a variety of surcharges to fund the Children’s Advocacy Center; county jail medical costs; teen court; specialty courts (e.g., mental health and veterans courts); the court appointed special advocate program; a judicial facilities fund; and court automation, documentation, storage, security, and electronic citation systems.²⁸⁴

charge a monthly fee, seven charge a single flat fee, and two allow local jurisdictions to determine fee schedules).

²⁷⁹ HUMAN RIGHTS WATCH, *supra* note 6, at 3, 24–30.

²⁸⁰ See, e.g., Katelyn J.B. King, Amber Petkus, & Ebony L. Ruhland, *Exploring How Fines and Fees Finance Community Supervision*, 34 FED. SENT’G. REP. 139, 140 (2022) (documenting that Texas receives 30 percent of its community supervision budget from supervision fees and an additional 5 percent from program participation fees); ALICIA VIRANI, *THE FINANCIAL IMPACT OF COURT-ORDERED BATTERERS’ INTERVENTION PROGRAMS IN LOS ANGELES COUNTY* 2–3 (2021) (discussing LA County’s mandatory batterers’ intervention programs for a broad category of persons convicted of a domestic violence crime, which include participation fees); HUMAN RIGHTS WATCH, *supra* note 6, at 32–37 (discussing monitoring, drug testing, and “moral reconnection” programs).

²⁸¹ Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 162 (2022).

²⁸² For a discussion of the increased use of fees and surcharges following budget cuts to court funding in the early 2000s, see Karin D. Martin, *Law, Money, People: Insights from a Brief History of Court Funding Concerns*, 4 UCLA CRIM. JUST. L.J. 213, 219–223 (2020).

²⁸³ See FINES & FEES JUSTICE CENTER, *ASSESSMENTS AND SURCHARGES: A 50-STATE SURVEY OF SUPPLEMENTAL FEES* (2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/12/Assessments-Surcharges-2.pdf> [<https://perma.cc/P86L-9W5K>].

²⁸⁴ STATUTORY COURT FEE TASK FORCE, *ILLINOIS COURT ASSESSMENTS* 12–14, 20 (2016), https://www.illinoiscourts.gov/Resources/4b970035-98ba-4110-86fc-60e02b6a126b/2016_Statutory_Court_Fee_Task_Force_Report.pdf [<https://perma.cc/36FT-UH79>]; see also Brittany Friedman & Mary Patillo, *Statutory Inequality: The Logics of Monetary*

Restitution. Beyond fees and surcharges, the increased use of restitution can also extend the base amount owed by a significant margin. The use of restitution as a criminal sanction was gaining greater acceptance around the time the fines trio were litigated,²⁸⁵ and restitution was one of the sanctions at issue in *Bearden* itself.²⁸⁶ Restitution is now often awarded in addition to numerous fees and surcharges, as well as fines, creating a full package of economic sanctions that are out of reach for many people against whom they are imposed. Though states do collect significant amounts of money across cases—Illinois, for example, distributed over \$10 million dollars in restitution collections in 2020 alone²⁸⁷—restitution arrears are in the billions of dollars nationally, the bulk of which is essentially uncollectable.²⁸⁸ On an individual basis, handling restitution (with or without other economic sanctions) through installment plans at periodic payment amounts that a person can meaningfully pay can easily render such payments perpetual.²⁸⁹

Collection Costs and Interest. In addition to expanding the principal amounts imposed, modern lawmakers and courts also departed from the

Sanctions in State Law, 5 RUSSEL SAGE FOUND. J. SOC. SCIS. 173, 181 tbl.1 (2019) (listing Illinois state agencies funded through economic sanctions). In 2019, Illinois made some limited steps toward reform, with a new law allowing judges to reduce certain surcharges in part or in full if the person can prove an inability to pay. See 725 ILL. COMP. STAT. 5/124A-20 (2021). Certain assessments are not subject to waiver and must be imposed. See *id.* at 124A-20(a) (excluding some Illinois Vehicle Code assessments). But data submitted by Illinois counties for cases in 2019, 2020, and 2021 show that once waivable assessments are imposed, waivers due to poverty essentially never occur. See ILLINOIS COURTS, *Circuit Civil, Criminal, and Traffic Assessment Reports*, <https://www.illinoiscourts.gov/reports/reports-circuit-court-civil-criminal-and-traffic-assessment-reports> [<https://perma.cc/NKZ5-DPSE>] (last visited Oct. 22, 2023). At the time of publication, this website provided Assessment Reports on fines, fees, and surcharges for each Illinois County. Some counties break their assessment reports into two components; clicking on the link to [Year] CTAA Criminal-Part I leads to a document showing the number of cases for which waivers of 25, 50, 75, or 100 percent of fines and certain fees and surcharges occurred. Other counties provided a consolidated record; clicking on the link to [Year] CTAA Criminal leads to a document providing the same information.

285 HILLSMAN, SICHEL & MAHONEY, *supra* note 226, at 147-50, 169-74, 186-90.

286 *Bearden v. Georgia*, 461 U.S. 660, 662 (1983) (noting *Bearden* was ordered to pay \$250 in restitution and a \$500 fine).

287 ADMIN. OFF. OF THE ILL. CTS., ANNUAL REPORT OF THE ILLINOIS COURTS: 2020 STATISTICAL SUMMARY 116-18 (2020), <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/de4253a6-147f-4643-a201-0e29ce403179/2020%20Annual%20Report%20Statistical%20Summary.pdf> [<https://perma.cc/A3EE-WLEE>].

288 See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 25 (2018), <https://www.gao.gov/assets/690/689830.pdf> [<https://perma.cc/GQ4T-ARWX>] (reporting that \$100 billion of the outstanding \$110 billion in federal restitution is uncollectible); see also COLO. OFF. OF STATE AUDITOR, VICTIM'S RESTITUTION: THE JUDICIAL BRANCH AND DEPARTMENT OF CORRECTIONS PERFORMANCE AUDIT 23 (2014) (finding \$115 million in arrears between 2009-2013).

289 See *infra* note 307 and accompanying text.

earlier installment fines experiments by tacking collection costs and interest onto these debts. These practices began in the federal system around the time of the fines trio,²⁹⁰ and are now commonplace more generally. For example, Florida adds up to 40 percent in collection costs on any debt left outstanding longer than 90 days.²⁹¹ Pennsylvania allows courts to contract with private collection agencies with “[t]he amount of the collection fee . . . [to] be added to the bill of costs to be paid by the defendant and . . . [to] not exceed 25% of the amount collected.”²⁹² Indeed, some jurisdictions charge defendants an additional fee every time a payment is made.²⁹³

Punitive Responses to Nonpayment. In addition to applying to smaller, more easily payable amounts, the installment fines experiments described in Part I frequently provided meaningful opportunities for post-imposition relief. In contrast, non-payment today can trigger a litany of highly punitive consequences that are often deployed automatically or employed without meaningful consideration of whether the person’s failure to pay was due to inability.²⁹⁴ These can include drivers’ license suspensions, issuance of arrest warrants, and extensions or revocations of probation and parole.²⁹⁵ The inability to pay economic sanctions may also preclude people from voting.²⁹⁶

²⁹⁰ Shortly after *Tate*, the Fifth Circuit opined that people placed on installment plans should have to pay interest in order to ensure that the “discounted value equals the initial amount of the fine.” *Frazier v. Jordan*, 457 F.2d 726, 729-30 (5th Cir. 1972). A year after *Bearden*, Congress put this approach into effect in the federal system, specifying that if a court ordered the use of installment payments for fines, then the defendant was to pay interest at the astoundingly high rate of 1.5 percent per month (and adding a 25 percent late fee for overdue payments). Act of Oct. 30, 1984, Pub. L. No. 98-596 § 2, 98 Stat. 3134, 3135. Congress has since reduced these charges. 18 U.S.C. § 3612 (providing for interest pegged to Treasury yields, giving courts and the Attorney General power to waive or limit interest, and setting penalties for late payments at 10 percent of the delinquent principal).

²⁹¹ FLA. STAT. § 938.35 (2023).

²⁹² 42 Pa. Con. Stat. § 9730.1(b)(2) (2023). For a discussion of how private debt collection agencies can add on collection fees, see Bryan L. Adamson, *Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System*, 15 NORTHWESTERN J. L. & SOC. POL. 305, 307-309 (2020); HUMAN RIGHTS WATCH, *supra* note 6, at 46-53 (discussing how private probation companies function as debt collectors).

²⁹³ *E.g.*, FLA. STAT. §§ 28.24(27)(b)-(c) (providing for either a one-time \$25 fee or a \$5 monthly fee for the use of installment payment plans); LA. OFF. OF MOTOR VEHICLES, PAYMENTS, <https://expresslane.org/drivers/installment-payment-plan-agreements/payments/> [<https://perma.cc/XNK6-R74C>] (last visited Dec. 11, 2023) (imposing a fee of 2.5 percent plus \$3.00 for each payment made by credit, debit, or prepaid card and \$4.00 for each payment made by bank account draft).

²⁹⁴ *See supra* note 9 and accompanying text; *see also* Commonwealth v. Mauk, 185 A.3d 406, 409-410 (Pa. Super. Ct. 2018) (finding a procedural due process violation where the court ordered 54 defendants imprisoned due to failure to make payments in a “high-speed sentencing” process that did not give them meaningful individual opportunity to be heard).

²⁹⁵ *See supra* note 7 and accompanying text.

²⁹⁶ Colgan, *supra* note 7, at app. B (detailing jurisdictions that condition reenfranchisement on payment of economic sanctions); Marc Meredith & Michael Morse, *Discretionary Disenfranchisement:*

prevent people from accessing public benefits,²⁹⁷ and block access to record sealing and expungement.²⁹⁸ So rather than responding to poverty through humane administration, states created systems in which people of limited means are trapped not only in long-term payment schemes, but also at constant risk of further punishment.

In sum, in crafting modern installment fines systems, lawmakers and courts in many jurisdictions have abandoned the most humane features of the early experiments—modest economic sanctions, payable in a short time, with opportunities for post-imposition forgiveness. At the same time, they have retained its most alarming features—a failure to adjust economic sanctions according to ability to pay prior to imposition and inattention to the need for alternatives to economic sanctions for people at the lowest rungs of the socioeconomic ladder.

III. ADDRESSING THE ABUSES OF INSTALLMENT FINES

As this Article has shown, installment fines are both a solution and a problem. They came into the criminal justice system as a solution—as an improvement on imprisonment for immediate inability to pay. And they are themselves a problem—a major source of oppression, injustice, and inequality.

In this Part, we turn to prescriptions. We offer two interventions to enhance the broader national conversation about reforming the use of economic sanctions. First, we argue a constitutional clause overlooked during the fines trio litigation—the Excessive Fines Clause—can provide crucial protection against abuses of installment fines practices. While the current Supreme Court has proved skeptical of arguments grounded in equal protection and due process, there are reasons to think that it would look favorably on arguments grounded in the Excessive Fines Clause.²⁹⁹ Second,

The Case of Legal Financial Obligations, 46 J. LEGAL STUD. 309 (2017) (analyzing disenfranchisement for failure to pay economic sanctions in Alabama).

²⁹⁷ If a person is deemed to have violated probation or parole due to nonpayment, that would render them ineligible for various federal public benefits. *See, e.g.*, 7 U.S.C. § 2015(k)(1)(B) (Supplemental Nutrition Assistance Program); 42 U.S.C. § 608(a)(9)(A)(ii) (Temporary Assistance for Needy Families); 42 U.S.C. § 1382(e)(4)(A)(ii) (Social Security Income for Aged, Blind, & Disabled); 42 U.S.C. § 1437d(1)(g)(2) (General Program of Assisted Housing); 42 U.S.C. § 1437f(d)(1)(B)(v)(II) (low-income housing).

²⁹⁸ Amy Kimpel, *Paying for a Clean Record*, 112 J. CRIM. LAW & CRIMINOLOGY 439, 467 & n.180 (2022) (noting some states require full payment of economic sanctions for expungement eligibility).

²⁹⁹ Notably, *Dobbs v. Jackson Women's Health Organization* cited repeatedly and favorably to *Timbs*, even as it reversed *Roe v. Wade* and evinced hostility to unenumerated rights previously understood as falling within the auspices of the Fourteenth Amendment. 597 U.S. 215, 237-39 (2022). The fines trio remains good law (and we trust will remain so) and continues to play an important

we highlight several “lessons learned” from this Article for those seeking policy reforms.

A. *The Excessive Fines Clause as a Powerful Source of Protection*

As noted above, the most obvious path for the litigators who took up the fines trio was to build upon the *Griffin* line’s due process and equal protection victories.³⁰⁰ It wasn’t until 1989—six years after *Bearden* was decided—that the Court would embark on its first interpretation of the Excessive Fines Clause.³⁰¹ Unlike Fourteenth Amendment claims, in which protections are triggered if an installment fines system discriminates on the basis of wealth to a degree that renders the system fundamentally unfair,³⁰² the Eighth Amendment’s Excessive Fines Clause affords protection if the economic sanctions imposed are grossly disproportionate to the underlying offense, with disproportionality measured by weighing the seriousness of that offense against the severity of the punishment.³⁰³ The Court has not yet taken up the broader question of whether a person’s financial condition is relevant to assessing the punishment severity side of the disproportionality scale,³⁰⁴ but it has strongly hinted that it will incorporate the financial effect of the economic sanction into the excessiveness inquiry, and some lower courts have already done so.³⁰⁵

Assuming that the financial effects of economic sanctions are relevant to excessiveness, then a crucial further question is whether placing a person on

role in securing rights for people charged with crimes or subject to economic sanctions in state courts. *See, e.g.*, *Beck v. Elmore Cnty. Magistrate Ct.*, 489 P.3d 820, 835-36 (Idaho 2021) (prohibiting, based on *Bearden*, issuance of a warrant for nonpayment of economic sanctions without probable cause that failure to pay was willful); *In re Humphrey*, 482 P.3d 1008, 1016-19 (Cal. 2021) (holding, in light of *Bearden*, that courts must consider ability to pay when setting bail). Nonetheless, especially in light of the Court’s recent skepticism about equal protection and due process, we see the Excessive Fines Clause as the most promising constitutional avenue for curbing abuses related to installment fines.

³⁰⁰ *See supra* notes 170–172 and accompanying text.

³⁰¹ *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) (noting the Court has not previously interpreted the Clause).

³⁰² *Bearden v. Georgia*, 461 U.S. 660, 665-66 (1983).

³⁰³ *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998).

³⁰⁴ *See Timbs*, 139 S. Ct. at 688 (citing *Bajakajian*, 524 U.S. at 340, n.15) (noting the Court has not yet determined the constitutional relevance of financial effect). The lower courts have split on the question. *Compare, e.g.*, *United States v. Rosales-Gonzalez*, 850 Fed. App’x. 668, 671-72 (11th Cir. 2021), *cert denied*, 142 S. Ct. 781 (2022) (noting the individualized impact of the fine is irrelevant) with *Colo. Dep’t of Lab. & Emp. v. Dami Hosp., L.L.C.*, 442 P.3d 94, 96, 101-02 (Colo. 2019), *cert denied*, 140 S. Ct. 849 (2020) (holding that financial effect is relevant to excessiveness).

³⁰⁵ *See Timbs*, 139 S. Ct. at 688 (noting *Magna Carta* and *Blackstone* referenced the effect of sanctions on the defendant).

an installment plan could transform an otherwise excessive fine³⁰⁶ into a constitutionally permissible punishment. The few courts to consider this specific question have taken different approaches. With very little analysis, the Iowa courts have taken the position that so long as each installment amount is set within a person's means, it is within the bounds of the Excessive Fines Clause, even if it means the person could never escape from the payment requirement—including one case where it would have taken 5,046 years for a person to pay the restitution imposed.³⁰⁷ In contrast, in 2021 the Washington Supreme Court engaged in an extensive analysis of the purpose and history of the Clause in a case involving Steven Long, an unhoused member of the Confederated Salish and Kootenai Tribes, who had received a \$547 penalty for a civil parking violation.³⁰⁸ Rather than finding that the use of a \$50 payment plan made the penalty permissible, it struck the penalty down as unconstitutionally excessive, reasoning that it was “difficult to conceive how [he] would be able to . . . lift himself out of homelessness [on an income of \$700 a month] while paying the fine and affording the expenses of daily life.”³⁰⁹

The historical development of installment fines detailed in this Article sheds light on this split and provides two reasons why mere placement on an installment plan should not be sufficient to thwart an excessive fines challenge. First, that only those people unable to pay immediately are subjected to added economic sanctions, further punishments, and a wider net of state involvement in one's private life undermines the Clause's prohibition against disproportionate sentencing. Second, installment fines have, from their inception, been intertwined with the revenue generating capacity of fines, a major issue of concern in the doctrine.

306 The Court has defined “fine” to include any sanction made payable to the government that is at least partially punitive. *Austin v. United States*, 509 U.S. 602, 609-10 (1993). There are strong arguments that fees, surcharges, and restitution constitute “fines” for purposes of the Clause. See Colgan, *supra* note 5, at 32-46; Colgan, *supra* note 31, at 295-319. Therefore, for ease of reference, in this Part we use “fine” to signify any economic sanction challenged as excessive.

307 *State v. Wagner*, 484 N.W.2d 212, 216, 217 n.1, 219-20 (Iowa Ct. App. 1992); see also *State v. Mayberry*, 415 N.W.2d 644, 646-47 (Iowa 1987) (holding a fine isn't excessive if it “bears a reasonable relationship to the damage caused”); *King v. Lehman*, No. CIV A. 93-6525, 1995 WL 121573, at *2 (E.D. Pa. Mar. 22, 1995) (stating, without analysis: “[T]he pertinent consideration is whether the prisoner has the ability to pay current installments rather than his ability ultimately to satisfy the entire amount”).

308 *City of Seattle v. Long*, 493 P.3d 94, 99, 110-16 (Wash. 2021). In an illustration of how other economic sanctions can now outstrip fines, his actual fine was for \$44 (and was waived), and the impoundment fees and related charges (after a reduction) added up to \$547.12. *Id.* at 99 & n.1.

309 *Id.* at 115.

1. Proportionality

The historical development and modern use of installment fines speaks directly to two key concepts within the Court's proportionality doctrine: equality in sentencing and comparative proportionality.³¹⁰

Equality in sentencing—the idea that two people equally culpable for the same offense should receive the same punishment—is central to the conception of proportionality.³¹¹ As detailed above, historically and today, installment fines went hand in hand with net-widening, whereby courts and probation officers surveil people paying by installment—where they work, who they associate with, and more.³¹² While seen as a benefit to the debtor given the opportunity for fiscal guidance and moral development,³¹³ installment plans infringed on privacy that debtors would have retained had they only the means to pay in full at sentencing. And today's installment fines carry with them the imposition of heavy collections costs, the loss of time for court hearings and probation and parole meetings, and the ongoing threat of penalties for missed payments such as driver's license revocation or arrest—none of which is imposed on those able to pay from the start. Therefore, were we to measure equality formally, today's practices would undermine the commitment to equality in sentencing. But even with those inequities eliminated, a system that fails to account for financial effect in measuring punishment severity—in other words, one that measures equality only formally by dollar value—remains problematic because it does not account for the ongoing nature of punishment by installment.³¹⁴

³¹⁰ The Court adopted the gross disproportionality test for excessiveness from the cruel and unusual punishments doctrine. *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). For a discussion of three other key principles in that doctrine that inform the idea of excessiveness—the expressive function of punishment, the potential for criminogenic effects and other social harms, and the Eighth Amendment's dignity demand—see Colgan, *supra* note 5, at 57-76.

³¹¹ The Supreme Court has spoken of the idea of proportionality as taking into account the nature of the offense, the degree of harm caused, and the culpability of the person in committing the offense. See, e.g., *Bajakajian*, 524 U.S. at 337-39 (assessing the seriousness of the offense and noting that failing to declare currency taken overseas was a mere reporting offense unconnected to other criminal activity and that it caused minimal harm and only to the government); *Graham v. Florida*, 560 U.S. 48, 71 (2010) (describing how juveniles' reduced culpability renders them ineligible for life without parole sentences for nonhomicide offenses). In analyzing this aspect of proportionality, Youngjae Lee has posited that it is better understood as a form of "relative culpability" rather than an issue of equality, noting: "A punishment would be 'undeserved' if it is more severe than the punishment imposed on those who have committed more—or equally—serious crimes because the judgment the punishment expresses about the seriousness of the criminal's behavior would be inappropriate." Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1841-42 & n.31 (2012).

³¹² See *supra* notes 97, 122, 279 and accompanying text.

³¹³ 1914 *Chicago Report*, *supra* note 15, at 5, 7, 10, 12-16; 1917 *Quakers Report*, *supra* note 44, at 14; Binford, *supra* note 16, at 42; *Aid to Justice*, *supra* note 17, at 4.

³¹⁴ Colgan, *supra* note 5, at 48-52.

Early reformers understood installment plans as an extended form of punishment. As Judge Bland explained, “the installment fine plan punishes the offender . . . he feels the sting of the law every time he makes a payment.”³¹⁵ Judge Binford agreed, noting that “if it takes fifteen or sixteen weeks to pay a small fine they are continuously reminded of their misdeeds by their reporting to court and their self denial.”³¹⁶

Payment by installment, in other words, is not simply the same punishment in smaller doses; in fact, the punitive nature of repeatedly paying over time becomes more and more acute along with financial precarity. Having to pay small monthly amounts over an extended period of time may seem a light punishment for those with means, but for those who are struggling financially, it can make or break the ability to meet basic human needs over and over again. People report having to choose between paying economic sanctions each month and putting food on the table, paying rent, affording basic hygiene items, meeting child support obligations, or attending to their medical needs.³¹⁷ Ironically, the more poverty-stricken the person, the smaller each payment amount could reasonably be, and therefore the longer the time such deprivations could continue.

In addition to equality in sentencing, the Court’s Eighth Amendment doctrine also includes the principle of comparative proportionality, in which a more serious crime should beget a more serious punishment than that imposed for a less serious offense.³¹⁸ This is reflected in many state and local statutes that set out fine amounts, where the fines that may be imposed for serious crimes far exceed those that may be imposed for minor offenses. But, as detailed above, increased fees, surcharges, restitution, interest, collections costs, and more significantly increases the principal debt, even for minor offenses. If all that is required is an installment payment set at an amount a person can tolerate each period, but that amount compromises the person’s ability to reach the principal debt, then comparative proportionality is lost: whether the person jaywalked or robbed a bank, the punishment is the same payment each period, and may be so indefinitely. But even if we remove all of the add-on charges so the only economic sanction at issue is a fine

³¹⁵ *Aid to Justice*, *supra* note 17, at 4; *see also 1914 Chicago Report*, *supra* note 15, at 8 (“[T]he punishment would be far greater if the man were compelled to pay in installments from time to time than if he were compelled to raise the amount at once, because every time an installment was paid it would remind him of his error.”).

³¹⁶ Binford, *supra* note 16, at 42.

³¹⁷ *See supra* notes 10–11.

³¹⁸ *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (“[I]t is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape.”); *Solem v. Helm*, 463 U.S. 277, 303 (1983) (warning that a person should not be “treated more harshly” than people “who have committed more serious crimes”). For further discussion of the role of comparative proportionality in the excessiveness inquiry *see Colgan*, *supra* note 5, at 55–57.

graduated by statute to reflect offense seriousness, the problem is not entirely resolved. Assume one statute sets a fine for jaywalking at \$50 and shoplifting at \$200, thereby indicating that the latter offense is comparatively more serious. And also assume that person A, who can pay only \$5 per month, is sentenced for a jaywalking offense while person B, who can pay \$50 per month, is sentenced for shoplifting. It would take person A ten months to extricate herself from the jaywalking charge and person B four months to extricate herself from the shoplifting charge, thereby inverting the comparative proportionality of the offenses. In other words, the use of a payment plan divorced from a mechanism for graduating economic sanctions according to ability to pay in the first instance threatens to flatten or undermine the goal of comparative proportionality.

2. Revenue Generation

As the Court has developed the excessive fines doctrine, a consistent theme has emerged: the Clause is intended to guard against abuses of prosecutorial power, which may stem from the desire to gain revenues from economic sanctions, particularly when used against the politically vulnerable.³¹⁹ In establishing the importance of this conception of the Clause, the Court has reached back to the 13th Century abuses that led to the protections of Magna Carta as well as the later abuses of the Stuart Kings—who used fines as weapons against political enemies and to enrich the crown—which instigated the inclusion of a prohibition against excessive fines in the English Bill of Rights.³²⁰ The Court has further pointed to how colonial and early American fear of such mistreatment promoted the adoption of excessive fines prohibitions in both the federal and state constitutions—as well as recognizing that these fears have been borne out by past abusive practices like the Black Codes and ongoing abuses enabling revenue generation from politically vulnerable communities.³²¹

As this Article has shown, revenue generation has been a goal of proponents of installment fines since the experiments of the early twentieth century. The 1914 Chicago Report and Judge Binford touted the fiscal benefits of installment fines, which would increase collections while also saving the

³¹⁹ *Timbs v. Indiana*, 139 S. Ct. 682, 687-89 (2019) (describing the Clause as a “constant shield” against “[e]xorbitant tolls” that may be used to “retaliate against or chill the speech of political enemies”).

³²⁰ *Id.* at 687-88; *id.* at 693-95 (Thomas, J., concurring in result); *United States v. Bajakajian*, 524 U.S. 321, 335-36 (1998); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-68 (1989).

³²¹ *Timbs*, 139 S. Ct. at 688-89; *id.* at 689 (describing the revenue generation concern as “scarcely hypothetical” in light of jurisdictions’ increasing dependence on economic sanctions, which are, as a political matter, easier to impose than taxes); *id.* at 695-98 (Thomas, J., concurring in result).

government money on incarceration costs and public welfare that may be required to aid families cut off from the wages a person incarcerated could have otherwise earned.³²² The pushback against adoption of installment fines focused in part on fiscal issues as well. As noted above, other judges relayed to Judge Binford that, despite his program's success, the expansion of installment fines to their jurisdictions would be opposed by sheriffs whose earnings were dependent upon the continued incarceration of those unable to pay fines.³²³ Later, in *Williams*, counsel for Illinois focused in on the government's fiscal needs. Apparently oblivious to the fiscal benefits generated through the early installment fines experiments, Illinois argued in its brief: "It is fair to say that many of the local courts across the country are supported almost entirely by revenue derived from the imposition of fines and costs in misdemeanor cases, especially traffic offenses."³²⁴ It then argued that taking away the ability to incarcerate those who could not pay immediately "would potentially saddle [those courts] with thousands of claims of indigency, both genuine and spurious, which would have to be heard after prior litigation had established the guilt of the defendant and the necessity for the imposition of fines as punishment."³²⁵ This same theme of administrative expense was taken up by counsel for Texas in *Tate*. In a bombastic brief, counsel wrote that installment fines would "raise insurmountable administrative and judicial problems" given that courts address "hundreds of traffic violations each day as well as the inevitable number of drunks, petty misdemeanors, and the like."³²⁶ At oral argument, counsel continued, claiming that implementing installment fines with an ability to pay analysis would "take the wisdom of Solomon and the sophistication of a computer that hasn't ever been invented."³²⁷ Similar concerns about administrative cost were echoed by lower courts after *Tate*.³²⁸

But concerns held by some about lost revenue and administrative expense shifted dramatically in the years that followed, becoming a story of revenue

322 See *supra* notes 18, 102–108, 123 and accompanying text.

323 *Supra* note 125 and accompanying text.

324 *Williams* Appellee's Brief, *supra* note 15, at 8.

325 *Id.*

326 *Tate* Respondent's Brief, *supra* note 216, at 18, 23–24. "Resp's brief is not very helpful," observed Justice Blackmun's clerk in an internal memo. Bench Memo in Case File of Justice Harry Blackmun, *Tate v. Short*, 401 U.S. 395 (1970) (No. 324) (on file with authors, original records available in Box 128, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.).

327 Transcript of *Tate* Oral Argument, *supra* note 215, at 32–34.

328 See, e.g., *Rutledge v. Turner*, 495 P.2d 119, 124 (Okla. Crim. App. 1972) (remarking that installment payments would "burden the already overtaxed trial courts"); *Hood v. Smedley*, 498 P.2d 120, 123 (Alaska 1972) (describing installment systems as an "administrative burden"); see also HILLSMAN, SICHEL & MAHONEY, *supra* note 226, at 103 (reporting that some court administrators found installment systems problematic).

growth. Just as lawmakers were expanding the scope of fees, surcharges, interests, and collections that funded an ever-expanding carceral state,³²⁹ it became clear that installment fines could be used to take greater advantage of those revenue streams.³³⁰ To encourage states to see the systems as a mechanism of revenue generation, the Department of Justice's National Institute of Justice published a report extolling the virtues of aggressive collection efforts in Texas, Oregon, and Washington.³³¹ For example, to incentivize probation departments to focus on revenue, Texas lawmakers passed a series of statutes which allowed probation departments to retain a greater portion of year-end revenue surpluses as collections rose, gave the departments broad discretion on how to spend the funds, and nearly tripled the amount of probation fees imposed.³³² The NIJ report also touted methods for incentivizing individual probation officers to engage in collections—including linking collections directly to staff performance evaluations through monthly reports or by posting collection rates on office bulletin boards.³³³ The report also praised judges and probation administrators for ordering that monies collected be paid to the government before distributing monies to crime victims owed restitution, and encouraged the adoption of structures that would disincentivize fee waivers.³³⁴

While there is jurisdictional variation in dependency, lawmaker adherence to using economic sanctions as an alternative to taxes has remained strong. The loss of court funding following the financial collapse of the early 2000s led many jurisdictions to increase the use of fees and surcharges, a problem exacerbated again by the financial crisis later that decade.³³⁵ With the addition of ever-more fees and surcharges, lawmakers have been able to maintain or expand funding not only of courts, but also of law enforcement, jails and prisons, and other public projects such as fire departments, schools, and

329 See *supra* notes 261–263, 266–270, 274–277, 284 and accompanying text.

330 Practice-oriented articles focused on “the revenue agent role of state courts” and how they could use pressure, technology, and better accounting to increase collections. See Jonathan P. Nase, *The Revenue Agent Role of State Courts: Implications for Administration and Adjudication*, 76 JUDICATURE 195, 196–98 (1993); George F. Cole, *Fines Can Be Fine—and Collected*, 28 JUDGES' J. 5, 8–9 (1989).

331 Finn & Parent, *supra* note 263.

332 *Id.* at 2–4.

333 *Id.* at 5–6.

334 *Id.*

335 See Karin D. Martin, *Law, Money, People: Insights from a Brief History of Court Funding Concerns*, 4 UCLA CRIM. JUST. L. REV. 213, 220–21 (2020); Akheil Singla, Charlotte Kirschner & Samuel B. Stone, *Race, Representation, and Revenue: Reliance on Fines and Forfeitures in City Governments*, 56 URBAN AFFS. REV. 1132, 1133 (2020).

parks.³³⁶ The use of fees and surcharges has become so prevalent that in many cases, the add-on charges can far outpace the amount of fines imposed.³³⁷

This is not to say that these policies actually make sound financial sense; the cost of collections and enforcement practices may well exceed the financial returns to the state where low-income defendants are concerned.³³⁸ But the perception by many system actors appears to be that economic sanctions serve as an important tool to generate revenue and avoid taxation.³³⁹ It is just this type of activity the Excessive Fines Clause is meant to protect against. As the Court has recognized, courts should scrutinize “governmental action more closely when the State stands to benefit,”³⁴⁰ particularly when such practices are targeted at politically vulnerable communities³⁴¹—including people of color who disproportionately shoulder the burdens of economic sanctions today.³⁴²

In short, since the reformers of the early twentieth century first experimented with installment fines, the practice has been inextricably intertwined with the desire for government revenue—a key part of the win-win-win the project offered. The history of installment fines also shows how that problem has grown over time as lawmakers become more and more dependent on the use of economic sanctions as a means of tax avoidance. Given the Court’s commitment to the Clause serving as a blockade against the government prizing revenue generation over fairness, this history supports taking a cautious and critical eye to the ways in which installment fines may hide unconstitutionally excessive practices.

336 See *MENENDEZ ET AL.*, *supra* note 29, at 6 (providing some of these examples); Friedman & Pattillo, *supra* note 284, at 181 tbl. 1 (same); RAM SUBRAMANIAN, JACKIE FIELDING, LAUREN-BROOKE EISEN, HERNANDEZ STROUD & TAYLOR KING, BRENNAN CTR. FOR JUST., *REVENUE OVER PUBLIC SAFETY* 11-13 (2022) (same).

337 See, e.g., Meredith & Morse, *supra* note 296 (analyzing economic sanction use in Alabama and finding that the median dollar value in felony cases was \$3,956, over half of which came from court fees); cf. Ward & Link, *supra* note 11, at 170 (noting that in Pennsylvania “court costs have driven the overall increases in financial sanction amounts over the past decade”).

338 See, e.g., Devah Pager, Rebecca Goldstein, Helen Ho & Bruce Western, *Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment*, 87 AM. SOCIO. REV. 529, 543-47 (2022) (concluding that for the control group of ~300 low-income defendants in Oklahoma County, “extensive efforts at debt collection do little to achieve their stated purposes of recovering costs or ensuring personal accountability” and noting the “large but ineffective cost-recovery bureaucracy”); Brief for the Office of the Controller of Allegheny County as Amicus Curiae Supporting Appellant at 7, *Commonwealth v. Lopez*, 280 A.3d 887 (Pa. Aug. 16, 2022) (No. 27 EAP 2021) (concluding from practical experience that when it comes to collecting court costs from indigent defendants, “[w]hat looks like a revenue source becomes, in practice, a revenue drain”).

339 See, e.g., Martin, *supra* note 335.

340 *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991)).

341 *Id.* at 687-89; *id.* at 693-98 (Thomas, J., concurring).

342 See *supra* note 13 and accompanying text.

B. Avenues for Policy Reform

The abusive role financial penalties play in our justice system has not escaped attention. Over the last decade, scholars and advocates have urged numerous changes, including abolition of some forms of economic sanction, better procedures for taking ability to pay into account at the front end, and more humane collections proceedings at the back end.³⁴³ Some legislatures and other institutional actors are taking note and instituting much-needed reforms.³⁴⁴ The account given in this Article points toward the need for additional reforms, and though a full explication is beyond our scope, we offer the following lessons in brief.³⁴⁵

First, one of the key features of the early experiments with installment fines was the application to modest fine amounts. Without these features we very much doubt that these experiments would have produced the inspiring results that made installment fines seem like such a “promising alternative.”³⁴⁶ To move us towards a more humane system, lawmakers and courts should eliminate the fees and surcharges that have done so much to drive up the base amount of economic sanctions imposed. Their elimination—and forgiveness of back debt related to them—is starting to gain traction in some

³⁴³ See, e.g., DEBT FREE JUSTICE, *Our Impact*, <https://debtfreejustice.org/our-impact> [<https://perma.cc/UZ3R-U39V>] (calling for the abolition of fines and fees in juvenile court); TEX. APPLESEED & TEX. FAIR DEF. PROJ., *DRIVEN BY DEBT: HOUSTON 1* (July 2020), <https://www.texasappleseed.org/sites/default/files/DrivenByDebt-Houston-July2020.pdf> [<https://perma.cc/8U68-BXWB>] (calling for numerous reforms including an end to putting holds on driver’s licenses and issuing arrest warrants for failure to pay; debt forgiveness; and income-based reductions and waivers of economic sanctions). Many of the sources cited *supra* note 29 also engage with these themes.

³⁴⁴ See, e.g., *Recent Legislation*, 128 HARV. L. REV. 1312, 1315-16 (2015) (describing a new Colorado law, passed nearly unanimously, that aimed at lowering the risk of incarceration due to default on installment payments).

³⁴⁵ This account suggests that reforms and remedies should be structured to anticipate and deflect judicial reluctance as much as possible. The innovative judges described in Part I were outnumbered by judges who just incarcerated those unable to pay in full, even when legislation encouraged them to do otherwise. See *supra* notes 109–113 and accompanying text. And the same do-the-minimum attitude can be seen in response to *Williams* and *Tate*, when judges grudgingly adopted the use of installments without thinking more broadly about just solutions. See, e.g., *Spurlock v. Noe*, 467 S.W. 2d 320, 321 (Ky. Ct. App. 1971) (“[W]e are not inclined to proceed beyond the requirement of [*Tate*]”); *State v. De Bonis*, 276 A. 2d 137, 147 (N.J. 1971) (advising that where a judge doubts the defendant’s ability to pay even in installments, the best course was to impose the fine anyhow “and then upon default, to recall the defendant for resentencing in the light of the defendant’s individual circumstances”). Therefore, consideration should be given to the use of mandates for humane treatment rather than grants of discretion and, relatedly, rules rather than standards. In the same vein, lawmakers should make sure that these mandates and rules can be incorporated into the high-volume practice of state and municipal courts and should establish review provisions to ensure incorporation happens.

³⁴⁶ See *Tate* Petitioner’s Brief, *supra* note 15 at 8-9.

jurisdictions.³⁴⁷ To be clear, this does not purge the revenue perversions caused by economic sanctions; the revenue from fines has always been used to pay system costs,³⁴⁸ and lawmakers and courts could merely raise fine amounts and redistribute funds to cover monies lost from fee and surcharge eradication. But given that fees and surcharges have become such easy tacks—on—a dollar here, fifty dollars there—often scattered throughout a jurisdiction’s codes and court rules so that their overall impact is obscured,³⁴⁹ their elimination would force system actors to take account of how much punishment they are inflicting. Lawmakers should also take seriously the implications of imposing effectively unpayable restitution awards. Unmanageable restitution traps debtors and their families in financial and social precarity while doing little to help crime victims, which should push us to consider alternative means of providing financial aid to victims while holding those who commit harm accountable.³⁵⁰

Second, a related feature central to the early experiments described in this Article is that payment could be completed in a reasonable time, far from the often long term, or even perpetual, systems of debt that are in frequent use today. These experiments did not formally scale fines to income. Indeed, one notable lesson of the history we describe is how an emphasis on installment payments predominated over another recommendation of the IPPC—namely, graduating economic sanctions according to a person’s financial condition.³⁵¹ Although these early approaches did not prioritize substantive equality, they gave defendants meaningful opportunities to clear their court debt within weeks or months.

We think it is important to put the element of *duration* front and center in the conversation around economic sanctions. Judges may think they are acting with a greater degree of empathy and fairness when providing more time for people to pay, but in reality this extends the period of judicial oversight, the need to attend hearings and the disruption that entails, and the

³⁴⁷ See, e.g., DEBT FREE JUST. CAL., *Governor Signs Historic Bill Repealing Unjust Criminal Fees in California Providing Much Needed Relief to Californians*, (Sept. 21, 2020), <https://ebclc.org/wp-content/uploads/2020/09/2020.09.21-AB-1869-Press-Release.pdf> [<https://perma.cc/3653-56CW>] (reporting passage of a California bill repealing all administrative fees in the state criminal legal system and forgiving outstanding fee debt).

³⁴⁸ Colgan, *supra* note 31, at 311-17 (discussing colonial and early American use of fines and forfeitures to cover court, law enforcement, incarceration, and prosecution costs).

³⁴⁹ See, e.g., Anjali Verma & Bryan L. Sykes, *Beyond the Penal Code: The Legal Capacity of Monetary Sanctions in the Corpus of California Law*, 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 36 (2022) (finding monetary sanctions hidden throughout California’s civil codes, thereby evading researchers and reformers).

³⁵⁰ For a discussion of the role of restitution and the potential substitution of other funds, see Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1558-65, 1577-80 (2020).

³⁵¹ See *supra* notes 40, 89, 159-162 and accompanying text.

requirement of explaining one's inability to pay over and over again. As Mary Pattillo and Gabriela Kirk have explained: "[T]he refrain of 'more time' in the criminal legal context is almost always a bad thing. More time to pay the court fines and costs meant more time bound to the courts. Without freedom from the [economic sanction], surveillance and legal precariousness endured."³⁵²

In other words, time is inextricably intertwined with the concept of system equality. Focusing only on ability to pay in a vacuum is insufficient. The Pennsylvania Supreme Court recently observed that assessing ability to pay fines at the time of sentencing can typically be done "by asking one simple question: 'How do you plan to pay your fines?'"³⁵³ This is better than nothing at all, and we are starting to see legislative reforms aimed at making monthly payments more affordable.³⁵⁴ But a still better approach, we think, would be for a court to start by asking itself "how long (if at all) should the defendant be subject to owing financial sanctions?" This could be done through a formalized system akin to a day fine system, in which penalty units are assigned to each offense to reflect its seriousness;³⁵⁵ when establishing the penalty unit that would be multiplied against a person's adjusted daily income, policy makers may find time to be a useful indicator of that seriousness. But even absent a formal sentencing mandate, attorneys negotiating plea bargains (and courts at sentencing) could start with that question, then consider what a reasonable monthly payment would be and set the cumulative amount of all financial penalties accordingly. By making time

³⁵² Mary Pattillo & Gabriela Kirk, *Layaway Freedom: Coercive Financialization in the Criminal Legal System*, 126 AM. J. SOCIO. 889, 912-913 (2021) (describing a Chicago judge who, when faced with defendants unable to pay due to health issues, lack of employment, or unexpected expenses, explained: "We take that into consideration and work with them on it. More time. Give them more time.").

³⁵³ Commonwealth v. Ford, 217 A.3d 824, 831 (Pa. 2019).

³⁵⁴ This is not to say such reforms are perfect. See, e.g., FINES & FEES JUST. CTR., *Gov. DeSantis Signs Bill Increasing Access to Payment Plans for Fines and Fees*, (June 23, 2022), <https://finesandfeesjusticecenter.org/2022/06/23/gov-desantis-signs-bill-increasing-access-to-payment-plans-for-fines-and-fees/> [<https://perma.cc/V3TM-DZHS>] (describing a recent Florida law setting mandatory minimum monthly payments at the greater of \$25 or 2 percent of one-twelfth of annual income, which may be out of reach for some people).

³⁵⁵ See *supra* text accompanying note 42. Graduation is not a panacea, and proper design is essential for any system. See Colgan, *supra* note 42 (discussing the need for objective criteria for establishing ability to pay); Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform A Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175 (2019) (warning that systems for graduation can imbed structural racism); Colgan, *supra* note 350, at 1551-55, 1565-71 (regarding the need to reform how monies generated through graduated economic sanctions are employed to avoid system entrenchment); Mitali Nagrecha, *The Limits of Fairer Fines: Lessons from Germany*, HARV. L. SCH.: CRIM. JUST. POL'Y PROGRAM 87-89 (June 2020) (reporting that German judges employing day fines over-estimate the financial capacity of people living in poverty).

central to the sentencing inquiry, courts can do a better job of promoting substantive equality and preventing hopelessness from the beginning.

Third, even the best-designed and most reasonably administered version of installment fines will not work for everyone. The high success rates of Judge Bland and Judge Binford came at a grim cost: they hand-picked the people given the “privilege” of paying in installments and sent those whom they saw as “incurable” straight to jail.³⁵⁶ Since *Williams* and *Tate*, this approach is thankfully no longer allowed, but this in turn leads to the use of installment fines for persons who will never succeed in paying them. Today, all too much of installment fines practice is simply “[j]udges . . . requir[ing] defendants to perform their compliance with the process of appearing in court even when collection of the fines and fees [is] likely impossible.”³⁵⁷ Some of this can be addressed by setting feasible financial penalties at the outset, but there will always be people for whom any payment is unrealistic. At a minimum, the system should lift court debt off the books for those without the meaningful ability to pay after a certain amount of time—and do so automatically rather than through a petition process that is unlikely to be activated. But focusing on the minimum is, perhaps, another example of allowing the idea of installment plans to crowd out more transformative opportunities for change.

Taking seriously the reality that installment fines do not work for everyone could lead us to ask not just *how* to punish people, but *why* we are doing so in the first place. Lawmakers might consider the countless low-level offenses on the books and ask whether they actually address public safety. And even if the answer to that question is yes for some offenses, lawmakers should still weigh that public safety value against the harms of enforcement, including not only the fiscal and social harms to people of limited means, their families, and their communities, but also the opportunities for violence that enforcement of low-level offenses creates.³⁵⁸ It may well be that a serious inquiry will make clear that the costs outweigh the benefits, and thus the books should be cleared of such offenses.³⁵⁹

³⁵⁶ See *supra* notes 74, 121 and accompanying text.

³⁵⁷ See Karin D. Martin, Kimberley Spencer-Suarez & Gabriela Kirk, *Pay or Display: Monetary Sanctions and the Performance of Accountability and Procedural Integrity in New York and Illinois Courts*, 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 128, 144 (2022).

³⁵⁸ See Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2016) (demonstrating how ordinary law enforcement interactions lead to violence).

³⁵⁹ Cf. Brendan Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. 213 (2021) (arguing that the individual societal costs of municipal court systems outweigh their benefits).

CONCLUSION

When Bruce Springsteen was fined \$540 for a minor alcohol offense in the winter of 2021, the judge asked how long he needed to pay it off.³⁶⁰ “I think I can pay that immediately,” Springsteen answered with a smile.³⁶¹

It is not so easy for everyone. Economic sanctions which are trivial to some can be devastating to others.³⁶² In theory, the use of installment fines make it easier for lower-income people to pay their economic sanctions. But as this Article has shown, the installment fines that the Supreme Court envisioned in *Tate* are not the installment fines of today. Instead, initial fines, fees, surcharges, and restitution are collectively set at levels that can take years to pay off under the best of circumstances; steep late penalties, collection costs, and further sanctions are added on; and collections are often not administered in a humane way. Moreover, installment fines now are used against defendants for whom they make no sense—those who will never have the ability to pay up over time.

Overall, installment fines have become a blight on U.S. criminal justice. At a minimum, we need to use constitutional law or policy reforms to revisit the use of installment fines so that the system is no longer a racket—so that additional costs, fees, surcharges, and restitution are either eliminated or set holistically with fines, and so that the cumulative financial penalties are set at achievable and time-limited levels from the beginning. More fundamentally, we urge consideration of other paths, such as well-designed variants on the day-fines system and evaluation of whether low-level offenses on the books have costs that exceed their benefits. It is long past time for major reforms.

³⁶⁰ Kathleen Hopkins, *Bruce Springsteen Pleads Guilty to Alcohol Consumption in Closed Area, DWI Charge Dropped*, USA TODAY (Feb. 24, 2021, 5:08 PM), <https://www.usatoday.com/story/entertainment/celebrities/2021/02/24/bruce-springsteen-dwi-court-appearance/4572548001/> [<https://perma.cc/3TMW-JTRZ>].

³⁶¹ *Id.*

³⁶² See *supra* notes 308–309 and accompanying text (describing the case of Steven Long, the unhoused man who faced the prospect of paying almost the exact same sum as Bruce Springsteen—\$547 in parking sanctions—but in his case out of an income of \$700 per month).

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