

Impact of Criminal Justice Debt on Indigent Defendants in Tennessee

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INTRODUCTION

The Shelby County Office of the Public Defender has a stack of intake forms from clients and other indigent former offenders who wish to have their administrative fees¹ waived by a judge. As a result of years of accumulated court costs and fees, people are unable to reacquire their driver's licenses² even after they complete their court-ordered sanctions unless they petition to have their records expunged or pay the costs and fees.³ Tennessee permits judges to waive court costs and fees.⁴ Because there are so few resources available to help petitioners, the process is slow, with the Public Defender's staff working to prepare motions in their spare time. The result is that people still face statutory and procedural hurdles to re-entry—even in a court system that is generally amenable to relieving court costs and fees for those unable to pay.⁵

Because of these statutory barriers, many ex-offenders are unable to fully reintegrate into society and obtain employment to support their families. The penological objectives for an offender-funded justice system are left unmet when defendants return home and are unable to get jobs, thus

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1. In this Note, the terms *administrative fees*, *court costs*, *criminal-justice debt*, and *legal financial obligations* (LFOs) are all used interchangeably. The specific varieties of fees are explored in Part II. Fines are not typically included in this category as they are assigned as part of a punitive sanction rather than to offset the administrative cost of a criminal procedure.

2. See TENN. CODE ANN. § 40-24-105(b) (2019).

3. See TENN. CODE ANN. § 40-32-101(g)(2)(C)(i) (2019).

4. TENN. CODE ANN. § 40-25-123(b) (2017). Sometimes, indigent criminal defendants may participate in community service in lieu of paying court costs. TENN. CODE ANN. § 40-25-123(c)(2) (2017).

5. See *infra* notes 106 to 113 and accompanying text.

becoming more likely to commit crimes out of desperation.⁶ Scholars have raised both constitutional and policy arguments against certain types of legal financial obligations (“LFOs”) and the ways in which they are assessed, particularly those that are incurred before any determination of guilt has been made.⁷

While Tennessee—and Shelby County in particular—follows the letter of the Supreme Court’s decision in *Bearden v. Georgia* and does not regularly incarcerate people for unpaid debt,⁸ the reality is that many ex-offenders are saddled with hundreds, if not thousands, of dollars in debt upon re-entry. With this in mind, this Note commends the repeal of Tennessee’s driver’s license revocation statute, implementing a state-wide system to track the revenue actually generated by LFOs, and providing more resources dedicated to public defender offices specifically to aid people petitioning for their costs to be waived.

Part I examines the history of criminal justice debt in the United States, beginning with legal history in the Supreme Court and the State of Tennessee. Then, the current state of LFOs in Tennessee is examined, drawn from statutes, case law, and the state and Shelby County budgets. Finally, various constitutional and policy arguments about criminal justice debt are discussed. Part II analyzes whether the constitutional and policy arguments are valid in the context of Tennessee law and practice. Part III offers Tennessee-specific remedies.

6. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 AM. SOC’Y OF CRIMINOLOGY (SPECIAL ISSUE) 509, 519–20 (2011).

7. See, e.g., Laura I. Appleman, *Nickel and Dime into Incarceration: Cash-Register Justice in the Criminal Justice System*, 57 B.C. L. REV. 1483, 1516 (2016); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 848 (2013); Beckett & Harris, *supra* note 6, at 509–10.

8. 461 U.S. 660 (1983). It should be noted that the situation is direr in many other areas of the country as people are regularly incarcerated for failure to pay their LFOs, despite the Supreme Court’s decision in *Bearden v. Georgia* barring incarceration for failure to pay unless the failure is found to be willful after a court hearing. See *id.* at 672. These states argue that *Bearden* hearings are properly given, but evidence shows that such hearings are perfunctory at best. See *infra* note 22. However, this Note is primarily focused on Tennessee, so it will only cover modern debtors’ prisons in the context of the general history of LFOs in the United States.

I. HISTORY

A. History of Indigent Defendants' Debt

The Supreme Court has long been concerned with the plight of indigent defendants in the criminal justice system. Though *Gideon v. Wainwright*⁹ is perhaps the most well-known indigent defense case, the Supreme Court addressed indigent defendants' procedural due process rights seven years earlier in *Griffin v. Illinois*.¹⁰ Soon after that, the Court followed *Griffin*'s precedent in *Burns v. Ohio*, a factually similar case.¹¹

Eventually, the Court specifically addressed state imprisonment for criminal debt. In *Williams v. Illinois*, the Supreme Court held "[a] statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly."¹² *Williams* is the first case in this area of law,¹³ though the holding was ultimately narrow.¹⁴ The *Williams* holding paved the way for cases such as *Tate v. Short*¹⁵ and *Bearden v. Georgia*.¹⁶ While *Tate* had

9. 372 U.S. 335, 344 (1963) (holding that felony defendants in state criminal court cases are entitled to appointed counsel under the Sixth Amendment's right to counsel).

10. 351 U.S. 12, 19–20 (1956) (holding that preventing a petitioner from filing an appeal because he could not afford the transcript fee violates the Fourteenth Amendment's Due Process and Equal Protection clauses because denying the petitioner the right to appeal was essentially the equivalent of denying him the right to a trial).

11. 360 U.S. 252, 258 (1959) (holding that requiring an indigent defendant to pay a filing fee in order to permit him or her to file a motion for appeal before the Ohio Supreme Court violates the defendant's right to due process and equal protection under the law).

12. 399 U.S. 235, 243 (1970).

13. See Appleman, *supra* note 7, at 1490; Torie Anderson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 211 (2016); Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1032 (2016).

14. While *Williams* is used as a jumping-off point for this area of law, the holding is primarily concerned with imprisonment for failure to pay exceeding the length of the sentence mandated by statute. See *Williams*, 399 U.S. at 236. Rather than address constitutional concerns about imprisonment for failure to pay, the Court concentrates on the narrower issue of whether the State exceeded the sentencing bounds it set for itself. *Id.*

15. 401 U.S. 395, 399 (1971) (holding that it is a violation of an indigent defendant's right to equal protection under the Fourteenth Amendment to only fine people who can afford to pay and convert the fine to imprisonment for those who cannot).

16. 461 U.S. 660 (1983).

analogous facts to *Williams*, the sentencing scheme in *Williams* only included fines rather than fines and imprisonment;¹⁷ thus, *Tate* is often read as an example of a *Williams* holding.¹⁸ *Bearden*, in contrast to *Tate*, broadened indigent defendants' rights. The Court held that a state cannot revoke probation for failure to pay a fine, absent evidence that the probationer was willfully refusing to pay and alternative forms of punishment were inadequate.¹⁹ Similar to *Williams*, the *Bearden* holding was relatively narrow and has been interpreted different ways by courts and scholars, from essentially barring debtors' prisons²⁰ to requiring a *Bearden* hearing.²¹ Researchers note that there is little guidance on how to conduct indigency hearings under *Bearden*, resulting in many states conducting perfunctory or arbitrary ones. In one jurisdiction, a probation office—not the judge—is permitted to make the ability-to-pay determination, using such factors as whether “the probationer smoked cigarettes, owned multiple cell phones, or possessed a pair of popular sneakers.”²² In Michigan, courts must make an ability-to-pay assessment based on a “manifest hardship” standard, but only when “the fee is enforced and the defendant challenges that enforcement based upon his or her ability to pay,” meaning that many assessments are never actually made.²³

17. *Williams*, 399 U.S. at 236.

18. Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1, 34 (2016).

19. *Bearden*, 461 U.S. at 662. The Court also explained, “A defendant’s poverty in no way immunizes him from punishment. Thus, when determining initially whether the State’s penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.” *Id.* at 669–70.

20. See, e.g., Appleman, *supra* note 7, at 1490 (“In 1983, the Supreme Court finally eliminated debtor’s prison in *Bearden v. Georgia*, holding that imprisoning a probationer who was unable to pay off his legal debts violated the Equal Protection Clause.”).

21. See, e.g., Hampson *supra* note 18, at 35 (explaining that because there was no clear holding by the Court, “state and federal appellate courts have affirmed that some effort to find employment is required, and some have put the burden on the debtor or have established a burden-shifting framework”).

22. Kurin, *Indebted to Injustice: The Meaning of “Willfulness” in a Georgia v. Bearden Ability to Pay Hearing*, 27 GEO. MASON U. CIV. RTS. L.J. 265, 291–92 (2017).

23. Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1854–55 (2014); see also ALICIA BANNON, MITALI NAGRECHA, & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1, 21–22 (2010) (describing that if a probationer smoked and had not paid anything since the previous court date, an Illinois judge would find that he or she had willfully refused to pay; and in Michigan, a judge may simply inquire whether or not the petitioner had cable television and then find he or she to have willfully refused).

While *Bearden* remains the most recent relevant case for indigent defendants' LFOs, the Supreme Court has shown its narrow support for indigent parties' rights in several civil cases.²⁴ Outside the area of indigent defendants, the Court also found a violation of the Excessive Fines Clause of the Eighth Amendment in *United States v. Bajakajian*.²⁵

Debtors' prisons have been around for thousands of years, dating back to biblical times and codified in Roman law, though the Roman Senate eventually prohibited them.²⁶ England had a long history of debtors' prisons,²⁷ famously depicted by Dickens. The tradition of English debtors' prisons was carried on in the American colonies, complete with horrific conditions.²⁸ After a push for reform, Congress abolished debtors' prisons for federal offenses in 1832, and a majority of states followed suit by the 1870s.²⁹

Though formal debtors' prisons fell out of favor in American society, there has been a push in the past several decades for an offender-funded justice system in which the costs are passed on to the offenders rather than taxpayers.³⁰ It should be noted that the Tennessee Administrative Office of

24. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (holding that both the Equal Protection and Due Process clauses are violated when parental rights are terminated and the parent is prevented from appealing the decision because he or she is unable to afford the fees associated with it); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that it was a violation of due process for indigent women to be barred from beginning divorce proceedings when they could not afford the fees, because of the importance of marriage and the "state monopolization of the means for legally dissolving this relationship").

25. 524 U.S. 321, 324 (1998) (holding that a civil forfeiture of \$357,144 for failure to report property in excess of \$10,000 is a violation of the Excessive Fines Clause of the Eighth Amendment because the forfeiture was punitive in nature and thus a fine, and the fine was "grossly disproportional to the gravity of his offense"); see also *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (applying the Excessive Fines Clause to the states).

26. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 494-95 (2016).

27. Kurin, *supra* note 22, at 272.

28. *Id.* at 272-74. Quarters were described as a "human slaughter house," and debtors were not given meal rations, unlike other prisoners—families, friends, and local aid organizations were expected to provide food, clothing, and fuel for them. *Id.*; see also Appleman, *supra* note 7, at 1489 (describing debtors' prisons in the United States following the Revolutionary War).

29. Appleman, *supra* note 7, at 1489; Kurin, *supra* note 22, at 274.

30. COUNCIL OF ECONOMIC ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1, 2 (2015) ("In the 1990s, policy makers began arguing that taxpayers should not bear responsibility for these increasing costs, but rather the individuals convicted of crimes."); Anderson, *supra* note 13, at 194 ("As the costs of enforcement and incarceration skyrocketed during the drug wars, public pressure to reduce costs prompted legislators

the Courts estimates seventy-five percent of people prosecuted for crimes in Tennessee are indigent,³¹ and thus less likely to be able to pay off their debts. While the offender-funded system may appeal to some taxpayers, we do not always know the amount of fees and fines being collected.³² Some states have conducted studies to determine the efficiency of using court debt as a revenue generator and found that these laws fail to generate revenue.³³ A 2015 Council of Economic Advisers report found that “[d]espite their goal of increasing revenue to fund local criminal justice expenditures, in many cases, the costs of collection may exceed revenues from fines and fees due to the high direct costs of collecting debt and the low rate of collection.”³⁴

It is difficult to determine just how much revenue is collected from administrative court costs and fees in Tennessee, as the state budget does not appear to denote which revenue is specifically collected from litigation taxes or court costs and fees.³⁵ However, Vidhi S. Joshi found that the state

to raise revenue by charging those who ‘use’ the system—criminal offenders—with the costs of maintaining it. A staunch anti-tax mentality resulted in drastic shortfalls in local and state budgets, exerting similar pressure on local leaders to explore new revenue streams, such as fines and fees.”); Lisa Foster, *Injustice Under Law: Perpetuating and Criminalizing Poverty Through the Courts*, 33 GA. ST. U. L. REV. 695, 703 (2017) (citing U.S. DEP’T OF EDUC., POLICY AND PROGRAM SERV., STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUC. 1 (2016)) (noting that “[f]rom 1979 to 2013, total state and local correctional expenditures increased by 324%—from \$17 billion to \$71 billion) (alteration added).

31. TENN. ADMIN. OFFICE OF THE COURTS, TENNESSEE’S INDIGENT DEFENSE FUND: A REPORT TO THE 107TH TENNESSEE GENERAL ASSEMBLY 19 (2011), http://www.tsc.state.tn.us/sites/default/files/docs/aoc_indigent_defense_fund_report.pdf [perma.cc/WX8L-KRAU].

32. Sobol, *supra* note 26, at 539 (recommending an accountability system to monitor and track the LFOs collected).

33. ROOPAL PATEL & MEGHNA PHILIP, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION, BRENNAN CTR. FOR JUSTICE 1 (2012). Massachusetts and Rhode Island both conducted studies that ultimately affected legislation. *Id.* at 11–13 (“Following the report of the Special Commission, Massachusetts did not adopt a state-wide jail fee. . . . [Researchers in Rhode Island found] that less incarceration for court debt had resulted in significant savings for the state. . . . [And] Rhode Island courts actually *increased* the amount of funds collected yearly by \$160,599.”). “Such studies can show lawmakers that the imposition and enforcement of fees and fines has both financial and social costs, and that these laws fail to generate revenue.” *Id.* at 3.

34. COUNCIL OF ECONOMIC ADVISERS, *supra* note 30, at 5. The report suggests that increasing the availability of exemption waivers, reforming bail conditions, and increasing pre-trial release could all be effective measures to combat unwieldy criminal justice debt. *Id.* at 6–8.

35. STATE OF TENNESSEE, THE BUDGET: FISCAL YEAR 2017-2018 (2017), <https://www.tn.gov/content/dam/tn/finance/budget/documents/2018BudgetDocumentVol1.pdf> [perma.cc/5DVE-M6MB].

litigation tax (which is \$29.50 and applies to all criminal charges) “has raised almost \$9 million annually for the past few years.”³⁶ The budget for Shelby County is clearer, explaining that the “Fines, Fees, & Permits” category includes fees collected by the Courts, County Clerk, Register, and Trustee.³⁷ It expects to generate \$68,382,520 in 2019³⁸ but this number does not represent the true amount of court costs collected because the category is much larger than just court costs and fees; it encompasses permits as well.

A 2015 local investigative news report sheds some light on this issue.³⁹ For the fiscal year 2015, the Shelby County Criminal Court collected \$5.7 million in fees and fines, but there is an outstanding balance due of \$555 million dating back to 1995.⁴⁰ The average bill for a defendant or former defendant was approximately \$1,100. A Criminal Court clerk stated, “Most of my counterparts across the state are in agreement that fees and court costs are getting somewhat out of hand.”⁴¹

B. Tennessee Judicial History of Indigent Defendants’ Debt

In several instances, Tennessee federal and state courts predated the United States Supreme Court in extending constitutional protection to indigent defendants imprisoned for failure to pay court costs or fines.⁴² Preceding *Williams*, *Tate*, and *Bearden*, a Tennessee federal district court found that it was unconstitutional under the Thirteenth Amendment to jail indigent defendants for failure to pay court costs.⁴³ Furthermore, the same

36. Vidhi S. Joshi, *Sentenced to Debt*, 53-MAY TENN. B.J. 18, 19 (2017).

37. SHELBY COUNTY, TENN., GENERAL FUND SUMMARY: FY19 ADOPTED BUDGET 66 (2018), <https://www.shelbycountyttn.gov/DocumentCenter/View/33017/General-Fund-FY19-Adopted-Consolidated-numbered> [<https://perma.cc/R7H4-55KP>].

38. *Id.* at 51.

39. *Debt to Society: How Ex-Offenders and Taxpayers Continue Paying for Crime* (WREG television broadcast Nov. 19, 2015), <http://wreg.com/2015/11/19/debt-to-society-how-ex-offenders-and-taxpayers-continue-paying-for-crimes/> [perma.cc/U8XD-SHJV].

40. *Id.* The \$5.7 million is just over one percent of the \$555 million outstanding.

41. *Id.*

42. See Walter Kurtz, *Pay or Stay: Incarceration of Minor Criminal Offenders for Nonpayment of Fines and Fees*, 51-JUL TENN. B.J. 16 (2015), for a thorough overview of several of the Tennessee cases.

43. *Anderson v. Ellington*, 300 F. Supp. 789, 793 (M.D. Tenn. 1969) (“[I]n Tennessee, costs in a criminal case are not part of the punishment, and we therefore hold that the statutes permitting imprisonment for their nonpayment are void in that respect as violative of the Thirteenth Amendment.”).

court found that imprisonment for failure to pay jail fees was a violation of the Fourteenth Amendment.⁴⁴ In 1971, the Tennessee Court of Criminal Appeals held in *State v. Walding* that an indigent defendant who had served the imprisonment portion of his sentence was entitled to release despite having not paid his fine.⁴⁵ While this case preceded the *Bearden* decision, the *Walding* court was convinced it was properly following the Supreme Court's line of decision from *Williams* and *Tate*.⁴⁶ In *State v. Dye*, the Tennessee Supreme Court applied the *Bearden* test, holding that an indigent defendant's probation should not be revoked when medical problems prevented the individual from working, the defendant was not willfully refusing to pay, and an installment plan was an appropriate alternate mode of punishment.⁴⁷ Later cases have been distinguished from *Dye*, but the standard for willful refusals to pay fees and fines articulated by *Dye* and *Bearden* is still good law.⁴⁸

C. Tennessee Statutes Pertaining to Criminal Justice Debt

The Tennessee state legislature has also picked up where the judiciary left off, going even farther than the *Bearden* court by providing that no

44. *Dillehay v. White*, 264 F. Supp. 164, 167 (M.D. Tenn. 1966) (holding that because jail fees do not accrue against the rich because they can post bond, "Tennessee's practice of imprisoning indigent misdemeanants to work out jail fees which accrue during their pre-trial detention is unconstitutional" under the Equal Protection Clause).

45. 477 S.W.2d 251, 252 (Tenn. Crim. App. 1971) (finding that the defendant could pay off his fine on an installment plan rather than remaining incarcerated to work it off at a rate of \$5 per day).

46. *Id.* ("Three recent U.S. Supreme Court decisions enunciate the controlling principle Although these cases are distinguishable on their precise facts from the case sub judice, the following dictum from *Tate* clearly covers it.") (citations omitted).

47. 715 S.W.2d 36, 41 (Tenn. 1986). The defendant made a prima facie case that "[his] state of health and financial condition were such that it cannot be said that he, 'willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay.'" *Id.* (quoting *Bearden v. Georgia*, 461 U.S. 660, 672).

48. *See, e.g., State v. Riffey*, No. E2011-00641-CCA-R3CD, 2012 WL 762320, at *1 (Tenn. Crim. App. 2012) (holding that the lower court erred in revoking appellant's probation for failure to pay court fines but the probation was rightfully revoked for other reasons); *State v. Armstrong*, No. E2004-02495-CCA-R3-CD, 2005 WL 1981787, at *1 (Tenn. Crim. App. 2005) (revoking probation for an indigent defendant who repeatedly violated the terms of her probation beyond just not paying her fines and fees—an example of a "willful refusal" under *Dye* and *Bearden*); *State v. Cooper*, No. E1999-01810-CCA-R3-CD, 2000 WL 1369510, at *1 (Tenn. Crim. App. 2000) (same).

defendant shall be imprisoned for failure to pay court costs.⁴⁹ The legislature has also mandated that a court may provide an installment plan⁵⁰ or require community service,⁵¹ further codifying the ideals of *Bearden*. Courts may look into the “financial and family situation” of defendants who are unable to pay—which is more than required by *Bearden*.⁵² The Tennessee legislature has also given certain judges the discretion to waive court costs.⁵³ Judicial discretion is often applied in Shelby County to waive at least some of the debt that former offenders have incurred.⁵⁴

Recently, Tennessee State House Bill 839 partially amended the driver’s license revocation statute by eliminating the revocation of licenses for those convicted of driving offenses who have unpaid fees and fines.⁵⁵ The bill passed the House 96–0 and the Senate 30–0; Governor Lee signed it on May 22, 2019, and it went into effect on July 1, 2019.⁵⁶ While the law alleviates the burden for those who would lose their license because of unpaid driving

49. TENN. CODE ANN. § 40-24-105(a) (2017) (“Costs and litigation taxes due may be collected in the same manner as a judgment in a civil action, but shall not be deemed part of the penalty, and no person shall be imprisoned under this section in default of payment of costs or litigation taxes.”).

50. TENN. CODE ANN. § 40-24-101(a)(3) (2017) (“That the defendant pay the fine in specified portions or installments at designated periodic intervals and that the portions be remitted to a designated official, who shall report to the court in the event of any failure to comply with the order.”).

51. TENN. CODE ANN. § 40-25-123(c)(2) (2017) (allowing the clerk of either general sessions or criminal courts to institute a community service program “in lieu of full payment for court costs and litigation taxes”; the clerk may adopt guidelines, and the defendant can complete such a program if accepted.).

52. TENN. CODE ANN. § 40-24-104(a) (2017).

53. TENN. CODE ANN. § 40-25-123(b) (2017) (“Notwithstanding any law to the contrary, the presiding judge of a court of general sessions may suspend the court costs and the litigation tax required by §§ 67-4-602–67-4-606, for any indigent criminal defendant, as in the presiding judge’s opinions the equities of the case require.”).

54. See Shelby County Public Defender’s Office, *Collateral Consequences* (unpublished handbook) (on file with the author). Based on my experience, interns in the Shelby County Public Defender’s Office receive a handbook entitled “Collateral Consequences” that contains the protocol of investigating and preparing motions for the fees to be waived. Interns often prepare the motions and present them to the public defenders, who bring them before a judge. This is a multi-step process that requires the client to be present in the courtroom. The number of clients wanting to petition for waiver far outstrips the capacity of the public defender’s office.

55. H.B. 839, 111th Gen. Assemb. (Tenn. 2019); 2019 Tenn. Pub. Acts 438-1.

56. *HB0839: Bill History*, TENN. GEN. ASSEMB., <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0839> [perma.cc/64BJ-QSGV] (last visited September 5, 2019).

tickets and fees, it does not apply to those who have been convicted of offenses other than driving.⁵⁷

D. Burdens of LFOs on Indigent Ex-Offenders in Tennessee

While Tennessee has both judicial and legislative safeguards that protect indigent defendants from imprisonment for failure to pay court costs and fees, there are still significant penalties—particularly the revocation of driver’s licenses⁵⁸—for those with outstanding debts. The statute automatically and mandatorily revokes the license if not all of the fees and fines are paid within one year of the disposition of the case, and the license may not be reinstated until all LFOs are paid off or judicially waived.⁵⁹ The statute does not require a hearing to determine whether or not someone has the ability to pay,⁶⁰ implicating *Bearden*’s indigency-hearing requirement.⁶¹ There is a hardship provision that permits a payment plan, but the judge does not have to consider whether the person can pay.⁶² Additionally, a stay of revocation may be issued for travel necessary for employment, the serious illness of the person or an immediate family member, or participation in a recovery court, but the stay may not be continued past six months.⁶³ If the person fails to make payments according to the plan for three consecutive months after the stay, the license is revoked.⁶⁴

57. *Id.* In fact, the Shelby County District Attorney clarified that those who are behind on child support payments could still face license revocation. Stacy Jacobson, *Bill to Halt License Suspension Could Impact Many Memphis Drivers*, WREG (May 1, 2019), <https://wreg.com/2019/05/01/tennessee-lawmakers-ok-license-suspension-bill/> [perma.cc/JXU3-UE4U].

58. TENN. CODE ANN. § 40-24-105(b)(1) (2017) (“A license issued under title 55 for any operator or chauffeur shall be revoked by the commissioner of safety if the licensee has not paid all litigation taxes, court costs, and fines assessed as a result of disposition of any offense under the criminal laws of this state within one (1) year of the date of disposition of the offense. The license shall remain revoked until such time as the person whose license has been revoked provides proof to the commissioner of safety that all litigation taxes, court costs, and fines have been paid.”).

59. *Id.* While H.B. 839 amends the statute to prevent revocation of those with driving offenses, those convicted of other crimes would still face revocation. *See supra* note 57.

60. Complaint at 6, *Thomas v. Haslam*, 3:17-cv-00005 (M.D. Tenn. Jan. 4, 2017).

61. BANNON, NAGRECHA, & DILLER, *supra* note 22, at 21–22; Eaglin, *supra* note 22, at 1854–55; Kurin, *supra* note 22, at 291–92.

62. Complaint, *supra* note 60, at 6–7.

63. TENN. CODE ANN. § 40-20-105(b)(3) (2017).

64. TENN. CODE ANN. § 40-20-105(b)(4) (2017).

In Tennessee, 146,211 drivers have had their licenses revoked since 2012.⁶⁵ Much of Tennessee is inaccessible by public transportation⁶⁶ and many jobs require a driver's license as a prerequisite of employment,⁶⁷ making a driver's license "a lifeline in this state."⁶⁸ Other authors have also discussed the barriers that people face with the revocation of driver's licenses for failure to pay off criminal-justice debt, though it is not specific to Tennessee. They note the dearth of employment opportunities without a license.⁶⁹ Furthermore, losing a license can incur more debt with reinstatement fees⁷⁰ or even lead to incarceration if people are forced to drive without their license and lack other means of transportation.⁷¹ In January 2017, two men filed a class-action lawsuit challenging the constitutionality of the mandatory revocation of driver's licenses in Tennessee.⁷² The suit alleged the Equal Protection Clause is violated because the statute deprives an indigent people of the ability to drive simply

65. Joshi, *supra* note 36, at 20.

66. *Id.* at 20–21; *see also* Complaint, *supra* note 60, at 10 ("Public transportation is unreliable or lacking entirely in many parts of Tennessee and people often have no way to get to work without driving. . . . Even in areas with public transportation services, those services do not meaningfully reach significant portions of the impoverished population."). In its opinion, the Middle District of Tennessee acknowledged the finding that ninety-two percent of Tennesseans drive to work. *Thomas v. Haslam*, 329 F. Supp. 3d 475, 491 (M.D. Tenn. 2018). For discussion of the *Thomas* opinion, *see infra* note 75 and accompanying text.

67. Joshi, *supra* note 36, at 20–21; *see also* Complaint, *supra* note 60, at 9–10 (noting that positions as an "automotive technician, cable installation technician, caregiver, construction worker, delivery driver, housecleaner, HVAC technician, landscaping crew member, maintenance worker, plumber and plumber's helper, pressure washer, truck driver, truck washer, unarmed security officer, valet parking attendant, and warehouse worker" often require a driver's license as a condition of employment).

68. Joshi, *supra* note 36, at 20–21.

69. *See* BANNON, NAGRECHA, & DILLER, *supra* note 22, at 28 ("Similarly, suspending driver's licenses for a failure to pay criminal justice debt can make it difficult for many people to search for and hold down jobs."); Kurin, *supra* note 22, at 287 ("'42% of suspended drivers lost their jobs and 45% remained unemployed' during the suspension period. . . . '80% of participants were disqualified from employment opportunities because their license was suspended'") (citing 2006 N.J. MOTOR VEHICLES AFFORDABILITY AND FAIRNESS TASK FORCE FINAL REPORT 12, 38 (2006)).

70. Sobol, *supra* note 26, at 519 ("Once a driver's license is suspended, reinstatement and late fees are added to the original fine, and an individual must pay this debt before she can regain her license.").

71. *See generally* John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 440–42 (2005) (telling the story of Sally, who was incarcerated for driving on suspended license that was only suspended because she could not afford the administrative fees associated with an unpaid traffic ticket).

72. Complaint, *supra* note 60.

because they are too poor to pay—a consequence only faced by debtors.⁷³ The Due Process Clause is implicated because of the automatic revocation of the license without notice or opportunity to be heard and because the statute does not inquire into ability to pay.⁷⁴ On July 2, 2018, the Middle District of Tennessee ruled in favor the plaintiffs’ motion for summary judgment holding that, subject to a “heightened” rational basis review, the driver’s license revocation statute was violative of the Equal Protection Clause.⁷⁵ The Court emphasized that an indigent debtor is more harshly penalized than one who can afford to pay⁷⁶ and that the revocation of a driver’s license actually inhibits a debtor from obtaining the means to repay the debt, making the statute inherently “counterproductive.”⁷⁷ The District Court’s decision is currently under appellate review.⁷⁸

E. Constitutional Arguments Pertaining to Criminal-Justice Debt

There are a number of arguments as to why both imprisonment for failure to pay fees and the imposition of such fees are unconstitutional. Laura I. Appleman analyzes the different fees that often accrue for defendants; some accrue well before a judge or jury decides the case. Appleman sorts these fees into four categories:⁷⁹ pre-trial fees such as booking fees, bail “administrative” fees, dismissal fees, public defender application fees, and private probation fees;⁸⁰ adjudication fees like court fees and disability and

73. *Id.* at 17.

74. *Id.*

75. *Thomas v. Haslam*, 329 F. Supp. 3d 475, 479 (M.D. Tenn. 2018). The “heightened” rational basis review is applicable when there is a “politically unpopular group and a law affirmatively and unjustifiably inflicting harm on them.” *Id.* at 493.

76. *Id.* at 480.

77. *Id.* at 483–84. The Court also held that under procedural due process, licensees are entitled to notice and pre-revocation hearings. *Id.* at 496.

78. Brief of Defendant-Appellant, *Thomas v. Haslam*, No. 18-5766 (6th Cir. Oct. 9, 2018). The State challenges the usage of the heightened rational basis review and the holding that licensees are entitled to a pre-revocation hearing. *Id.* at 15–16.

79. Appleman, *supra* note 7, at 1492–1516.

80. *Id.* at 1492–98. Booking fees are accrued when an arrestee is processed at the jail; bail “administrative” fees are assessed when a defendant posts bail; dismissal fees may be incurred when minor offenders can occasionally pay to have their charges dropped; indigent defendants can be charged to apply for a public defender through the public defender application fee; and private probation fees are accrued when private firms are contracted to provide probation services and collect fees for their work. *Id.*

translation fees;⁸¹ post-conviction fees including jail and prison fees, statutory penalties, post-conviction levies, criminal restitution, probation, parole, and post-release supervision penalties, community service and expungement charges;⁸² and, “additional financial impositions” similar to late penalties, interest, and collection charges and child support debt.⁸³ An itemized list of fees from Shelby County has twenty-five different potential fees one can incur.⁸⁴ The fees range from jail fees and clerk fees to litigation taxes and indigent fees.⁸⁵

For fees that are assessed prior to a conviction, Appleman argues that when criminal-justice debt has morphed from “regulatory to punitive,” the Sixth Amendment right to a jury trial demands the community dictate the imposed punishment, rather than allowing the government to unilaterally assess fees.⁸⁶ Citing a line of Supreme Court cases,⁸⁷ Appleman argues that with the “reinvigoration”⁸⁸ of the Sixth Amendment jury right and because “imposing criminal justice debt results in punishment,”⁸⁹ assessing fees and

81. *Id.* at 1498–1500. Court fees can include a variety of things, from DNA test fees to billing the cost of the public defender. *Id.* at 1498. Disability and translation fees are assessed when a defendant requires an interpreter or other support because of a disability or being a non-English speaker. *Id.* at 1500.

82. *Id.* at 1500–13. Jail and prison fees are those accrued for being housed in jail or prison and are often assessed even if the defendant is acquitted. *Id.* at 1506. Statutory penalties are fines associated with the crime, with some jurisdictions attaching a surcharge on top of the fine. *Id.* at 1503–04. Post-conviction levies are assessed to repay the justice system for things such as investigations, arrest warrants, and a jury. *Id.* at 1499. Criminal restitution is designed to repay the victim for harm caused. *Id.* at 1505–06. Probation, parole, and post-release supervision penalties include paying for GPS monitoring, fees for the private probation, and drug testing. *Id.* at 1508. Community service and expungement fees are required to complete community service or to have charges expunged. *Id.* at 1511–13.

83. *Id.* at 1513–16. Late penalties, interest, and collection fees are all penalties assessed for failure to pay other fees in a timely fashion. *Id.* Child support still accrues while the parent is imprisoned, so that debt is added to the rest of the LFOs. *Id.*

84. I obtained a listing of fees from the Shelby County Criminal Court Clerk.

85. Appleman, *supra* note 7, at 1513–16.

86. *Id.* at 1516.

87. *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *Southern Union Co. v. United States*, 567 U.S. 43 (2012); *Hurst v. Florida*, 136 S. Ct. 616 (2016)).

88. *Id.*

89. *Id.* at 1520–21 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–169 (1963) (providing benchmarks to determine if a sanction has a punitive purpose or effect) and *United States v. Bajakajian*, 524 U.S. 321 (1998) (finding that certain civil forfeitures are fines and grossly disproportionate to the Excessive Fines Clause of the Eighth Amendment)).

finer prior to a conviction is a violation of one's Sixth Amendment right to a jury trial.⁹⁰ Some defendants have had varying degrees of success arguing that booking fees are a violation of the Due Process Clause of the Fourteenth Amendment; at least two courts have found that a version of booking fees is unconstitutional, while another has found the opposite.⁹¹ Sometimes, former offenders who still have criminal-justice debt may be unaware of how much they owe or when the due dates are, which can lead to increased debt through late penalties. Such penalties may be construed as a violation of procedural due process under the Fourteenth Amendment, if proper notice has not been given.⁹² In a positive move, the Supreme Court recently held that a Colorado statute that required exonerated defendants to prove their innocence by clear and convincing evidence in order to be refunded costs, fees, and restitution was a violation of the due process clause.⁹³ In a similar vein, the Court in *United States v. Bajakajian* found that certain types of civil forfeiture are unconstitutional.⁹⁴

II. ANALYSIS

Over the latter half of the twentieth century, the Supreme Court regularly protected indigent defendants' due process rights. Beginning with *Griffin v.*

90. *Id.* at 1494 ("Any financial sanction imposed before conviction or the adjudication of punishment cannot stand, as this usurps the role of the jury and community, a role specifically reserved under the Sixth Amendment jury trial right.")

91. *See, e.g., id.* at 1493–1494 (citing *Allen v. Leis*, 213 F. Supp. 2d 819, 832–34 (S.D. Ohio 2002) (holding there is a violation of due process when a county claims a small booking fee from arrestees without notice or hearing) and *Roehl v. City of Naperville*, 857 F. Supp. 2d 707, 717 (N.D. Ill. 2012) (holding there is a violation of due process when an automatic arrest fee is imposed without any procedural mechanism to properly impose it)). *But see id.* at 1492–1493 (citing *Markadonatos v. Village of Woodridge*, 739 F.3d 984, 986–87 (7th Cir. 2014) (holding that booking fees are constitutional when they are imposed equally on all arrestees whether or not the arrest is made with probable cause)).

92. Anderson, *supra* note 13, at 214. While Anderson's analysis deals primarily with municipal fines and charges and the lack of notice provided to the citizens of Ferguson, Missouri, her Fourteenth Amendment procedural due process argument is relevant to this context. *Id.* 213–14. She argues that the lack of proper notice constituted a violation of due process. *Id.* at 214. This argument extends to people who may not have been afforded proper notice about their criminal justice debt.

93. *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). This Note concentrates more broadly on the effect of costs and fees on defendants, regardless of whether they are exonerated, but this opinion is a positive acknowledgment by the Court nonetheless.

94. 524 U.S. 321, 324 (finding that civil forfeiture is unconstitutional under the Eighth Amendment's Excessive Fines Clause if it is deemed both punitive in nature and grossly disproportionate to the offense).

Illinois, the Court found that when indigent defendants were prevented from appealing decisions because of a lack of funds or when they were being imprisoned for longer than the maximum sentence for failing to pay a fine, the Due Process Clause was violated since the penalties only affected debtors.⁹⁵ *Bearden v. Georgia* was the most expansive decision; it protects probationers' liberty rights when they do not make a payment, absent evidence of a willful failure to pay.⁹⁶ The Court also showed its support for indigent people in civil cases through *Boddie v. Connecticut*⁹⁷ and *M.L.B. v. S.L.J.*⁹⁸ In the 2016 term, the Supreme Court issued one of its most defendant-favorable decisions yet in *Nelson v. Colorado*.⁹⁹ This series of cases demonstrate an arc toward the protection of indigent parties' rights in the legal system.¹⁰⁰ While the changes in law are undeniably important and positive, it is still not enough. The *Bearden* decision has been interpreted in a number of ways,¹⁰¹ with most courts giving only brief or perfunctory hearings on the ability to pay costs and fees.¹⁰² With such a lack of uniformity among courts' applications of *Bearden*, the law is weak.¹⁰³ While the Supreme Court seems to have been trying to protect the indigent defendant's rights, later cases demonstrate lower courts' inclination to only pay lip service to the language of *Bearden*.¹⁰⁴ In the future, the Court should reinforce its *Bearden* language by clarifying the requirements of a *Bearden* hearing.¹⁰⁵

95. 351 U.S. 12, 18 (1956).

96. 461 U.S. 660, 672–73 (1983).

97. 401 U.S. 371 (1971).

98. 519 U.S. 102 (1996).

99. 137 S. Ct. 1249 (2017).

100. It should be noted that, in general, the rights that have been protected are procedural due process rights, not substantive ones.

101. See Appleman, *supra* note 7, at 1490 (interpreting *Bearden* as a case that eliminated debtors' prisons); see also Hampson, *supra* note 18, at 35 (interpreting *Bearden* as a case requiring some variation of a hearing to determine indigency).

102. See *supra* text accompanying note 22.

103. With a clear willful-refusal standard that should be uniform across the country, there should not be such variation among the courts. The arbitrary nature of many of these hearings—particularly ones in which the judge asks the defendant if he or she smokes or owned popular sneakers as a sign of expendable income—means that indigent defendants are treated differently not only because of their socioeconomic status but also depending on the jurisdiction or the presiding judge. See *supra* note 23.

104. See, e.g., cases cited *supra* note 48.

105. The judiciary would also benefit from a clarification of the discretion a judge has when determining the factors for a willful refusal to pay. Factors such as jobs and family life should be taken

Tennessee has a strong legislative and judicial history on this issue, but the reality of indigent defendants' plight is much different than the language of the statutes and decisions. In *State v. Walding*, the Tennessee Court of Criminal Appeals upheld the trial court's release of a defendant who was unable to pay his fine.¹⁰⁶ Similar to several of the interpretations of *Bearden* hearings, the Tennessee Supreme Court in *State v. Dye* found that medical conditions prevented the defendant from working and paying off costs, so an installment plan was a more appropriate remedy than incarceration.¹⁰⁷ The Tennessee legislature has also enacted several statutes that support indigent defendants, including no imprisonment for failure to pay costs or litigation taxes,¹⁰⁸ provision of installment plans¹⁰⁹ and community service,¹¹⁰ a more rigorous set of factors for a *Bearden* hearing,¹¹¹ and judicial discretion for waiver of costs.¹¹² Taken together, these measures appear to provide a strong level of protection for indigent defendants. However, an examination of the reality for indigent defendants after they are released illustrates that these statutes are insufficient to provide complete relief for the formerly incarcerated.¹¹³

The greatest barrier facing indigent former offenders is section 40-24-105(b)(1) of the Tennessee Code—the revocation of driver's licenses for

into account, rather than inquiring into whether or not the defendant has cable television. At the very least, however, uniformity across court systems would be positive.

106. 477 S.W.2d 251, 252 (Tenn. Crim. App. 1971). Before *Bearden*, the Tennessee courts recognized the problems of imprisoning a defendant because of an inability to pay. This decision, along with several Tennessee federal district court decisions, *see supra* notes 43–44 and accompanying cases, set the stage for a judicial environment that seemingly protects indigent defendants from imprisonment for failure to pay.

107. 715 S.W.2d 36, 41 (Tenn. 1986). This opinion seems to fully take into account the spirit of *Bearden* and grapple with whether or not the defendant was “willfully” refusing to pay—a process that the Supreme Court seemed to indicate was necessary. *Id.* at 39–41. *State v. Dye* is still good law in Tennessee, but recent cases seem to only give the *Bearden* test a cursory once-over while the *Dye* court so carefully applied it. *See, e.g.*, cases cited *supra* note 48.

108. TENN. CODE ANN. § 40-24-104(a) (2017).

109. TENN. CODE ANN. § 40-24-101(a)(3) (2017).

110. TENN. CODE ANN. § 40-25-123(c)(2) (2017).

111. TENN. CODE ANN. § 40-24-104(a) (2017) (allowing for a court to examine the defendant's “financial and family situation”).

112. TENN. CODE ANN. § 40-25-123(b) (2017).

113. Some may argue that the formerly incarcerated should not be eligible for such relief since it is a part of the price for committing a crime. This idea of an offender-funded system is challenged later in this section.

those who do not pay all litigation taxes, court costs, and fines.¹¹⁴ While the statute was likely enacted to encourage payment of such costs, it has had the opposite effect. In Shelby County, over 22,000 people have had their licenses revoked,¹¹⁵ while there is an outstanding balance of \$555 million owed in court costs and fees dating back to 1995¹¹⁶ with an average of \$1,100 per debtor.¹¹⁷ This comparison is imperfect,¹¹⁸ but the separate effects on the formerly incarcerated and the county are clear. Without driver's licenses, employment prospects are low since a number of jobs that could be open for ex-offenders require a driver's license.¹¹⁹ Without a source of income and the necessary expenses mounting, people will likely fall deeper and deeper in debt.¹²⁰ As Joshi notes, public transportation is simply not a viable alternative for a number of people across the state.¹²¹ In a vicious cycle, an ex-offender is unlikely to get a job to pay off his or her court costs and fees without a driver's license, but, prior to the law enacted in July 2019, a driver's license could not be reobtained until the court costs and fees are paid off.¹²²

114. TENN. CODE ANN. § 40-24-105(b)(1) (2017).

115. *Debt to Society*, *supra* note 39.

116. *Id.*

117. *Id.*

118. The Shelby County General Sessions Court, which provided the data for revoked licenses, is a separate court from Shelby County Criminal Court, from which the outstanding balance is drawn. Additionally, the data is from 2015 and before. While the court costs balance is from 1995-2015, we do not know the time period of the driver's license revocations.

119. See sources cited *supra* note 66.

120. A person's immediate priority is to cover everyday expenses like providing shelter and food for one's family. The abstract debt of court costs may pale in comparison to the urgent and concrete need of keeping the lights on. Even if someone prioritized the payback of the court costs, obtaining a job can be incredibly difficult for someone with a criminal record, especially without a driver's license. See, e.g., Joshi, *supra* note 36, at 21.

121. Joshi, *supra* note 36, at 20–21. This Note primarily concentrates on Shelby County, an urban area. Shelby County's public transportation, however, is not nearly as developed as other major American cities, still presenting a massive barrier to those without driver's licenses. See ADIE TOMER ET AL., BROOKINGS INST., MISSED OPPORTUNITY: TRANSIT AND JOBS IN METROPOLITAN AMERICA 36 (2011) (In a survey of 100 metropolitan areas, Memphis—which makes up most of Shelby County—ranked 69th). Moreover, rural areas are especially affected by a lack of public transportation. See Joshi, *supra* note 36, at 20.

122. TENN. CODE ANN. § 40-20-105(b)(4) (2017). While H.B. 839 eliminates the revocation of licenses for those convicted of driving offenses who have unpaid fees and fines, it only applies to those convicted of driving offenses—not all offenders. See *infra* text accompanying notes 55–57. The cycle is continuous, increasing the debt owed by the ex-offenders while simultaneously denying them a feasible option of employment. Being without regular means of transportation imposes other, non-quantifiable

Beyond the pragmatic concerns of an ex-offender being unable to get a job, there is also a constitutional question at hand. In a recent decision, the Middle District of Tennessee found violations of the Due Process and Equal Protection Clauses.¹²³ The alleged equal protection violation mirrored the argument in cases like *Tate v. Short*¹²⁴ because only an indigent defendant faces the driver's license revocation.¹²⁵ The proposed due process violation was similar to the violation found in *Bearden v. Georgia*¹²⁶ with the ex-offender arguing that the automatic revocation of the license is a violation of due process.¹²⁷ The due process claim presents an intriguing argument for the court. Following in the vein of *Bearden*, the defendant argued that he has the constitutional right to be heard on his failure to pay court costs and the effect of a revoked license.¹²⁸

The Middle District of Tennessee's decision in *Thomas v. Haslam* was a refreshing course of action, but it may be short-lived with the current appeal to the conservative Sixth Circuit. Likewise, House Bill 839 provides relief for those convicted of driving offenses, but that is not the only class of people affected by unconstitutional fees and fines. Rather, indigent defendants convicted of non-driving offenses—including nonpayment of child support—would still face license revocation. While this bill is an important step forward toward codifying protection for some people, it is not enough. The harm that the Middle District of Tennessee describes in *Thomas v. Haslam* still looms over those with non-driving offenses. While

costs, such as difficulty getting to and from grocery stores, doctor's appointments, children's schools, or court-mandated appointments. The cycle may also contribute to an environment that promotes recidivism—a climate in which people feel they have no alternative but to break the law in order to provide for their families. See, e.g., ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION, 5 (2012); Beckett & Harris, *supra* note 6, at n.14.

123. *Thomas v. Haslam*, 329 F. Supp. 3d 475 (M.D. Tenn. 2018).

124. 401 U.S. 395, 399 (1971) (finding a violation of the Equal Protection Clause where the government only fines people who can afford to pay the fine while imprisoning those who cannot).

125. A defendant who can afford it will simply pay the court costs and fees and never face the issue of having the license revoked. The Middle District held that this is an equal protection issue because the revocation uniquely affects debtors. *Thomas*, 329 F. Supp. 3d at 480.

126. 461 U.S. 660, 672–63 (1983) (holding that the state cannot revoke probation for failure to pay unless there is evidence that the probationer willfully refused to pay).

127. Complaint, *Thomas v. Haslam*, 3:17-cv-00005 (M.D. Tenn. Jan. 4, 2017). It is a violation of due process because the ex-offender was not given notice or an opportunity to be heard nor did the court inquire into ability to pay. *Thomas*, 329 F. Supp. 3d at 496.

128. Complaint, *Thomas v. Haslam*, 3:17-cv-00005 (M.D. Tenn. Jan. 4, 2017).

the driving-offenses class is protected under the district court's decision, the Sixth Circuit could reverse.

To some people, an offender-funded justice system, rather than a taxpayer-funded one, may sound both just and fiscally responsible. However, this idea has not been successful in reality. A great majority of criminal defendants in Tennessee are indigent,¹²⁹ and thus unlikely to be able to pay off their debts. Moreover, studies have found that some of these laws fail to generate revenue.¹³⁰ The state and county budgets are unclear about the revenue generated from the court costs and fees, but the numbers from the WREG-TV "Debt to Society" report are staggering and suggest that the courts are collecting only a fraction of the debts.¹³¹ The Shelby County Criminal Court Clerk, whose job it is to collect those debts, even questioned the utility of this system.¹³² With such gaps between collected and owed debt,¹³³ the system does not seem to be working for taxpayers, the state, or the defendant.

Appleman presents a compelling Sixth Amendment argument regarding fees that are assessed prior to conviction.¹³⁴ However, with the recent *Nelson v. Colorado* decision, it seems unlikely that this argument will gain any real traction.¹³⁵ In the series of cases that Appleman cites about booking fees and a potential Fourteenth Amendment claim,¹³⁶ the courts are divided

129. TENN. ADMIN. OFFICE OF THE COURTS, *supra* note 31 (stating it is "generally agreed that approximately 75% of those being prosecuted by the district attorney will be indigent").

130. PATEL & PHILIP, *supra* note 33, at 11–13. However, Tennessee was not specifically listed in the report.

131. *Debt to Society*, *supra* note 39.

132. *Id.* ("Most of my counterparts across the state are in agreement that fees and court costs are getting somewhat out of hand.")

133. *Id.* (Shelby County Criminal Court collected \$5.7 million in fees in 2015, contrasted with a balance sheet dating back to 1995 of \$555 million).

134. *See supra* text accompanying note 86. Fees that are assessed prior to conviction "usurp" the roles of the jury and community, which the Sixth Amendment specifically protects. Appleman, *supra* note 7.

135. 137 S. Ct. 1249 (2017) (finding that it was a violation of the Due Process Clause to force defendants who were exonerated to then prove their innocence by clear and convincing evidence in order to get a refund). In light of that decision, states may not be as tight-fisted when faced with exonerated defendants requesting a refund. On the other hand, once a defendant has been convicted, a court seems unlikely to find that a constitutional violation for fees that were incurred while the case was working its way through the justice system.

136. Two courts found a procedural due process violation for assessment of booking fees; one court held that they were constitutional. *See Allen v. Leis*, 213 F. Supp. 2d 819, 832–34 (S.D. Ohio

and will likely remain so. While there is a compelling claim that automatic fees for booking are unconstitutional because there is not a proper mechanism in place to impose the fee,¹³⁷ many courts are unlikely to find this constitutional argument persuasive for the same reasons that the Sixth Amendment argument would likely fail. While it would be threading a needle, an Eighth Amendment case modeled off of *Bajakajian*¹³⁸ could theoretically be accepted by a court.¹³⁹

III. PROPOSAL

Scholars and advocates have suggested a number of different reforms to criminal-justice debt,¹⁴⁰ but many of them are focused specifically on debtors' prisons.¹⁴¹ Tennessee has largely eradicated debtors' prisons, but former defendants still face a number of collateral consequences from their debt. The driver's license revocation statute is a major barrier for indigent ex-offenders. As a recent court filing argues, a finding of the statute as unconstitutional is necessary.¹⁴² Only protecting those with driving offenses is not enough. While *Thomas v. Haslam* concentrates on the constitutional arguments against such a statute, the legislature should repeal the statute

2002); *Roehl v. City of Naperville*, 857 F. Supp. 2d 707, 717 (N.D. Ill. 2012); *Markadonatos v. Village of Woodridge*, 739 F.3d 984, 986–87 (7th Cir. 2014). See generally cases cited *supra* note 91.

137. E.g., *Roehl v. City of Naperville*, 857 F. Supp. 2d 707, 717 (N.D. Ill. 2012).

138. 524 U.S. 321 (1998).

139. While an application to court costs and fees might be a stretch, there is a colorable argument that a fee may be punitive in nature (e.g. a fine assessed as part of sentencing) and grossly disproportionate to the offense. While *Bajakajian* is clear that civil forfeitures should not be grossly disproportionate to the offense itself, the Tennessee courts, in its *Bearden* test, can take family situation into account with one's willful refusal to pay. TENN. CODE ANN. § 40-24-104(a) (2017). Thus, there could be a potential Eighth Amendment Excessive Fines argument couched in the *Bajakajian* test.

140. See, e.g., BANNON, NAGRECHA, & DILLER, *supra* note 22, at 32–33 (2010) (suggesting remedies such as evaluating total debt burden before adding additional debt, exempting indigent defendants from user fees, and eliminating public defender fees); COUNCIL OF ECONOMIC ADVISERS, *supra* note 30, at 8 (including expanding pre-trial release for low-level offenders); Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. FOR SOC. JUST. 963, 977–78 (2013) (proposing, among other reforms, zealous advocacy at *Bearden* hearings and evaluating existing debt before tacking on more fees).

141. See, e.g., Sobol, *supra* note 26, at 524–539 (suggesting remedies such as examining whether charges and imprisonment should be assessed, prohibiting incarceration for failure to pay reimbursement charges, establishing guidelines to determine indigency, providing a system for procedural safeguards and protections, and establishing effective enforcement mechanisms).

142. Complaint, *supra* note 60, at 17.

because of the practical implications. Evidence suggests that the costs borne by the indigent debtor far outweigh the relatively slight benefits to the government. Allowing debtors—not just those who committed driving offenses—to retain their licenses will increase job opportunities and put them back to work, eventually enabling them to pay off at least some of their court costs.

Another common-sense reform is based on the lack of Tennessee-specific evidence in this field.¹⁴³ There should be clear accounting maintained at both individual county clerks' offices and at the state level that tracks the amount of debt owed and paid. Without this type of data available, it is difficult to determine just how significant the issue is. It is challenging to support one's arguments either in support or against criminal-justice reform when most of the available evidence is drawn from anecdotal and first-hand reports. A more transparent and thorough accounting system should be relatively inexpensive to implement and would greatly serve interested parties in studying the impact that criminal justice debt has on individuals and the government.

Finally, at least some public defender's offices carry the weight of researching and filing motions for waiver of costs on behalf of indigent former offenders.¹⁴⁴ While perhaps the most effective solution would ultimately be to reduce the amount of debt passed on to indigent defendants, a more practical and short-term solution is to devote more resources to the public defender's offices to alleviate some workload. This solution could cost almost nothing—even as little as increasing the number of unpaid interns each summer with some dedicated to working on waiver petitions full-time. Because the motions are fairly routine, undergraduate interns could prepare them under attorney supervision. Many judges have proven to be amenable to waiving at least some of the fees for indigent defendants, and the Shelby County Public Defender's Office has piles of client letters pleading for assistance. If interns, not the already over-worked attorneys, help address this issue on a base level, more ex-offenders could have at least

143. This assertion is drawn from my efforts to contact the Shelby County Clerk's Office and the State of Tennessee Department of Revenue. I did not encounter anyone who was aware of any collected data, and I found that statistics about criminal justice debt were, at the very least, not easily accessible. At the most, there is no accounting for the effect criminal-justice debt has on the budgets of these levels of government.

144. The Shelby County Public Defender's Office performs these tasks.

a portion of their fees waived. With a lower remaining balance and a reinstated driver's license, it is not inconceivable that people will be able to return to work and pay off the smaller amount while still affording regular expenses—rather than perceiving a larger balance as insurmountable.

CONCLUSION

The issue of criminal-justice debt has a long history and deeply rooted problems. However, several small, common-sense reforms could drastically change the nature of this issue for Tennesseans across the state. Reinstating driver's licenses for those whose licenses are revoked for failure to pay would be a huge step forward, particularly when public transportation in the state is limited.¹⁴⁵ Alleviating this barrier would open up a gateway of opportunities for ex-offenders.¹⁴⁶ Creating a more transparent accounting process of the criminal justice debt—including the amount owed, the amount paid, and the expenses for recouping those costs—would aid both legislators and interested parties in assessing the costs and benefits of the current criminal-justice debt system. Finally, dedicating more resources to public defender's offices and others that aid ex-offenders could streamline the process. Waiving some or all of indigent people's debts can jumpstart a new beginning, allowing people to more easily attain employment, which will help them pay off any remaining debt.

The Supreme Court, and courts across the country, have regularly demonstrated a willingness to aid and protect the rights of the indigent criminal defendant. While there are colorable constitutional arguments against imprisonment for debt and the ways that ability to pay is assessed, there are practical arguments for non-imprisonment consequences as well. Moving forward, it may benefit parties to consider making a cost-benefit argument when advocating on behalf of indigent parties. Research, from across the country and in Tennessee, suggests that it is to the benefit of both the former offender and the government in the long run to help a person reintegrate into society.

145. Joshi, *supra* note 36, at 20–21.

146. A number of jobs require driver's licenses for employment applications, so reinstating the licenses strengthens the chances of employment and gives people the opportunity to pay off their debt, make a living, and contribute to society again.