

March 2023

Minnesota's Mandatory Court Surcharge and the Failure of the Fee-for-Service Criminal Justice System

Jake Polinsky
University of Minnesota Law School

Follow this and additional works at: <https://lawandinequality.org/>

Recommended Citation

Jake Polinsky, *Minnesota's Mandatory Court Surcharge and the Failure of the Fee-for-Service Criminal Justice System*, 41(1) LAW & INEQ. 191 (2023), DOI: <https://doi.org/10.24926/25730037.658>.

Minnesota Journal of Law & Inequality is published by the
University of Minnesota Libraries Publishing.



Minnesota's Mandatory Court Surcharge and the Failure of the Fee-for-Service Criminal Justice System

Jake Polinsky†

Introduction

In 2014, Ebony was thirty-six and living in Ferguson, Missouri.¹ She had amassed about \$2,000 in fines and fees due to traffic tickets and was having trouble paying this debt off.² Unfortunately for Ebony, the Ferguson Municipal Court's primary tool for collecting on outstanding fines and fees when someone missed a payment was to issue an arrest warrant.³ Therefore, when Ebony was unable to pay off all her fines, Ferguson police arrested her and put her in jail for a week—about two weeks after she had given birth to her son.⁴ Ebony was the victim of a common practice in Ferguson, wherein the Department of Justice found that the city's law enforcement and municipal court coordinated to target the Black community with excessive fines and fees for minor offenses to raise money for the city's budget.⁵

Ferguson, though one of the most egregious examples, is not alone in this practice. The U.S. Commission on Civil Rights has found that states and municipalities across the country have increased their reliance on fines and fees for minor offenses that disproportionately target low-income and BIPOC (Black, Indigenous, and People of Color) communities

†. J.D. 2023, University of Minnesota Law School; B.A. 2020, Brown University. Special thanks to Professor Perry Moriearty and Note and Comment Editor Thor Hawrey for their time, invaluable feedback, and guidance throughout the writing process. Thank you to all the *Journal of Law and Inequality* staff members and editors who dedicated time and effort in the editing process to improve this Article and make it ready for publication. Sincere thanks to Caroline Deitch and Jim Polinsky for their constant love, support, and encouragement. Finally, this Article is dedicated to the memory of my late mother Jill Polinsky. Always my rock, I am forever grateful to have been your son and for all you did to make me who I am today.

1. Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NAT'L PUB. RADIO (Aug. 25, 2014), <https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger> [https://perma.cc/7D2T-ZPQV].

2. *Id.*

3. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 54–58 (2015).

4. Shapiro, *supra* note 1.

5. See U.S. DEP'T OF JUST., *supra* note 3.

to generate greater revenue for their budgets.⁶ Minnesota is no exception. Take, for instance, a violation for driving with expired tabs.⁷ This violation carries with it a fine of \$30.⁸ A defendant who pleads guilty to this offense must pay substantially more than just \$30, however.⁹ When a defendant pleads guilty there is also a Court Surcharge of \$75 and a law library fee as high as \$15 depending on the county.¹⁰ This can balloon further if someone is late in paying the court, as there is a \$5 late fee after thirty days and a \$25 late fee after sixty days.¹¹ Thus, the cost of this minor violation can quickly swell up to \$150 for an indigent defendant unable to pay.

The bulk of this cost, the \$75 Court Surcharge, is not a fine related to culpability, but rather it is a fee applied to all criminal convictions which raises money to support the state court system.¹² Ramsey County Manager of Safety and Justice, Scott Williams, described the system as “an ongoing pattern where, ‘Oh, we have a tough budget year — we have a number of tough budget years — we have a budget hole to fill. How do we fill this? Well, we can add some fees.’”¹³ Despite the benefits the whole community receives from a functioning criminal justice system, policies like the Court Surcharge promote a view that the cost of a functioning criminal justice system should fall squarely on the shoulders of the low-income, BIPOC communities who are policed and arrested at disproportionate rates.¹⁴ Further, fee-for-service criminal justice is antithetical to the purposes of punishment which help guide the system to more just and socially beneficial results.¹⁵

6. U.S. COMM’N ON C.R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR 72 (2017).

7. Jessie Van Berkel, *Minnesota’s Criminal Justice Fees Often Fall Hardest on Poor*, STAR TRIB. (May 2, 2021), <https://www.startribune.com/minnesota-s-criminal-justice-fees-often-fall-hardest-on-poor/600050762/?refresh=true> [https://perma.cc/R9A9-KVMS].

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. MINN. STAT. § 357.021, subd. 6 (2021).

13. Van Berkel, *supra* note 7.

14. See Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 740–42 (2020); THE SENT’G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 2–6 (2018); ASHLEY NELLIS, THE SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021).

15. Highlighted in more depth in Section III.B, the purposes of punishment are retribution, specific deterrence, general deterrence, rehabilitation, and incapacitation. These are the principles that guide policy makers and courts in determining what the proper punishment for different crimes and different defendants should be. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005).

Though Minnesota has taken some steps to recognize the negative effects of fee-for-service criminal justice—namely by amending the Court Surcharge so that judges may waive or decrease the surcharge based on a defendant's financial situation instead of the surcharge being mandatory¹⁶—this Article posits that this was a missed opportunity. Rather than tie funding to guilty pleas at all, the Court Surcharge should be fully repealed to firmly move away from the fee-for-service court system that has a disproportionately negative effect on low-income and BIPOC communities.¹⁷

Part I of this Article outlines the national background of fee-for-service criminal justice and the negative impact it has on low-income and BIPOC communities across the country. Part II delves into the history of Minnesota's Court Surcharge specifically. Part III analyzes the negative impact of the Court Surcharge in Minnesota, explains why it is a poor criminal justice policy that does not serve the purposes of punishment, and concludes by providing recommendations for how the state could better fund its court system.

I. National Background

A. *Fee-for-Service Criminal Justice*

The criminal justice system that first developed in the American colonies was a for-profit model where amateur law enforcement individuals received rewards from the government and private parties for enforcing the law.¹⁸ This model continued in the late eighteenth and early nineteenth centuries before the advent of modern professional policing in the mid-nineteenth century.¹⁹ The punishments for defendants under this system were fines, whipping, or death.²⁰ In the early nineteenth century, the criminal justice system moved away from these modes of punishment in favor of imprisonment.²¹ Reformists such as the Pennsylvania Quakers believed that imprisonment better served the purposes of punishment, as it provided an opportunity to rehabilitate

16. *See infra* Part II.

17. *See* Van Berkel, *supra* note 7.

18. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1182 (2014).

19. *Id.* ("State and local governments developed fee schedules, specifying the monetary benefit tied to solving different crimes. Naturally, law enforcement focused on better-paying crimes at the expense of less remunerative ones. Private party rewards, tied to the value of the property allegedly stolen, also shaped enforcement priorities. In such a system, murders received less attention than robberies and theft, because the latter offered more financial benefit.")

20. R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice*, 33 CRIM. JUST. & BEHAV. 242, 242 (2006).

21. *Id.*

criminals and turn them into contributing members of society.²² Fines, on the other hand, were seen as having little value as a punishment tool because they lack influence on affluent defendants while being difficult to enforce against low-income defendants.²³ Leading model penal codes and sentencing standards such as the National Commission on Reform of Federal Criminal Laws (1971), the American Law Institute's Model Penal Code (1962), the National Council on Crime and Delinquency Model Sentencing Act (1977), and the American Bar Association Standards Relating to Sentencing Alternatives and Procedures (1978) all roundly rejected the use of economic sanctions as a punishment tool.²⁴

This Reformist model, meant to rehabilitate offenders, led to an ever-increasing incarcerated population, with the prison population increasing from 91,669 in 1925 to 353,167 by 1981.²⁵ In the 1980s and 90s, a variety of new punishment methods meant to be less intrusive than prison—such as house arrest, boot camps, and electronic home monitoring—began to be utilized.²⁶ Despite this pivot in punishment, the United States' incarcerated population continued to grow, increasing by over 63% between 1990 and 2014.²⁷

With this continued growth in the incarcerated population came substantial increases in criminal justice system expenditures.²⁸ While in 1982 the United States spent \$388 per capita on criminal justice expenditures, in 2015, that number had grown to \$937 per capita.²⁹ As of 2016, the total direct governmental cost of the criminal justice system is about \$295.6 billion.³⁰ These cost increases spurred policymakers across the country to argue that those convicted of crimes, rather than

22. Dominic S. Depersis & Alfred Lewis, *The Development of American Prisons and Punishment*, 12 INT'L J. HUM. RTS. 637, 642 (2008).

23. Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 53–54 (1990).

24. *Id.* at 52.

25. U.S. DEP'T OF JUST., PRISONERS 1925–81, at 2 (1982) (reporting that the United States' modern mass incarceration accelerated most sharply in the 1970s, as the incarceration rate—the number of prisoners per 100,000 citizens—increased from 96 in 1970 to 153 in 1981).

26. Ruback & Bergstrom, *supra* note 20, at 243.

27. See *Key Statistics: Total Correctional Population*, BUREAU OF JUST. STAT. (May 11, 2021), <https://bjs.ojp.gov/data/key-statistics> [<https://perma.cc/PB99-3DY5>].

28. COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2 (2015) (“Between 1993 and 2012, total real annual criminal justice expenditures grew by 74 percent from \$157 to \$273 billion, and local spending comprised approximately half of total expenditures. State corrections expenditures represent 7 percent of the total State general funds on average, and 11 States spent more on corrections than higher education in 2013.”).

29. PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, THE HAMILTON PROJECT, NINE FACTS ABOUT MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 5 (2019).

30. SHELLEY S. HYLAND, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2016 – FINAL (2021) (noting \$142.5 billion is for police protection, \$88.5 billion is for corrections, and \$64.7 billion is for the judicial and legal systems).

taxpayers, should pay for the criminal justice system.³¹ An Iowa sheriff at the time said, “if they are violating the law, then they should be the ones to pay for it.”³² One private consultant to government agencies across the country described it as a “very easy [decision] for jurisdictions to pass the cost on to the offender No one wants to raise taxes on the public. Politicians — it’s the last thing they want to do.”³³ In turn, states and courts across the country have turned to fines and fees as a source of revenue.³⁴ Today, economic sanctions are imposed on a significant majority of criminally convicted individuals across the country.³⁵

Evidence has shown that the imposition of fines and fees as a tool for revenue generation is highly ineffective due to the cost of collecting court debt and punishing those who do not pay what they owe.³⁶ In Santa Clara, California, for example, the cost of collecting juvenile administrative fees was 112% of the actual revenue collected.³⁷ More disturbing were the results of a recent study regarding a new \$200 surcharge imposed on those convicted of misdemeanors in Milwaukee.³⁸ The study found that when you calculate the small amount of money

31. COUNCIL OF ECON. ADVISERS, *supra* note 28, at 2.

32. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate#co_footnote_F30404910944_1 [<https://perma.cc/3Y93-29F3>].

33. Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NAT’L PUB. RADIO (May 24, 2014), <https://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor> [<https://perma.cc/36C7-Y5JQ>].

34. See COUNCIL OF ECON. ADVISERS, *supra* note 28, at 2; Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 71 (noting that a study of data in North Carolina counties from 1990 to 2003 “reveal[ed] that a 10 percent decrease in negative revenue growth results in a 6.4 percent increase in the growth rate of traffic tickets”); U.S. DEP’T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) (finding that the City of Ferguson, its police, and court officials worked together for years to maximize revenue through increasing fines and the enforcement of finable offenses).

35. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1756 (2010).

36. See MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES, (2019) (finding that, on average, jurisdictions across the country spend \$0.41 for every dollar of fines and fees they collect; this number is even worse when factoring in the cost of incarceration for failure to pay, with jail costs in Bernalillo County, New Mexico representing up to 98% of collection costs).

37. BERKELEY L. POL’Y ADVOC. CLINIC, MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA 18, 22 (2017) (explaining that these administrative fees included “\$30 per day for juvenile detention, \$14 per day for electronic monitoring, and \$280 per hour for legal representation”).

38. Tyler Giles, *The (Non)Economics of Criminal Fines and Fees* (Fines & Fees Just. Ctr. Working Paper, 2021).

actually collected, the negative impact on recidivism, and the negative impact on already socially disadvantaged groups, the \$200 fee increase resulted in a net economic cost of \$2,214 per misdemeanor case.³⁹

Courts may have the power to impose monetary sanctions, but defendants are often unable to pay these high court debts.⁴⁰ In Ferguson, Missouri, for example, the Justice Department found that the court issued 9,007 arrest warrants in fiscal year 2013 alone, in substantial part because it issued warrants for failures to pay without making ability-to-pay determinations.⁴¹ Though many states do not properly track court debt, or even track it at all, we know that the national court debt total is at a minimum \$27.6 billion.⁴² This number is certainly much higher than \$27.6 billion, as in California alone—one of the few states with complete data on accumulated court debt—there was \$12.3 billion in unpaid fines and fees as of 2016.⁴³ All in all, state and local governments were only able to generate \$14.9 billion in revenue from forfeitures and fines in 2017, a number that pales in comparison to the \$295.6 billion spent on the criminal justice system.⁴⁴

39. *Id.* at 5 (basing the net economic cost on a calculation of the increase in revenue collected per case on average—\$19.89—minus the resulting increase in recidivism); *id.* at 29 (finding that the increase in recidivism was largely driven by violent crimes and drug crimes and derived based off the empirical literature on the total costs of crime that “the expected recidivism cost of the surcharge is about \$1,640 per offense”).

40. See Katharine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 516–17 (highlighting that legal debtors in Washington State still owed 77% of their court debt); COUNCIL OF ECON. ADVISERS, *supra* note 28, at 5 (“Florida and Maryland collected 14 percent and 17 percent of certain types of fees assessed, respectively. Additionally, the collection rate was zero in half of sentenced felonies in Washington over three years, and a large majority of sentenced cases had only collected 20 percent of funds charged.”).

41. U.S. DEP’T OF JUST. C.R. DIV., *supra* note 34, at 55–58.

42. BRIANA HAMMONS, FINES & FEES JUST. CTR., TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 5 (2021) (noting that the results were restricted because only twenty-five states were able to provide data on court debt, and of those twenty-five, only nine states were able to provide complete data).

43. ANITA LEE, LEGIS. ANALYST’S OFF., THE 2017–18 BUDGET: GOVERNOR’S CRIMINAL FINE AND FEE PROPOSALS, <https://lao.ca.gov/reports/2017/3600/Criminal-Fine-Fee-030317.pdf> [<https://perma.cc/Q2GQ-5693>].

44. Aravind Boddupalli, *Fines and Forfeitures and Racial Disparities*, TAX POL’Y CTR. (Aug. 14, 2020), <https://www.taxpolicycenter.org/taxvox/fines-and-forfeitures-and-racial-disparities> [<https://perma.cc/A2Q7-DC9N>]; HYLAND, *supra* note 30.

B. The Disproportionate Negative Impact of Fee-for-Service Criminal Justice on BIPOC and Low-Income Communities

i. Burden on Low-Income Communities

Fees and fines are often small in isolation, but when accumulated, they can build up to hundreds or thousands of dollars for defendants.⁴⁵ While a few hundred-dollar economic sanction may not be a big deal for a person of means, for low-income individuals, it can become an insurmountable cost.⁴⁶ In a survey of formerly incarcerated individuals and their families by twenty-three community-based organizations in fourteen states, 48% of families said they were unable to afford the costs of incarceration.⁴⁷ A failure to pay can result in further fines and possibly imprisonment, preventing rehabilitation and trapping defendants in a cycle of poverty.⁴⁸ The Supreme Court has held that a defendant cannot be imprisoned solely because their indigency prevents them from paying an economic sanction.⁴⁹ Despite this ruling, judges across the country rarely hold hearings to determine a defendant's ability to pay before imposing economic sanctions, and defendants regularly wind up imprisoned for failure to pay their court debt.⁵⁰ Even when not

45. See ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010); *House File 306: Hearing Before the Minn. H. Judiciary Fin. & Civ. L. Comm.*, 92nd Leg., 2021-2022 Reg. Sess. (Mar. 9, 2021) [hereinafter *Judiciary Fin. Hearing*] (eliciting testimony from a Hennepin County Public Defender that the total amount owed for a ticket with fees and fines is often over \$800 for her clients).

46. See, e.g., *Nearly 60% of Americans Can't Afford Common Unexpected Expenses*, BANKRATE (Jan. 12, 2017), <https://www.bankrate.com/pdfs/pr/20170112-January-Money-Pulse.pdf> [<https://perma.cc/K2B5-8VXX>] (finding that nearly six in ten Americans do not have enough money saved up for a \$500 car repair or a \$1,000 emergency room bill).

47. SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, ELLA BAKER CTR., FORWARD TOGETHER & RSCH. ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 7, 9 (2015) (specifying that this number jumped to 58% among poor families with "poor" being characterized as families making less than \$15,000 a year).

48. See Alexandra Shookhoff, Robert Constantino & Evan Elkin, *The Unintended Sentence of Criminal Justice Debt*, 24 FED. SENT'G REP. 62 (2011); Beckett & Harris, *supra* note 40, at 517 (showing that criminal justice debt reduces household income, forcing individuals to choose between essential household items; creates a long term debt that defendants are stuck paying off for years; garnishment of wages to pay the debt creates a disincentive to work; and the inability to pay and threat of criminal sanctions encourages some defendants to go on the run).

49. *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) ("[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."); *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) ("[D]epriv[ing] the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment.").

50. MENENDEZ ET AL., *supra* note 36, at 9; Harris et al., *supra* note 35, at 1761.

imprisoned, having a warrant issued for a failure to pay keeps individuals from feeling free to go to places where they might interact with police and prevents them from accessing a variety of welfare programs, such as food stamps (Temporary Assistance for Needy Families) and federally assisted housing.⁵¹

ii. Burden on BIPOC Communities

The weight of the economic burden from fines and fees is felt most severely by BIPOC communities. To start, BIPOC communities in the United States are policed and ticketed at disproportionate rates.⁵² Further, BIPOC individuals are arrested at higher rates than white individuals.⁵³ Even as crime rates decreased between 1999 and 2015, the racial disparities in arrests increased from 5.48 Black individuals for every white individual to 9.25.⁵⁴ BIPOC individuals also face disparities in the harsh sentences they receive.⁵⁵ The United States Sentencing Commission found that Black males received prison sentences that were

51. Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOCIO. REV. 339, 353 (2009) (“Young men who are wanted by the police find that activities, relations, and localities that others rely on to maintain a decent and respectable identity are transformed into a system that the authorities make use of to arrest and confine them. The police and the courts become dangerous to interact with, as does showing up to work or going to places like hospitals.”); Harris et al., *supra* note 35, at 1762.

52. Pierson et al., *supra* note 14 (analyzing around 221 million traffic stops across the country and finding that Black and Hispanic drivers were more likely to be stopped than white drivers, Black drivers were less likely to be pulled over at night when their race was hidden by a “veil of darkness,” and there was a lower bar for searching Black and Hispanic drivers’ cars); LAUREN NOLAN, WOODSTOCK INST., *THE DEBT SPIRAL: HOW CHICAGO’S VEHICLE TICKETING PRACTICES UNFAIRLY BURDEN LOW-INCOME AND MINORITY COMMUNITIES* (2018) (discovering that in Chicago, tickets were about 40% more likely to be issued to drivers from zip codes with higher-than-average minority populations than to those in non-minority zip codes).

53. See THE SENT’G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018) (highlighting that Black Americans make up 27% of arrests as of 2016, double their share of the total population); ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE* (2013) (finding that Black individuals are on average 3.73 times more likely to be arrested for marijuana possession than white individuals, despite using marijuana at similar rates); PREETI CHAUHAN, ADAM G. FERA, MEGAN B. WELSH, ERVIN BALAZON & EVAN MISSHULA, JOHN JAY COLL. OF CRIM. JUST., *TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK 25–27* (2014) (finding that Black and Hispanic New Yorkers made up 82% of misdemeanor arrests while accounting for only 51% of the city’s population over sixteen years old).

54. Beth Redbird & Kat Albrecht, *Racial Disparity in Arrests Increased as Crime Rates Declined* 8 (Nw. Inst. for Pol’y Rsch., Working Paper No. 20–28, 2020).

55. See, e.g., TUSHAR KANSAL, THE SENT’G PROJECT, *RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 2* (2005) (reviewing studies on sentencing to find that Black and Latino males are subjected to “particularly harsh sentencing” comparatively; that Black and Latino defendants have worse outcomes than white defendants “with regard to legal-process related factors such as the ‘trial penalty,’ sentence reductions for substantial assistance, criminal history, pretrial detention, and type of attorney”; and that Black and Latino defendants receive more severe sentences than comparably situated white defendants for less serious offenses, such as drug and property crimes).

19.1 times longer than similarly situated white males and were 21.2% less likely to receive a non-government sponsored downward departure or variance.⁵⁶ Overall, Black Americans are incarcerated in state prisons at five times the rate of white Americans, and Latinx Americans are incarcerated at 1.3 times the rate of white Americans.⁵⁷

When it comes to fines and fees, the disproportionate effect the criminal justice system has on BIPOC communities intersects with the vast disparity in wealth between white and BIPOC families across the country.⁵⁸ A study of the municipalities with the largest imposition of criminal fines found that their defining characteristic from the rest of the country was having large Black populations.⁵⁹ Within these municipalities, it is BIPOC communities, and particularly Black communities, who get most heavily sanctioned.⁶⁰ The amount of court fines and fees collected from white, higher-income communities in these cities is proportionally much smaller than what is collected from low-income, BIPOC communities.⁶¹ Even when accounting for higher poverty rates, BIPOC communities have been found to have higher court debt burdens than white communities.⁶² This traps individuals in court debt,

56. GLENN R. SCHMITT, LOUIS REEDT & KEVIN BLACKWELL, U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017).

57. NELLIS, *supra* note 14, at 5.

58. Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/EFD2-GUQ2>] (revealing that white families have a median and mean family wealth of \$188,200 and \$983,400 respectively; Black families have a median and mean wealth of \$24,100 and \$142,500 respectively; and Hispanic families have a median and mean wealth of \$36,100 and \$165,500).

59. Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), <https://priceonomics.com/the-fining-of-black-america/> [<https://perma.cc/J99W-GL87>] (“Among the fifty cities with the highest proportion of revenues from fines, the median size of the African American population—on a percentage basis—is more than five times greater than the national median.”).

60. MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 18 (2017) (highlighting that in New Orleans, out of \$3.8 million in economic sanctions imposed in 2015, \$2.7 million was charged to Black residents).

61. Ray Downs, *ArchCity Defenders: Meet the Legal Superheroes Fighting for St. Louis' Downtrodden*, RIVERFRONT TIMES (Apr. 24, 2014), <https://www.riverfronttimes.com/stlouis/archcity-defenders-meet-the-legal-superheroes-fighting-for-st-louis-downtrodden/Content?oid=2505869> [<https://perma.cc/YFF7-8Z97>] (“Pine Lawn is 96 percent black, and its per capita income a measly \$13,000. In 2013 the city collected more than \$1.7 million in fines and court fees. That same year, the affluent west-county suburb of Chesterfield, with a population of 47,000 (about fifteen times bigger than Pine Lawn) and a per capita income of \$50,000, collected just \$1.2 million from municipal fines, according to statistics compiled by the state.”).

62. Kate K. O'Neill, Ian Kennedy & Alexes Harris, *Debtors' Block: How Monetary Sanctions Make Between-Neighborhood Racial and Economic Inequalities Worse*, 8 SOCIO.

with one study finding that the mean court debt for formerly incarcerated Black men was 222% of their estimated average annual earnings after incarceration.⁶³ This debt has long-term negative effects on low-income and BIPOC communities. A study of Washington State found that there was a positive relationship between a community's court debt burden and its poverty rate.⁶⁴

II. Minnesota's Court Surcharge

Under Minnesota Statute section 357.021, courts must impose a \$75 surcharge on everyone "convicted of any felony, gross misdemeanor, misdemeanor, or petty misdemeanor offense, other than a violation of a law or ordinance relating to vehicle parking, for which there shall be a \$12 surcharge."⁶⁵ The Court Surcharge is imposed only once per case, so someone convicted of multiple offenses would have to pay just one \$75 surcharge.⁶⁶ It is a funding tool rather than a penalty, with 1% going to training peace officers at the Department of Natural Resources for game and fish law enforcement, and the rest going to the state general fund.⁶⁷ The Court Surcharge has increased over time, going from \$25 when it was passed in 1999 to its current level of \$75 in 2009.⁶⁸ It was originally passed to address a budget shortage in the state.⁶⁹ In line with this history, the last Court Surcharge increase was passed as part of a \$708 million package filled with fee-for-service increases in the court system to trim the court budget by 2%.⁷⁰

These increases all came under the governorship of Tim Pawlenty, a major proponent of fee-for-service government who believes that government services should be paid by those who use them rather than through taxes.⁷¹ Governor Pawlenty's philosophy was spelled out by

RACE & ETHNICITY 43, 51 (2021).

63. Harris et al., *supra* note 35, at 1776.

64. O'Neill et al., *supra* note 62, at 51.

65. MINN. STAT. § 357.021, subd. 6 (2021).

66. *Id.*

67. *Id.* at subd. 7.

68. ALEXES HARRIS, BETH HUEBNER, KARIN MARTIN, MARY PATILLO, BECKY PETTIT, SARAH SHANNON, BRYAN SYKES, CHRUS UGGEN & APRIL FERNANDES, LAURA & JOHN ARNOLD FOUND., MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 101 (2017) (noting the Court Surcharge has gone from \$25 in 1999, to \$35 in 2002, to \$60 in 2004, to \$72 in 2006, and finally to \$75 in 2009).

69. *E.g., Judiciary Fin. Hearing, supra* note 45 (statement of Rep. Paul Novotny, Member, H. Comm. on Judiciary Fin. & Civ. L.).

70. Dennis Lien, *Minnesota Senate Approves User-Fee Increases in Court System*, PIONEER PRESS (Nov. 13, 2015), <https://www.twincities.com/2009/04/21/minnesota-senate-approves-user-fee-increases-in-court-system/> [<https://perma.cc/5NKC-UTHF>].

71. Michael Khoo, *Minnesota: Land of the Fee*, MINN. PUB. RADIO (June 29, 2003), http://news.minnesota.publicradio.org/features/2003/06/30_khoom_fees/ [<https://perma.cc/96KG-2JAB>].

David Strom, the legislative director for a leading advocacy group that sponsored Pawlenty's no-new-taxes pledge.⁷² Strom defended the increased use of fees by saying that "[w]e charge taxes to pay for general goods. And we charge fees to pay for particular goods for particular individuals. And, in general, we try to make those fees match, more or less, the costs of the service that we're providing."⁷³

In 2021, the state legislature amended section 357.021 as part of a series of criminal justice reforms.⁷⁴ Section 357.021, subd. 6(c) originally stated "[t]he court may not waive payment of the surcharge required under this subdivision. Upon a showing of indigency or undue hardship upon the convicted person or the convicted person's immediate family, the sentencing court may authorize payment of the surcharge in installments."⁷⁵ Now, the statute allows courts to "reduce the amount or waive the payment of the surcharge required under this subdivision on a showing of indigency or undue hardship upon the convicted person or the convicted person's immediate family."⁷⁶ The legislature also added that the surcharge may be replaced by the performance of community work service.⁷⁷

The amendment was proposed by Representative Cedrick Frazier, who emphasized the importance of giving judges the power to consider a defendant's economic circumstances before imposing the Court Surcharge.⁷⁸ Multiple members of the legislature questioned why the amendment did not go further and said they would be interested in repealing the Court Surcharge altogether.⁷⁹ Representative Johnson, for instance, started his questioning by stating, "I want to thank you again for this bill. I love it. The problem is it doesn't go far enough."⁸⁰ Despite Representative Frazier saying he would be interested in pursuing this bolder legislation, nothing came of these concerns, as Committee Chair

72. *Id.*

73. *Id.*

74. H.F. 63, 92nd Leg., 1st Spec. Sess. (Minn. 2021).

75. MINN. STAT. §357.021, subd. 6(c) (2008) (amended 2021).

76. MINN. STAT. §357.021, subd. 6(b) (effective July 1, 2021).

77. *Id.*

78. *House File 306: Hearing Before the Minn. H. Pub. Safety & Crim. Just. Reform Fin. & Pol'y Comm.*, 92nd Leg., 2021–2022 Reg. Sess. (Feb. 9, 2021) [hereinafter *Pub. Safety Hearing*] (statements of Rep. Cedrick Frazier, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol'y); *Judiciary Fin. Hearing*, *supra* note 45 (statements of Rep. Cedrick Frazier, Member, H. Comm. on Judiciary Fin. & Civ. L.).

79. *Pub. Safety Hearing*, *supra* note 78 (statement of Rep. Brian Johnson, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol'y); *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Paul Novotny, Member, H. Comm. on Judiciary Fin. & Civ. L.).

80. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Brian Johnson, Member, H. Comm. on Judiciary Fin. & Civ. L.).

Becker-Finn said the cost of fully repealing the Court Surcharge would be \$31 million.⁸¹

III. Analysis

A. *Minnesota's Court Surcharge and Fee-for-Service Criminal Justice System Negatively Impacts Minnesota's BIPOC and Low-Income Communities*

The fee-for-service criminal justice model has proven just as inequitable and damaging in Minnesota as it has been across the country. In fiscal year 2020, the state and local governments of Minnesota collected over \$91 million in fines, fees, and surcharges assessed for criminal and traffic cases.⁸² More than a third of this money came from the Court Surcharge.⁸³ On top of what was actually collected, there is over \$140 million of outstanding court debt still owed by convicted defendants.⁸⁴ As seen in other jurisdictions, this court debt is difficult to collect, with the Second District Court reporting a collection rate of only 20%.⁸⁵

The weight of these economic sanctions is felt most heavily by Minnesota's BIPOC and low-income communities. For starters, there are vast disparities between the arrests of BIPOC and white Minnesotans for low-level offenses.⁸⁶ Though Black Minnesotans are only about 5% of the

81. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Jamie Becker-Finn, Comm. Chair, H. Comm. on Judiciary Fin. & Civ. L.).

82. Van Berkel, *supra* note 7 (noting that this number was tens of millions of dollars lower than in most years because the courts delayed some payments due to the COVID-19 pandemic).

83. *Id.*

84. *Id.*

85. PFM'S CTR. FOR JUST. & SAFETY FIN., REDUCING RELIANCE ON CRIMINAL FINES & FEES 19 (2019).

86. *ACLU Releases Data Showing Racial Disparities in Low Level Arrests in Minneapolis*, ACLU MINN. (Oct. 27, 2014) [hereinafter *ACLU*], <https://www.aclu-mn.org/en/press-releases/aclu-releases-data-showing-racial-disparities-low-level-arrests-minneapolis> [<https://perma.cc/L7N4-E7QQ>] (according to Minneapolis Police Department data recorded between 2004 and 2012, Black Minnesotans are 11.5 times more likely than white Minnesotans to be arrested for marijuana possession; 8.86 times more likely to be arrested for disorderly conduct; 7.54 times more likely to be arrested for vagrancy; and 16.39 times more likely to be arrested for curfew/loitering); Jennifer Mayerle, *Nuisance Data Reveals Racial Disparities in Arrests and Citations in Minneapolis*, CBS MINN. (Nov. 5, 2021), <https://minnesota.cbslocal.com/2021/11/05/nuisance-data-reveals-racial-disparities-in-arrests-and-citations-in-minneapolis/> [<https://perma.cc/5759-3XRP>] (discussing a report from the Police Conduct Oversight Commission which found that while Minneapolis's population is 63% white and 19% Black, only 17% of those arrested or cited for misdemeanors were white compared to 47% who were Black); INST. ON METRO. OPPORTUNITY, THE MINNESOTA STATEWIDE RACIAL PROFILING STUDY 1 (2003) ("If officers in the participating jurisdiction had stopped drivers of all racial/ethnic groups at the same rate, approximately 18,800 fewer Blacks, 5,800 fewer Latinos and approximately 22,500 more Whites would

state's population, they account for 36% of the state's prison population.⁸⁷ Native Americans make up 1.3% of the state's population but 9% of its prison population.⁸⁸ A major reason for this discrepancy is disproportionate levels of policing, as a state-funded study found that BIPOC drivers are stopped and searched at higher rates than white drivers despite the fact that white drivers were more likely to be in possession of contraband.⁸⁹ Seemingly race-neutral policing policies utilized in Minnesota such as CODEFOR—crime mapping used to deploy officer patrols to crime “hot spots”—contribute to this discrepancy, as they have police disproportionately spending their time in neighborhoods where the population is primarily BIPOC.⁹⁰ Within these over-policed neighborhoods, Black Minnesotans report being subjected to more police scrutiny than their white neighbors.⁹¹

There is also a vast economic disparity between white and BIPOC Minnesotans.⁹² While the state's poverty rate is only 9.6%, the poverty rate for BIPOC individuals in Minnesota is more than 20%.⁹³ Across a series of socioeconomic status measures from the 2000 census, the ratio of disadvantaged Black Minnesotans to white Minnesotans was higher than the national average in every category.⁹⁴ Black and Native American

have been stopped in the sixty-five jurisdictions in 2002.”).

87. Christopher Magan, *Minnesota's Worsening Racial Disparity: Why it Matters to Everyone*, PIONEER PRESS (Apr. 29, 2016), <https://www.twincities.com/2016/04/29/minnesotas-racial-disparities-worsening-why-and-why-it-matters/> [https://perma.cc/Z68R-3P8Q].

88. *Id.*

89. INST. ON METRO. OPPORTUNITY, *supra* note 86.

90. COUNCIL ON CRIME AND JUST., REDUCING RACIAL DISPARITY WHILE ENHANCING PUBLIC SAFETY: KEY FINDINGS AND RECOMMENDATIONS 6 (2006).

91. See Michell S. Phelps, Amber Joy Powell & Christopher E. Robertson, *Over-Policed and Under-Protected: Public Safety in North Minneapolis*, UNIV. OF MINN. CTR. FOR URB. & REG'L AFFS.: CURA REPORTER (Nov. 17, 2020), <https://www.cura.umn.edu/research/over-policed-and-under-protected-public-safety-north-minneapolis> [https://perma.cc/875Q-NQCP] (“You can't go outside on the street or take your kids to the park without being harassed by the police. And when there was a serious crime, like a shooting or a murder, they wouldn't show up... But any other day they'll show up just to harass you and racially profile you...”).

92. See MINN. DEP'T OF EMP. & ECON. DEV., MINNESOTA DISPARITIES BY RACE REPORT (2020) (“Minnesota's median household income was \$70,315 in 2018, but varied widely by racial groups. The median household income for American Indian households was \$35,148, less than half that of white households. Black or African American households also had median incomes less than half those of whites. Except for Asians, all other households of color in the state also had substantially lower household incomes than Whites.”).

93. *Id.*

94. Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations*, 38 CRIME & JUST. 201, 231 (finding the percent of high school graduates ages twenty-five and over black/white ratio – 1.94; percent living in a different U.S. house in 1995 – 1.48; percent unemployed, of population 16 and over – 3.04; percent unemployed, of labor force 16 and over – 3.28; median household income – 0.60; median family income – 0.53; per capita income – 0.56; percent of families below poverty – 6.18;

Minnesotans are homeless at about 17 times the rate of white Minnesotans.⁹⁵ Considering the disparities in policing and economic status, it is unsurprising that the Minnesota ZIP codes with the largest percentage of license suspensions for failure to pay a fine or appear at a court date closely correlate with the ZIP codes that have higher percentages of BIPOC individuals and people living in poverty.⁹⁶ The Court Surcharge may apply to everyone convicted of a criminal offense in the state, but it is hitting BIPOC and low-income communities harder, worsening already unacceptable levels of inequality.

B. Fee-for-Service Criminal Justice Is a Misguided Public Policy That Does Not Serve the Purposes of Punishment

As detailed above, in terms of actually collecting revenue, fee-for-service criminal justice is incredibly ineffective.⁹⁷ It costs counties on average 121 times more to collect revenue from fines and fees than what it costs the IRS to collect taxes.⁹⁸ The fee-for-service model should be rejected not just for its ineffectiveness as a tool for collecting revenue, but also because it is a poor public policy choice contrary to the purposes of punishment.

The purposes of punishment are largely categorized as utilitarian or retributive. Utilitarian purposes, including rehabilitation, incapacitation, specific deterrence, general deterrence, and denunciation, aim to use punishment to prevent future crimes from being committed by the defendant being sentenced and/or by others in the community.⁹⁹ Under the retribution theory, defendants should be punished proportionally to the severity of their crime, judged by factors such as their blameworthiness and the seriousness of the crime they have committed.¹⁰⁰

Fee-for-service criminal justice serves next to no utilitarian purpose. First, an underlying principle of utilitarian punishment is that particular defendants have elevated risks of committing further

percent of individuals below poverty – 4.37).

95. Greta Kaul, *Across a Range of Measures, Minnesota's American Indians Fare Worse Than Other Groups. So Why Isn't It Talked About More?*, MINNPOST (Oct. 10, 2018), <https://www.minnpost.com/politics-policy/2018/10/across-a-range-of-measures-minnesotas-american-indians-fare-worse-than-other-groups-so-why-isnt-it-talked-about-more/> [<https://perma.cc/WP9R-5NK4>].

96. Van Berkel, *supra* note 7.

97. MENENDEZ ET AL., *supra* note 36; Beckett & Harris, *supra* note 40, at 516–17 (finding that legal debtors in Washington State still owed 77% of their court debt); COUNCIL OF ECON. ADVISERS, *supra* note 28, at 5 (revealing that in multiple states the vast majority of court debt goes uncollected).

98. MENENDEZ ET AL., *supra* note 36, at 9.

99. JAMES Q. WILSON, THINKING ABOUT CRIME 146 (rev. ed. 1983).

100. Frase, *supra* note 15, at 73.

crimes.¹⁰¹ For low-level offenders hit particularly hard by fee-for-service court fees, such as Minnesota's Court Surcharge, the evidence does not support this underlying principle.¹⁰² The defendants who are punished with these fees often are not less law-abiding, but rather more heavily policed.¹⁰³ Second, fines and fees do nothing to incapacitate or rehabilitate defendants, as they do not physically restrain someone from committing further crimes, nor do they do anything to address the problems a defendant may have that are causing them to commit further crimes.¹⁰⁴ As discussed earlier, fines and fees can leave a defendant with substantial court debt which can trap them in poverty and may increase their risk of recidivism.¹⁰⁵ In fact, the study of the newly imposed \$200 surcharge on misdemeanor convictions in Milwaukee found that Wisconsin's new surcharge had increased the likelihood of defendants committing a future felony offense within two years of sentencing.¹⁰⁶

As a special or general deterrent, it is possible that fees may have some effect, but research points towards the certainty of punishment having a greater deterrent effect than the severity of punishment.¹⁰⁷ Even if court fees may have a deterrent effect due to their severity, this effect vacillates and is limited by the fact that defendants with higher incomes can more easily pay the fees while low-income defendants are often never capable of paying these costs.¹⁰⁸ Considering this reasoning, it makes sense that the National Commission on Reform of Federal Criminal Laws (1971) concluded that "fines are to be discouraged... unless some affirmative reason indicates that a fine is peculiarly appropriate."¹⁰⁹

Not only does fee-for-service criminal justice not contribute to utilitarian punishment purposes, the very notion of these punishment purposes and their benefits contradicts the idea that just those who are punished by the criminal justice system should pay for it. The purpose of incapacitation is to prevent "crime by imprisoning high-risk offenders, thus physically restraining them from committing further crimes against the public."¹¹⁰ General deterrence and denunciation "are designed to

101. WILSON, *supra* note 99, at 146.

102. ACLU, *supra* note 86.

103. *Id.*; Mayerle, *supra* note 86; INST. ON METRO. OPPORTUNITY, *supra* note 86.

104. WILSON, *supra* note 99, at 146.

105. Shookhoff et al., *supra* note 48; Beckett & Harris, *supra* note 40.

106. Giles, *supra* note 38, at 4.

107. See A. von Hirsch, A.E. Bottoms, E. Burney & P-O Wikström, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, 39 ALTA. L. REV. 597, 602 (2001) (citing A. VON HIRSCH, ANTHONY E. BOTTOMS, ELIZABETH BURNEY & P-O WIKSTROM, CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 34-37 (1999)).

108. Hillsman, *supra* note 23, at 52-53.

109. *Id.* at 52.

110. Frase, *supra* note 15, at 70.

prevent future crimes by members of the public at large . . .”¹¹¹ Utilitarian punishment purposes are thus a “general good” serving the whole community by preventing crime, rather than a “particular good[] for particular individuals.”¹¹² The criminal justice system is a classic example of a public good, a service that is non-excludable because it benefits everyone in a community regardless of whether they specifically pay for it or not and non-rivalrous because one individual’s enjoyment of the service does not detract from another’s enjoyment.¹¹³ Rather than fund the criminal justice system with inefficient collection measures such as fees and fines that fall only on those convicted of crimes, governments should collectively fund the system through taxes which reflect the collective benefit to public safety.

Fee-for-service criminal justice further undermines the retributive aims of punishment. Instead of reflecting a defendant’s blameworthiness or the seriousness of their crime, these fees designed to finance the criminal justice system can decrease trust in and thus the legitimacy of the criminal justice system.¹¹⁴ For one, defendants feel the imposition of fees serves as a second punishment on top of their criminal punishment.¹¹⁵ This feeling is exacerbated by the fees accumulating and being too much for defendants to reasonably pay.¹¹⁶ This debt accumulation leads defendants to feel they are being extorted, not justly punished.¹¹⁷ By collectively financing this public good rather than placing

111. *Id.* at 71.

112. Khoo, *supra* note 71.

113. Daniel J. D’Amico, *The Social Provision of Punishment and Incarceration*, 76 AM. J. ECON. & SOCIO. 1107, 1110 (2017). See generally Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954) (developing a distinction between “private consumption goods,” wherein consumption can be divided between individuals, and “collective consumption goods,” where one individual’s consumption of the good does not subtract from any other individual’s consumption of the good).

114. Breanne Pleggenkuhle, Kimberly R. Kras & Beth M. Huebner, *Twice Punished: Perceived Procedural Fairness and Legitimacy of Monetary Sanctions*, 37 J. CONTEMP. CRIM. JUST. 88, 97 (2020) (“Collectively, the required nature of [legal financial obligations] felt punitive because they seemed disproportionate to the initial punishment they received and were often assigned to them without transparency.”).

115. *Id.*; Mary Pattillo & Gabriela Kirk, *Pay Unto Caesar: Breaches of Justice in the Monetary Sanctions Regime*, 4 UCLA CRIM. JUST. L. REV. 49, 65 (2020) (“I’m the one gotta do the jail time and why should I have to pay?”).

116. Pleggenkuhle et al., *supra* note 114, at 100–01 (“Participants felt that the system was set up to see them fail because compliance and payment were prioritized over rehabilitation.”); Pattillo & Kirk, *supra* note 115, at 64 (“Retributive justice is overwhelmed by the impossibility of complying with this form of punishment, which is more burdensome for those who cannot pay.”).

117. Pattillo et al., *supra* note 115, at 69 (“When they threaten my life with the county [jail], I pay them some money They tell me all the time, they’ll petition to revoke my probation and then you go to court, and if they revoke you, they be like, ‘We going to offer you 180 days [in county jail] unless you pay this amount.’ I’m fixing to pay this amount because I don’t want to do 180 days.”).

the cost on predominantly low-income individuals, we could thus increase the effectiveness of actual retributive punishments.

C. *The State Legislature Took a Half-Measure Because It Failed to Rebuke the Fee-for-Service Criminal Justice Model*

Minnesotans and individuals in all parts of the United States were shocked and forced to contend with the racial inequities of the criminal justice system when George Floyd was killed by Minneapolis police officer Derek Chauvin in May of 2020.¹¹⁸ While some actions to reshape policing standards were passed by the State Legislature in 2020, the police killing of Daunte Wright, another unarmed Black man, brought greater urgency for reform.¹¹⁹ The resulting bill that was passed was Omnibus Public Safety Bill H.F. 63, a compromise reform and budget bill that left many legislators who had been pushing for serious structural reform disappointed.¹²⁰

A purported strength of H.F. 63, however, was its measures focused on reducing fines and fees, particularly the amendment creating discretion in the imposition of the Court Surcharge.¹²¹ The Court Surcharge amendment passed as introduced by Representative Frazier, who said that he was unsure if he would vote for the bill due to its lack of substantive reform.¹²² A closer examination of the Court Surcharge reveals it to be just as lacking as the rest of the bill in substantive reform.

Section 357.021, subd. 6 still requires the surcharge to be imposed “on every person convicted of any felony, gross misdemeanor, misdemeanor, or petty misdemeanor offense”¹²³ H.F. 63 changed the language of section 357.021, subd. 6 so that courts “may reduce the

118. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020), <https://time.com/5847967/george-floyd-protests-trump/> [<https://perma.cc/D33Z-ST83>]; Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/CPS3-E43L>] (estimating that 15 to 26 million people in the United States participated in protests over the killing of George Floyd).

119. Walker Orenstein, *How the Killing of Daunte Wright is Affecting Police Reform Efforts at the Minnesota Legislature*, MINNPOST (Apr. 13, 2021), <https://www.minnpost.com/state-government/2021/04/how-the-killing-of-daunte-wright-is-affecting-police-reform-efforts-at-the-minnesota-legislature/> [<https://perma.cc/V9RR-V2JK>].

120. H.F. 63, 92nd Leg., 1st Spec. Sess. (Minn. 2021); Walker Orenstein, *Minnesota Lawmakers Reach Deal on Public Safety; Bill Includes Restrictions on No-Knock Warrants, Requirements for Responding to Mental Health Crises*, MINNPOST (June 27, 2021), <https://www.minnpost.com/state-government/2021/06/minnesota-lawmakers-reach-deal-on-public-safety-bill-includes-restrictions-on-no-knock-warrants-requirements-for-responding-to-mental-health-crises/> [<https://perma.cc/C88A-B6YX>].

121. Orenstein, *supra* note 119.

122. *Id.*

123. MINN. STAT. § 357.021 (2021).

amount or waive payment of the surcharge . . . on a showing of indigency or undue hardship.”¹²⁴ “May” is defined as “[w]hat is within a person’s discretion to do or not to do.”¹²⁵ Courts have at times interpreted “may” to have the same meaning as “shall” where “a statute directs the doing of a thing for the sake of justice or the public good.”¹²⁶ Courts largely interpret “may” as permissive, however, because a legislature could simply use the word “shall” if it intended an action to be mandatory.¹²⁷ A permissive interpretation of the use of “may” in section 357.021, subd. 6 is supported by the legislative history of the amendment, as Representative Frazier repeatedly emphasized that the importance of the language change was to give judges discretion over the Court Surcharge.¹²⁸

Thus, while a court “may reduce the amount or waive payment of the surcharge . . . on a showing of indigency or undue hardship . . .,” the amended statute does not require the court to do this.¹²⁹ In fact, the amended statute does not require any inquiry into the defendant’s economic status.¹³⁰ This is concerning considering that researchers who observed over 1,000 court proceedings in seven jurisdictions found that courts rarely, if ever, held hearings on a defendant’s ability to pay.¹³¹ There may be many judges who utilize the new language of section 357.021, subd. 6 to the benefit of low-income defendants, but nothing in the amended language of the statute requires courts to consider a defendant’s ability to pay.

What scant case law there is regarding the Court Surcharge would seem to support a judge’s decision to ignore the discretion the State Legislature has given them. The Court of Appeals has held that because the Court Surcharge is mandatory, it is to be assessed even if it was never discussed or agreed to in the plea agreement.¹³² In reviewing a different fine, the Court of Appeals explicitly found that a statute giving courts the

124. *Id.*

125. *May*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed., Desk ed. 2012).

126. *Id.*

127. *Louisville & Ind. R.R. Co. v. Ind. Gas Co.*, 792 N.E.2d 885, 892 (Ind. Ct. App. 2003); *R.S.L. Funding, L.L.C. v. Alford*, 239 Cal. App. 4th 741, 745–46 (2015).

128. *Judiciary Fin. Hearing*, *supra* note 45 (statements of Rep. Cedrick Frazier, Member, H. Comm. on Judiciary Fin. & Civ. L.); *Pub. Safety Hearing*, *supra* note 78 (statements of Rep. Cedrick Frazier, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol’y).

129. MINN. STAT. § 357.021 (2021).

130. *Id.*

131. MENENDEZ ET AL., *supra* note 36, at 9.

132. *State v. Edwards*, No. A10-1742, 2011 Minn. App. LEXIS 829, at *5–6 (Aug. 29, 2011); *Morris v. State*, No. A14-0170, 2014 Minn. App. LEXIS 1019, at *4–5 (Sept. 15, 2014).

discretion to consider indigency or undue hardship does not require a court to consider these factors.¹³³

Even if a court is willing to exercise the discretion granted to it by the amended language, how does it determine that a defendant is indigent or will be subject to undue hardship by imposing the full Court Surcharge? The Supreme Court has come closest to defining this standard by saying that the proper inquiry is whether a defendant could pay the costs “and still be able to provide himself and dependents with the necessities of life.”¹³⁴ The Court has also found, however, that a certain amount of financial hardship from criminal trials and convictions is inevitable.¹³⁵

Under Minnesota law, a defendant is deemed indigent for the purposes of public defender eligibility if they receive means-tested governmental benefits, or they can meet the burden of proving through financial verification of their assets that they are unable to afford counsel.¹³⁶ Showing indigency can prove difficult depending on the judge. The Minnesota Supreme Court has held that the income and willingness of people close to the defendant, such as a cohabitating partner, to contribute should be considered, along with the liquidity of assets such as a home.¹³⁷

A recent study looked into how judges in Washington State interpreted and implemented changes in the law requiring courts to waive or reduce fees if a defendant would be unable to pay them.¹³⁸ Researchers found that due to the prioritizing of efficiency in courtrooms, some judges were quick to waive fees while others were quick to impose them, with both sides spending little time looking into the financial situations of defendants before making a decision.¹³⁹ A lack of regulatory oversight—something missing from H.F. 63—also hampered consistent implementation of the new law across the state.¹⁴⁰ Though many judges may be more than willing to waive or reduce the Court Surcharge, there will certainly be some judges across the state who determine that while a defendant may be poor, they are not poor enough show “indigency or undue hardship.”

133. *State v. Alama*, No. C4-95-1494, 1995 Minn. App. LEXIS 1479, at *3 (Minn. Ct. App. Dec. 5, 1995).

134. *Adkins v. E.I. DuPont de Nemours Co.*, 372 U.S. 331, 339 (1948).

135. *See Fuller v. Oregon*, 417 U.S. 40 (1974).

136. MINN. STAT. § 611.17 (2021).

137. *See State v. Jones*, 772 N.W.2d 496 (Minn. 2009); *In re Stuart*, 646 N.W.2d 520 (Minn. 2002).

138. Tyler Smith, Kristina J. Thompson & Michelle Cadigan, *Sensemaking in the Legal System: A Comparative Case Study of Changes to Monetary Sanction Laws*, 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 63 (2022).

139. *Id.* at 76.

140. *Id.* at 78.

Sensing these issues of discretion and showing economic hardship, multiple legislators at committee hearings questioned why the amendment did not go further.¹⁴¹ Representative Donald Raleigh proposed that a period should be inserted after “[t]he court may reduce the amount or waive payment of the surcharge required under this subdivision,” as he believed this would provide judges more discretion instead of tying them to a showing of “indigency or undue hardship.”¹⁴² Representative Frazier responded that he was interested in any proposals that would grant judges more discretion in waiving the surcharge, but he did not address whether the language “on a showing of indigency or undue hardship” in section 357.021, subd. 6 restricted this discretion in his view.¹⁴³

At multiple committee hearings, several legislators from the opposing party proposed even more drastic change, asking why the surcharge was not being appealed altogether.¹⁴⁴ They even offered to cosponsor a surcharge repeal with Representative Frazier.¹⁴⁵ Representative Frazier repeatedly responded that he would be interested in pursuing this legislation with them.¹⁴⁶ Committee Chair Jamie Becker-Finn ended discussion of completely eliminating the surcharge, however, saying fully repealing the surcharge would cost the state \$31 million.¹⁴⁷

This rationale by Chair Becker-Finn for avoiding substantive reform was both misguided and inaccurate. If she cited this figure from 2020 collections, then she was citing the amount of money collected under the old language of the statute where the Court Surcharge was imposed with no exceptions.¹⁴⁸ It is difficult to estimate how much this figure would decrease, considering how much court debt from low-income defendants

141. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Paul Novotny, Member, H. Comm. on Judiciary Fin. & Civ. L.); *id.* (statement of Rep. Brian Johnson, Member, H. Comm. on Judiciary Fin. & Civ. L.); *Pub. Safety Hearing*, *supra* note 78 (statement of Rep. Brian Johnson, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol’y).

142. *Pub. Safety Hearing*, *supra* note 78 (statement of Rep. Donald Raleigh, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol’y) (referencing the standard used to waive or remove the Court Surcharge in MINN. STAT. § 357.021, subd. 6(b) (2021)).

143. *Id.* (statement of Rep. Cedrick Frazier, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol’y).

144. *Id.* (statement of Rep. Brian Johnson, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol’y); *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Paul Novotny, Member, H. Comm. on Judiciary Fin. & Civ. L.).

145. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Brian Johnson, Member, H. Comm. on Judiciary Fin. & Civ. L.).

146. *Id.* (statements of Rep. Cedrick Frazier, Member, H. Comm. on Judiciary Fin. & Civ. L.).

147. *Id.* (statement of Rep. Jamie Becker-Finn, Comm. Chair, H. Comm. on Judiciary Fin. & Civ. L.).

148. Van Berkel, *supra* note 7 (reporting that the Court Surcharge accounted for about a third of the \$91 million Minnesota collected from fines, fees, and other assessments in 2020).

is already uncollectible, but if the amendment to section 357.021, subd. 6 provides any real benefit to low-income Minnesotans, the amount collected from the Court Surcharge should be lower than the number Chair Becker-Finn cited. Regardless of the accuracy of this statement, it is misguided in that it endorses the fee-for-service model of criminal justice. As Representative Brian Johnson noted when commenting on the bill, states have a constitutional responsibility to fund the courts, but this economic burden should be shared by everyone, not just those cited for offenses.¹⁴⁹

D. Recommendations

There are a variety of reforms, both big and small, that Minnesota could take to make up for the loss of funding from fully repealing the Court Surcharge. Abolishing the Court Surcharge would lead to, at most, a decrease in funding of \$31 million for the state.¹⁵⁰ To put this number in perspective, Minnesota's fiscal year 2022–2023 Budget included \$102.3 billion in total spending¹⁵¹ and \$51.8 billion in general-fund spending over the course of the two-year period.¹⁵² Further, the State currently projects to have a budget surplus of \$11.605 billion for the fiscal year 2022–23 Biennium.¹⁵³ Though \$31 million is no small number for a state government, taken in context of the state budget as a whole, it is not an insurmountable number incapable of being met through funding mechanisms other than a regressive fee system.

i. Reducing Reliance on Fees

For one, reducing the state's reliance on fees will save money as there is a cost to collecting court debt.¹⁵⁴ It is primarily the role of the State to collect court debt, but Ramsey County found that even with the small amount of fees it collects the county could save \$87,463 annually if

149. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Brian Johnson, Member, H. Comm. on Judiciary Fin. & Civ. L.).

150. *Id.* (statement of Rep. Jamie Becker-Finn, Comm. Chair, H. Comm. on Judiciary Fin. & Civ. L.).

151. *State Fiscal Briefs Project: Minnesota*, URB. INST. (Sept. 2022), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-fiscal-briefs/minnesota> [<https://perma.cc/4Q72-4ZKT>].

152. *November 2022 Forecast General Fund Spending by Major Area (FY 1990–2027)*, MINN. OFF. OF MGMT. & BUDGET (Nov. 2022), <https://mn.gov/mmb-stat/documents/budget/operating-budget/forecast/nov-2022/nov22-gf-spend-by-major-area.pdf> [<https://perma.cc/567D-835Z>].

153. MINN. MGMT. & BUDGET, BUDGET AND ECONOMIC FORECAST 4 (2022).

154. COUNCIL OF ECON. ADVISERS, *supra* note 28 (finding there is a high cost to collection which can substantially detract from, or even surpass, the fees and fines collected in many states—the 2006 fee revenue of \$21 million in Washington State only amounted to a \$6 million net gain, for instance).

it reduced its reliance on fines and fees by eliminating the Community Corrections staffer position charged with managing fee collections.¹⁵⁵ The State would save money on personnel by decreasing its reliance on fees, along with the material cost of sending non-payment notifications.¹⁵⁶

The State would also save on the indirect costs associated with the criminal justice system's handling of those who cannot pay their court debt.¹⁵⁷ The costs differ by jurisdiction, but they can include personnel and operational costs of holding court hearings, arrest and detention, and extending a defendant's probation for failure to pay fees.¹⁵⁸ Further, while research on this topic is limited, there are some indications that the accumulation of criminal debt can increase recidivism, adding costs throughout the criminal justice system.¹⁵⁹ By repealing the Court Surcharge, the State would save on these indirect costs, lessening the impact of losing the funding it provides.

ii. Law Library Reform

There are also some small actions that could be taken to make up for the potential loss from eliminating the Court Surcharge. Ramsey County, for instance, would save \$567,000 annually if it consolidated its county library with the state library.¹⁶⁰ The State could also charge law firms a higher fee for accessing the state law library, as the current fee is only \$85 a year.¹⁶¹

iii. Criminal Justice Reform

One of the most effective ways to replace lost funds from repealing the Court Surcharge would be for the State to take decisive steps in criminal justice reform. In 2019, the ACLU released a report listing recommendations for reducing mass incarceration in Minnesota.¹⁶² The proposed reforms included fully legalizing marijuana; eliminating cash bail, except for rare cases where a person "poses a serious, clear threat to

155. PFM'S CTR. FOR JUST. & SAFETY FIN., *supra* note 85, at 21.

156. *Id.*

157. COUNCIL OF ECON. ADVISERS, *supra* note 28, at 5 ("[I]n Rhode Island in 2008, 2,446 individuals were incarcerated for unpaid debts at an average cost of \$505 per commitment, and in 13 percent of cases the cost of incarceration alone exceeded the debt assessed.").

158. PFM'S CTR. FOR JUST. & SAFETY FIN., *supra* note 85, at 21.

159. *Id.*; Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 325 (finding that the recidivism rate in a cohort of juveniles was higher for those with criminal debt than for those juveniles without criminal debt).

160. PFM'S CTR. FOR JUST. & SAFETY FIN., *supra* note 85, at 26.

161. *Id.*

162. *ACLU-MN Releases Study to Sharply Reduce Mass Incarceration*, ACLU OF MINN. (Nov. 7, 2019), <https://www.aclu-mn.org/en/press-releases/aclu-mn-releases-study-sharply-reduce-mass-incarceration> [<https://perma.cc/DSR8-ACNC>].

others” capping probation terms and expressly prohibiting the extension of probation for wealth-based conditions; and prohibiting the revocation of probation for technical violations.¹⁶³ The ACLU estimated that if these reforms were enacted by 2025, they would decrease Minnesota’s prison population by 5,484 individuals, saving the state over \$41 million.¹⁶⁴

iv. Taxation

The lost \$31 million could also be made up for, and then some, by tax increases on the state’s highest earners. In 2021, Governor Walz’s budget proposal called for creating a fifth-tier income tax bracket for individuals making over \$500,000 and couples making over \$1 million.¹⁶⁵ This tax increase would affect only the top 0.7% of filers—about 21,000 households—increasing their taxes by \$8,072 on average while raising an additional \$403 million for the state.¹⁶⁶ Governor Walz also proposed a new capital gains tax of 1.5% on profits between \$500,000 and \$1 million and 4% on transactions that are over \$1 million.¹⁶⁷ This would raise another \$486 million for the state.¹⁶⁸ These tax increases would be a more just way to finance the state’s criminal justice system—a public good from which all society benefits—rather than the current regressive fee-for-service system in which the poorest community members bear the cost.

California took this collective approach to the financing of criminal justice when it reformed its fee system in 2020.¹⁶⁹ Assembly Bill 1869 was the first bill in the nation to abolish the assessment and collection of twenty-three criminal administrative fees across the state.¹⁷⁰ To make up for lost revenue, the bill created an annual apportionment of \$65 million from the state’s general fund.¹⁷¹ California showed that when there is

163. *Id.*

164. *Id.*

165. Briana Bierschbach, *Tax Increase on Minnesota’s Highest Earners Renews Fair Share Debate*, STAR TRIB. (Feb. 13, 2021), <https://www.startribune.com/tax-increase-on-minnesota-s-highest-earners-renews-fair-share-debate/600022904/> [<https://perma.cc/YF5L-SG92>].

166. *Id.*

167. *Id.*

168. Peter Callaghan, *Walz’s Revised Budget Maintains Tax Hike on High-Earners, Corporations*, MINNPOST (Mar. 18, 2021), <https://www.minnpost.com/state-government/2021/03/walzs-revised-budget-maintains-tax-hike-on-high-earners-corporations/> [<https://perma.cc/CP4Z-6NLJ>].

169. *Governor Newsom Signs the Families Over Fees Act!*, THE FIN. JUST. PROJECT S.F. (Sept. 25, 2020), <https://sfgov.org/financialjustice/newsletters/governor-newsom-signs-families-over-fees-act> [<https://perma.cc/MU9H-4XYP>].

170. *Id.*

171. Assem. B. 1869 ch. 92, 2019–2020 Reg. Sess. (Cal. 2020).

collective will to address the inequities that fee-for-justice policies perpetuate, funding deficiencies can be solved.

Conclusion

For decades, states across the country have pursued a policy of making the defendants who are criminalized by the justice system pay for their use of the system through a variety of fees. These fees saddle defendants with court debt, decrease trust in the justice system, increase recidivism, rarely serve the purposes of punishment, and cost nearly as much to collect as they bring into the state. Though not the highest fee, the Court Surcharge is the most pervasive fee in Minnesota. While it is laudable that the State took some action by giving judge's discretion to consider a defendant's financial situation, this was only a half measure. It is questionable to what degree judges will utilize this newfound discretion, and the surcharge imposition continues to endorse the merits of fee-for-service criminal justice. It is time for Minnesota to take a true step forward by repealing the Court Surcharge, as the cost of the criminal justice system must be shared by every citizen, not just the most socioeconomically disadvantaged.