March 6, 2013

Mercenary Criminal Justice

Ronald F. Wright, *Wake Forest University*
Wayne A. Logan, *Florida State University*
Mercenary Criminal Justice

Ronald F. Wright
Wayne A. Logan

ABSTRACT

Lately, a growing number of bill collectors stand in line to collect on the debt that criminals owe to society. Courts order payment of costs; legislatures levy conviction surcharges; even private, for-profit entities get a piece of the action, collecting fees for probation supervision services and the like. And some of these collectors beckon even before a final bill is due, such as prosecutors who require suspects to pay diversion fees before they file any charges.

Government budgetary cutbacks during the Great Recession have led criminal justice actors to rely on legal financial obligations (LFOs) as a source of revenue to support and expand system operations. When this happens, courts and other criminal justice actors become mercenaries, in effect working on commission. While a significant literature now exists on the adverse personal consequences of LFOs for offenders, this article is the first to offer a comprehensive examination of their legal and policy ramifications for government institutions. Courts, building on the handful of Supreme Court decisions on the issue, have recognized two chief threats. First, LFOs can undermine the neutrality of decision makers, who feel the pull of money. Second, the morass of automatic payments, with their complex triggers and objectives, dulls the ability of criminal justice actors to treat offenders as individuals.

To mediate these risks, the article proposes the use of LFO commissions. Commissions, because of their system-wide vantage point, will be able to inventory and assess the propriety of existing LFOs, and monitor their use going forward. In so doing, they will lend order and transparency to LFOs. Such oversight can overcome the risk of self-dealing and the haphazard nature of LFOs.

* Needham Y. Gulley Professor of Criminal Law, Wake Forest University.
** Gary and Sallyn Pajic Professor of Law, Florida State University. Thanks to Shannine Anderson, Chris Edwards, Steven Ferrell, Katie Hughes, Maureen Kane, Tori Kepes, and Tom Watkins for excellent research assistance. Elizabeth Farrell and Elizabeth Johnson provided invaluable support from our libraries.
Introduction

It is often said that the criminal offender owes a debt to society. Lately, though, it seems that a growing number of bill collectors are trying to cash in on that debt. Courts ask for payment of costs; corrections officials demand recovery of incarceration-related expenses; legislatures levy surcharges for convictions. Even private, for-profit entities get a piece of the action, collecting fees for probation supervision services and the like. And some of these collectors beckon even before a final bill is due, such as when prosecutors require suspects to pay diversion fees before charges are filed. The payment demands have become so numerous and complex that they have earned their own acronym: LFOs, or “legal financial obligations.”

While it might be easy to understand the rationale for each LFO standing alone, taken together they often have debilitating consequences for individuals. Today, it is not uncommon for costs, fees, surcharges and the like to exceed the amount of restitution or fines that a defendant owes in a given criminal case. Recent academic work and advocacy group studies have condemned LFOs for their economic unfairness, the barriers they impose to offender reentry, and the racial disparities they reflect.

In this article, we consider LFOs from a different vantage point: we explore the legal and policy ramifications for government institutions when

---

4 See American Civil Liberties Union, In for a Penny: The Rise of America’s New Debtors’ Prisons 6-10 (2010) [hereinafter ACLU, In for a Penny], http://www.aclu.org/files/assets/InForAPenny_web.pdf; Alexes Harris et al., On Cash and Conviction: Money Sanctions as Misguided Policy, 10 CRIMINOLOGY AND PUB. POL’Y 509 (2011); Harris et al., Drawing Blood, supra note --, at 1769.
5 See, e.g., ACLU, In for a Penny, supra note --, at 69-79; Bannon et al., Criminal Justice Debt, supra note --, at 27-29.
they use the criminal justice system to generate revenue. Today, criminal justice actors rely on the income from LFOs to meet their budgets for ordinary system operations. In other instances, LFOs fund expansion of criminal justice system operations and can even support non-justice-related causes. When this happens, courts and other criminal justice actors become mercenaries, in effect working on commission.

The incentives surface at various times, including shortly after arrest, when payments from arrestees can short-circuit the criminal justice process. Demands for payment at a point so early in the process, when institutional oversight is weak, threaten the presumption of innocence. They also raise equal justice concerns.

Yet the troubling effects of LFOs extend beyond individual case outcomes. When the tax-paying public is not asked to fund criminal justice, it gets a distorted message about the real costs of enforcement. While requiring offenders to internalize the costs associated with their wrongdoing can be justified in principle (for instance, by promoting an offender’s acceptance of responsibility), doing so weakens one of the key moderating influences in public safety politics. The volume and variety of LFOs now imposed extend well beyond the recovery of current costs; they enable expansion of the nation’s already colossal criminal justice system. As one commentator has observed, a “government that can fob off costs on criminals has an incentive to find criminals everywhere.”

This article proceeds as follows. Part I surveys the historical use of payments from suspects and criminals, dating back to the earliest English practices, to benefit criminal justice systems and actors. Part II maps the many ways that this same impulse marks modern-day American criminal justice, through the recent growth of LFOs.

Part III examines the effort by courts, including the U.S. Supreme Court, to control the flow of payments. The case law underscores two basic concerns.

---

7 See, e.g., ACLU, In for a Penny, supra note --, at 52 (noting that “mayor’s court” in the Village of New Rome, Ohio, population 60, collects an average of $400,000 per year); Rachel L. McLean & Michael D. Thompson, Council of State Governments, Repaying Debts 8 (2007), http://tools.reentrypolicy.org/repaying_debts/ (noting that administrative assessments on misdemeanor citations funded nearly all of the budget of the Nevada Administrative Office of the Courts and that probation fees accounted for 46% of the Travis County, Texas supervision and corrections budget); Gibeaut, supra note --, at 54 (noting that the City of Philadelphia collected $2 million and wrote off another $1 million as uncollectible); Steve Thompson, Judges Key to Plan to Fix City Courts, DALLAS MORNING NEWS, June 19, 2012, at A1 (describing pressure from city council on local courts to increase collection efforts).


9 For discussion of the recent proliferation of LFOs, starting in the 1980s and significantly expanding since then, see Alexes Harris, et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 AM. J. OF SOC. 1753, 1769 (2010) [hereinafter Harris et al., Drawing Blood]; Paul Peterson, Supervision Fees: State Policies and Practice, 76 FED. PROB. 40, 40 (June 2012) (noting mere handful of states in 1980s, aligned with privatization movement taking root during the time).
First, LFOs can corrode the neutrality of government officials and others, who feel the gravitational pull of money as they resolve cases and process offenders. Second, LFOs that apply to broad groups of offenders – regardless of their connection to the purpose for the payment – undermine the capacity of the criminal justice system to treat those offenders as individuals. Part IV builds on this common law foundation. Treating the task ahead as one of risk assessment and reduction, we propose a regime to police the current pell-mell nature of LFOs. In particular, we explore the possible use of LFO commissions to assess, monitor and control the ever-expanding menu of LFOs.

The task we undertake here is as timely as it is important, coming at a time when the nation is rethinking its decades-long resort to mass imprisonment, with its tremendous human and financial costs. It remains to be seen whether correctional options less expensive than prison will sate the nation’s punitive appetite. If, as expected, the nation increasingly resorts to less expensive (non-brick and-mortar) community corrections strategies, LFOs will very likely grow in tandem. This is because they actually produce revenue for cash-starved criminal justice actors. With budgets not promising to improve any time soon, and powerful incentives pushing LFOs, from the public and private sector alike, the invisible hand will not rescue us. We need to decide for ourselves a principled set of limits on LFOs.

I. A Brief History of Criminal Justice Payments

The recent surge in LFOs might appear to be an outgrowth of a modern cost-benefit mindset or perhaps an example of privatization trends. In actuality, however, criminal justice payments have a long pedigree. Up until the mid-late nineteenth century, criminal justice was dominated by private actors, with government playing a secondary role in crime investigation and in the apprehension, prosecution and punishment of criminal offenders. It was the aggrieved private party and private counsel, not the publicly paid constable and prosecutor, who held wrongdoers to account. These private criminal justice actors – including “thief takers,” prosecutors and judges – mainly earned their income from money collected from defendants and offenders. In this part, we survey this history to show how the American justice system addressed the problematic incentives that worked on private fee-based actors.

A. English Experience


11 See William J. Stuntz, The Collapse of American Criminal Justice 55-56 (2011) (tracing nation’s evolution from a predisposition for punishment parsimony to the view that “a healthy criminal justice system should punish all the criminals that it can.”); David Cole, Turning the Corner on Mass Incarceration?, 9 Ohio St. J. Crim. L. 27, 44-49 (2011) (lauding recent decreases in imprisonment rates but questioning whether they will be sustained when budgetary conditions improve).
Over a millennium ago in England, parties to disputes of all kinds resolved their disagreements without government intermediaries, whether by violence or through transfer of goods among themselves. Until the tenth century, criminal wrongs met with private prosecutions, and offenders were forced to pay, rather than being killed. In non-homicide cases, compensation went to the victim (“bot”); in homicide cases, to the victim’s survivors (“wergild”), based on the victim’s social status. Under the reign of Anglo-Saxon kings in the late tenth century, government increased its role in criminal prosecutions, requiring local noblemen to accuse and arrest suspected criminals in their districts. Alongside this shift, compensation (“amercement”) became payable to the church, king or community, rather than the injured party.

The 1300s witnessed major changes in the English criminal justice system. Most significant was the creation of the office of the justice of the peace (JP), who assumed responsibility for local law enforcement. JPs typically were local landowners without formal legal training, serving under a royal commission. They served on a part-time basis, and presided over petit and grand juries. Constables, who replaced the ancient system of sheriffs, were also employed part-time, and apprehended suspects upon orders from a JP, who decided what further action to take.

The JPs and constables benefited financially from their criminal justice work. While corruption had been a constant threat in the past, the office of the JP heightened concerns about self-dealing. As England became more urbanized, and crime more prevalent, the Crown was obliged to expand the pool of JPs, deploying men who treated the position less as a social responsibility and more

---

17 Id.
18 See R. P. Meagher et al., Equity, Doctrine and Remedies § 1-1005, at 3 (1975); see also Langbein et al., supra note --, at 233.
20 This was especially true with respect to the forfeiture of chattel. Kesserling, supra note --, at 115 (“Medieval petitioners cited abuses by rapacious officials who skimmed profits or even indicted the innocent in hopes of personal gain.”). Forfeiture thefts remained endemic through the nineteenth century, with constables and gaolers (jailers) inspiring particular suspicion. Id. at 122-24.
as a source of income. The JP came to be known as the “trading justice,” who sustained himself on the basis of fees.21

Judicial officials worked in tandem with part-time police officers, assuming most prominent form in the mid-1700s with the “Bow Street runners,” who served the London court situated on Bow Street.22 The runners were compensated by direct government payment, reward money, and preferment to other offices.23 Around this same time, in an effort to boost incentives for private prosecution, the Crown instituted a reward system for successful prosecutions of particular serious felonies, such as highway robbery.24 Rounding out this incentive-based investigative system were the “thief-takers,” entrepreneurs – often with close connection to the criminal underworld – who gathered evidence and contraband and received rewards.25

The threat to integrity that such a system of reward created was obvious from the outset. With the promise of private gain, individuals were tempted to accuse falsely; the history of eighteenth-century London contains vivid stories of individuals meeting the hangman as their accusers profited.26 Indeed, as John Langbein and his co-authors note, concern over official deceit inspired the English in the 1730s to allow the accused to employ defense counsel, who could probe the validity of evidence and cross-examine witnesses.27

The reward system also tainted street-level police behavior, motivating officers to act when rewards were large and dampening their interest when “profits were slight.”28 Sometimes an officer would even ignore a theft as it was about to happen, in the hope of later catching the thief and securing a reward.29

The last actor on the English enforcement landscape, the public prosecutor, did not materialize until later. While public officials took charge of prosecutions in some non-felony offenses starting in 1790 (crowding out private victims as prosecutors), the office of public prosecutor was not created until 1870.30 Prosecutors were compensated like private attorneys for the

24 See LANGBEIN ET AL., supra note --, at 674, 676-677.
26 See LANGBEIN ET AL., supra note --, 678-81.
27 Id. at 686.
29 Id.
30 See LANGBEIN ET AL., supra note --, at 712.
victims of alleged crimes; they shared an “entrepreneurial outlook” and the primary prosecutorial goal was extraction of payment rather than punishment of defendants.31  

**B. Criminal Justice Payments in the United States**

Britain’s colonies in North America followed a similar path. The amateurs who comprised the early constabulary were paid through a combination of government and private rewards.32 Sheriffs, for instance, received fees when they issued subpoenas.33 Justices of the peace also earned fees for their work.34 Forfeiture proceeds were split between the government and the enforcement officials involved.35  

Post-colonial criminal justice systems left in place these financial incentives. Prior to the advent of full-time, professional police forces – which took root in places such as Boston and New York in the mid-nineteenth century – the fee and reward system held complete sway. State and local governments developed fee schedules, specifying the monetary benefit tied to solving different crimes. Naturally, law enforcement focused on better-remunerated crimes at the expense of less remunerative ones.36 Private party rewards, tied to the value of the property allegedly stolen, also shaped enforcement priorities.37 In such a system, murders received less attention than robberies and theft, because the latter offered heightened financial benefit.38  

Systemically, the fee and reward system also had other quite independent negative effects. Direct monetary payments encouraged collusion between law enforcement and the criminal element, in the form of pay-offs and kickbacks for orchestrated crimes, with outlaws being set free.39 The system also discouraged cooperation, as law enforcement officers became disinclined to work with one another for fear of a diminished take.40

---

33 See Walker, supra note --, at 27.  
37 See Miller, supra note --, at 28; Richardson, supra note --, at 30-32.  
38 See Richardson, supra note --, at 37-49.  
39 Id. at 30-32. The arrangement was similar to that characterizing English “thief-takers.” See supra notes -- and accompanying text.  
40 It was even possible that fees and rewards induced criminal activity, because criminal opportunities would increase the enforcers’ monetary intake. See Richardson, supra note --, at 30-32.
The advent of full-time salaried police changed this landscape. These enforcers began to think of themselves as professionals, subject to professional norms; they wore indicia of government authority, such as uniforms and badges. Police officers (as they came to be known) measured their success on the job through something other than personal profit. They ramped up the investigation of “victimless” crimes such as gambling, drunkenness, and prostitution, even though no reward typically attached to those crimes.

Private monetary incentive, however, did not disappear. Because the fee and reward system remained in place, strategically minded officers benefited when they were detailed to the most lucrative areas for patrol. In addition to direct compensation from fees and rewards, officers benefited indirectly from the favorable treatment of politically connected businesses and individuals, allowing them to retain their jobs and advance in departments. Officers also benefited from graft and bribes, based on their power to selectively enforce less serious offenses, such as those concerning Sabbath observance and operation of brothels.

Monetary influence also continued to be an issue in the courts. Although victims remained prime instigators of criminal cases, more public prosecutors began work in the late nineteenth century. While paid on a salary basis in some jurisdictions, fee-based systems for prosecutors continued to predominate, often supplementing the meager public salaries of the day. In New Jersey, for instance, prosecutors received $10 for a guilty plea, $15 for a jury-determined guilty outcome, and nothing at all if the jury acquitted the defendant. In

---

41 See Friedman, supra note --, at 70 (“The rise of the police was...an event of huge significance. The police interposed a constant, serious, full-time presence into the social spaces of the cities.”).
42 See Wesley Oliver, Magistrates’ Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century, 81 TUL. L. REV. 777, 797-98 (2007).
43 See Friedman, supra note --, at 70.
44 Fee and reward inducements remained available to police officers, and a new actor emerged—the detective—who proved susceptible to influence. Detective squads were established in Boston (1846), New York (1857), Philadelphia (1859), and Chicago (1861). This distinct unit in the police force was prone to private reward or collusion with members of the underworld. See Friedman, supra note --, at 203-06; Roger Lane, Policing the City: Boston, 1822-1885, at 148-52 (1967); Eric H. Monkoff, Police in Urban America: 1860-1920, at 35-36 (1981). Again, in this sense the detectives resembled the “thief-takers” of late eighteenth century London.
45 See Richardson, supra note --, at 62-63.
46 Id. at 57.
47 See Friedman, supra note --, at 154-55; Richardson, supra note --, at 182-210; Walker, supra note --, at 55-62; Oliver, supra note --, at 472-74.
49 See Walker, supra note --, at 71. In early twentieth-century Chicago, the unsalaried office of the state’s attorney received $20 for each felony conviction and $5 for each misdemeanor conviction, along with 10% of all forfeited bonds. Michael Willrich, City of Courts: Socializing Justice in Progressive Era Chicago 15 (2003). In late nineteenth century Kentucky, prosecutors received a percentage of fines recovered, and because fines were imposed only in misdemeanor and minor felony cases, more serious felonies got short shrift. See Robert M. Ireland, Law and Disorder in Nineteenth Century Kentucky, 32 VAND. L. REV. 281, 283 (1979).
Philadelphia, prosecutors were paid for filing charges but not for evaluating or dismissing them.  

Judges personally benefitted from payments to an even greater extent. Justices of the peace and alderman, who presided over high-volume, low-level offense courts, secured private money in cases from start to finish. At times, the flow of money triggered concern about conspiracies between police officers and judicial officials to arrest large numbers of poor people for vagrancy and drunkenness without legal justification. It was even difficult to get a sense of how much money flowed to judges. In 1842, Pennsylvania adopted a law that required judge-aldermen to post a quarterly statement with the county treasurer specifying all payments received. The law, however, met with widespread under-accounting. What Allen Steinberg has referred to as “pay-as-you-go” justice predominated until the early part of the twentieth century. In Chicago, JP tribunals were maligned as “justice shops,” a phrase historian Michael Willrich offers captured “the unapologetically entrepreneurial spirit” in which justice was quite literally for sale.

Finally, no discussion of criminal justice payments would be complete without mention of the corrections system. Dating back to pre-colonial times, jailers could recover for themselves the costs of incarceration. The financial benefits of prison labor, in particular, were also quite readily apparent to governments. While states contracted out convicts to private business owners prior to the Civil War, the practice came into its heyday in the Reconstruction

52 See Steinberg, supra note --, at 38-44, 121-25.
53 Id. at 173-76.
54 Id. at 107.
55 Id. at 174, 190.
56 Id. at 106.
57 Willrich, supra note --, at 3-4; see also id. at 10 (noting that “JPs grabbed any business, civil or criminal, that came their way”). See also Steinberg, supra note --, at 192 (“The fee system negated the magistrates’ ability to properly dispense justice. Selling justice was their living, and their need to secure that living forced them to modify the product in order to suit those who could pay the most. One need not be dishonest at all...What was obviously necessary was a new relationship that placed more distance between the alderman and his ‘customers.’”). The JP system operated until 1905 in Chicago when the city implemented the nation’s first modern municipal court. Willrich, supra note --, at 40.
58 See, e.g., Marion L. Starkey, The Devil in Massachusetts: A Modern Inquiry into the Salem Witch Trials 238 (1949) (noting that in Salem witchcraft era that “[e]ven if you were wholly innocent...you still could not leave unless you had reimbursed the jailer for his expenses on your behalf, the food he had fed you, the shackles he had placed on your wrists and ankles.”). Prisons and jails, first taking root in Jacksonian America, replaced more physical carceral punishments such as whippings and the pillory. Friedman, supra note --, at 155.
59 See Jeremy Travis, But They All Come Back: Facing the Challenges of Prisoner Reentry 153-54 (2005) (noting that Massachusetts contracted out prison labor in 1807 and that in the following decades New York, Ohio and other states followed suit); see also Elizabeth Dale, Criminal Justice in the United States, 1790-1820: A Government of Laws or Men?, 133, 161, in
Era south. During that time, emancipated African-Americans were frequent targets of police sweeps for minor offenses such as vagrancy or “suspicious behavior.” Upon conviction, states would “lease” the individuals to businesses operating coal and phosphate mines, pine tree forests (to collect turpentine), and plantation farms. Proceeds from the arrangements were far from insignificant, with one-third of the annual budgets of Alabama and Tennessee at the time derived from convict leases. Leasing continued well into the twentieth century, with New Hampshire not abandoning the practice until 1932. Also, as now state and local governments used convict labor to perform public work, such as street-sweeping and landscape maintenance.

II. Survey of Current LFO Practices

Today’s LFO-dominated criminal justice system carries forward many of these historical practices, along with the impulse to treat criminal law enforcers as entrepreneurs who can fund their own work. What is new – and noteworthy – is the growing number and cumulative effect of modern LFOs. In this section we survey this expanding menu of options. The LFOs that interest us most are typically connected to low-level offenses, such as misdemeanors and infractions, which dominate the criminal justice diet. Such LFOs very often surface in dimly lit institutional environments, attracting less attention than felonies, and are imposed by local governments, themselves the subject of infrequent public scrutiny.

The LFOs that suspects, defendants, convicts, and prisoners pay during their modern journeys through the criminal justice system accrue at different times. Some are extracted before the formal start of any proceedings, such as a payment to a prosecutor’s office as part of an agreement to defer prosecution. Some arise after the filing of charges but before any entry of judgment, such as

---


60 See Friedman, supra note --, at 157; Travis, supra note --, at 154.

61 See Dale, supra note --, at 612. Governments profited from the operation of their payment systems more generally. Oakland, California, for instance, put judges on salary in 1880 and did away with its system, allowing all monies to go to the city treasury, accounting for a “tidy profit.” Lawrence Friedman & Robert Percival, Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910, at 45 (1981).

62 See Dale, supra note --, at 162. Prison labor also netted benefits for states as a result of the building of furniture and the like, a practice that met its demise as a result of pushback from free labor. Travis, supra note --, at 155.


the up-front fees that some jurisdictions charge for access to public defense attorneys. Others take hold after the entry of judgment, such as the fee an offender pays for participation in a probation program.

Criminal justice LFOs also vary in the incentives they create for the full-time insiders: the public and private actors who operate the criminal justice system. In some situations, the actor who assesses the LFO is different from the one who collects the LFO and the one who receives the financial benefit from it. In other cases, the assessor, collector and recipient of the LFO might all be the same person or entity; and in other cases still, the funds might go to a cause unrelated to criminal justice.

A. Pre-Judgment LFOs

The presumption of innocence does not slow the onset of LFOs. Criminal suspects and defendants incur these obligations – sometimes by consent and sometimes not – before a court ever enters judgment or imposes sentence. The obligations are not a consequence of a criminal conviction; rather, they are the practical result that flows from a criminal charge, or sometimes from a potential charge.

1. Prosecutorial Intervention

Prosecutors decide whether or not to file charges. While in some cases prosecutors decline charges because the evidence is not sufficient, in others they defer prosecution by agreement with the defendant. Under these “deferred prosecution agreements,” the potential defendant agrees to perform community service, to obtain drug treatment, or to take other actions that are commonly associated with criminal sentences. If the suspect successfully completes the agreed-upon program, the prosecutor declines prosecution. If the individual fails to complete the program, the criminal case goes forward, often on the basis of an admission of guilt built into the initial agreement.

A variation on this theme is known as “pre-trial diversion.” In such circumstances, a prosecutor can suspend criminal proceedings for a defendant, after filing initial charges, based on the defendant’s willingness to complete probation-like conditions. Again, if the defendant completes the preconditions, the prosecutor dismisses the pending charges. A similar type of program allows the prosecutor to supervise the defendant after a criminal conviction but before

---

66 While such agreements are best known in the white collar criminal cases they are enjoying increasing use in more traditional criminal justice contexts. See Matthew J. Parlow, The Great Recession and Its Implications for Community Policing, 28 GA. ST. U. L. REV. 1193, 1233-35 (2012).
67 See BEN KEMPINEN, DIVERSION PROGRAMS (2010).
the court imposes sentence; if the offender successfully completes the conditions, the court does not enter judgment on the conviction.\footnote{See Nat’l Ass’n of Pretrial Services Agencies, Promising Practices in Pretrial Diversion 5 (2009), \url{http://www.pretrial.org/Docs/Documents/PromisingPracticeFinal.pdf}; Tom Humphrey, \textit{House Votes to Abolish Pre-Trial Diversion Program}, KNOX NEWS (May 15, 2011), available at \url{http://blogs.knoxnews.com/humphrey/2011/05/house-votes-to-abolish-pre-tri.html}.}

Some prosecutors have the power to collect fees from suspects during the period that they monitor the suspect’s progress. About two-thirds of the states that authorize deferred prosecution programs by statute also allow prosecutors to collect LFOs.\footnote{See NAT’L ASS’N OF PRETRIAL SERVS AGENCIES, PRETRIAL DIVERSION IN THE 21ST CENTURY 8 (2009) [hereinafter IN THE 21ST CENTURY], available at \url{http://www.napsa.org/publications/NAPSAPretrialPracticeSurvey.pdf}.} For example, Oklahoma allows for local creation of a “supervision” program, which empowers the district attorney to enter into a pre-charge agreement with a criminal suspect for up to three years.\footnote{Okla. Stat. tit. 22, § 305.1 (West 2012). Oklahoma has authorized such programs since 1979. 1979 Okla. Sess. Law Serv. Ch. 226, § 1 (West). When the accused enters into the agreement, he or she agrees to “waive any right to a speedy accusation, a speedy trial, and any statute of limitations, and agrees to fulfill such conditions to which the accused and the State … may agree including, but not limited to restitution and community service.” Okla. Stat. tit. 22, § 305.2(A) (West 2012).}


2. Pre-Trial Abatement

In some instances, local law or practice allows defendants in minor cases to pay an amount to the police or the courts that stops the prosecution from going forward. The payment, which takes various names, results in a dismissal of the charges or a “stay of adjudication,” blocking any conviction from appearing on the defendant’s criminal record. Minnesota, for instance, empowers localities to impose a “prosecution cost,” permitting defendants in traffic and lesser misdemeanor cases to pay an amount above and beyond the
face amount of a traffic ticket to resolve the case without a conviction. 75 Similarly, under the District of Columbia’s “post-and-forfeit” statute, the police can offer minor offense arrestees the chance to “post” and immediately “forfeit” a relatively small amount of money (typically on the order of $50 to $150), that flows to the Metropolitan Police Department, in exchange for waiving any right to an adjudication on the merits. 76 The law treats the payment as bail to secure the defendant’s release, and the “forfeiture” of the bail leads to a dismissal rather than a conviction. 77

3. Bail

Another practice that asks defendants to open their wallets is bail. Criminal courts in most states release some defendants before trial based on a payment, either present or future. In all but a few states, commercial bail bond dealers promise the courts to pay the bail amount if the defendant fails to appear for a later hearing; they make this promise after receiving payment (typically ten percent of the total bail amount) from the defendant. 78 When bailees abscond it is common for courts to waive their right to collect the full bond amount, resulting in economic windfalls for dealers. 79 Moreover, states sometimes tack on “administrative” LFOs to bail amounts and collect them from bond dealers or defendants, even after acquittals. 80 Finally, bailees can incur added expense as a result of payments they are required to make to public or private entities overseeing their supervision in the community. 81

---

75 See Pam Louwagie & Glenn Howatt, Some Drivers Find That Cash Can Make the Tickets Go Away, STARBURBNE (Minneapolis), Mar. 25, 2012.
77 Although the charges remain on the person’s arrest record, for most offenses a request can be made to seal the record, either immediately upon an assertion of actual innocence or within two years after dismissal of the charges. See Jamison Koehler, Constitutionality of D.C.’s “Post and Forfeit” Statute Upheld, KOEHLER LAW, http://koehlerlaw.net/2012/04/constitutionality-of-d-c-s-post-and-forfeit-statute-upheld/ (Apr. 3, 2012).
4. Application Fees for Defense Counsel

While the state must provide a defense attorney without charge to an indigent defendant who faces charges that could end in the deprivation of liberty, often that lawyer is not cost-free. Even if an individual qualifies as indigent, many jurisdictions require the defendant to pay an up-front "application" fee or "co-payment" for appointed counsel, in an amount tied to the severity of the seriousness of the charge. Some but not all such jurisdictions allow judges to waive the fees in cases of extreme poverty.

B. Post-Judgment LFOs

Once the justice system evaluates the evidence and adjudicates the charges, LFOs really come into their own. Post-judgment LFOs go by many different names, many different actors assess and collect them, and they serve many different avowed purposes.

1. Investigation, Prosecution and Court Costs

Criminal courts in all but a few states have the power to assess costs against convicted offenders, and the majority of states have legislation mandating assessments after conviction. A smaller number of states make assessment of costs permissible. In many states, local governments have the express authority to impose assessments on their own.

The variety of costs and the amounts they entail have increased significantly over time, often serving as a major fiscal benefit for governments.
Mercenary Justice

Facing decreased tax revenues, consider first the LFOs that apply across the board to all offenders. In Florida, such assessments include a mandatory court cost ranging from $60 (traffic offenses) to $225 (felonies), and a mandatory minimum $50 assessment for the “cost of prosecution” payable to the “State Attorneys Revenue Trust Fund.” This is in addition to a non-waivable $50 cost payable to the “Crimes Compensation Trust Fund,” a $20 court cost for “crime stoppers” programs, and a $3 cost directed to the “Additional Court Cost Clearing Trust Fund” (required even when prosecution is withheld). Defendants might also be required to pay for investigative costs incurred by law enforcement agencies, including the salaries of permanent employees and prosecutors and $100 allocated to the “Operating Trust Fund of the Department of Law Enforcement” to help finance state crime laboratories. The state also allows counties with “teen courts” to require anyone convicted of any non-traffic offense to pay $3 to help fund the court.

Other states have similar laws. In Illinois, for instance, a $10 medical assessment is levied on persons convicted of crimes, regardless of whether the individual receives any medical treatment. In California, the legislature, to “maintain adequate funding for court facilities,” assesses $30 for misdemeanor and felony convictions and $35 for each infraction, and extracts a $20 “court security fee” for every conviction.

Second, LFOs very often are tied to particular kinds of cases. For example, New York, among other states, favors conviction “surcharges”: $250 for a felony, $140 for a misdemeanor, and $75 for a violation. Colorado targets convicted sex offenders with surcharges, ranging from $150 for a class 3 misdemeanor to $3000 for a class 2 felony. States also extract fees when they

---

89 Fla. Stat. § 938.05 (2012).
90 Id. § 938.03(1).
91 Id. § 938.06(1).
92 Id. § 938.03(2).
93 Id. § 938.27(1).
94 Id. § 938.055.
95 Id. § 938.19(1)-(3).
require convicted sex offenders to register. With drug cases, jurisdictions commonly seek payment for laboratory services.

If an offender is late in paying a LFO, a penalty can be imposed, based on a flat rate or a percentage of the amount owed. Late payment can also get private collection agencies involved, who themselves impose charges. Separate charges for extended payment plans can also ratchet up payments, with penalties again attaching to late payments.

2. “Pay-to-Stay”: Detention LFOs

Assessments are also very commonly imposed upon offenders sentenced to prison or jail terms. Despite the typically limited financial means of inmates, state and local governments usually charge offenders for the costs of incarceration. Michigan, for instance, allows counties to recover up to $60 per day from inmates, and Arizona authorizes a $2 monthly electric utility fee. The total amounts collected can be substantial: New York State, for example, collected $22 million during 1995-2003.

Charges for telephone calls are also a significant moneymaker. The charges — paid by recipients of “collect” calls from inmates, based on rates far above the prevailing market — generate millions of dollars annually, with most of the money going to contractors.

---

103 See, e.g., People v. Taylor, 12 Cal. Rptr. 3d 923, 925 (Cal. Ct. App. 2004) (discussing various surcharges imposed as a result of assessing mandatory “drug laboratory analysis fee”).
104 Bannon et al., Criminal Justice Debt, supra note --, at 17 (20% rate in Michigan, 30% rate in Illinois, and $300 flat rate in California).
105 Id. at 17 (noting 30% rate in Alabama and 40% rate in Florida).
106 Id. at 18 n.65 (noting inter alia $135 fee in one Florida county and $100 fee in New Orleans).
107 Id. at 7 n. 20 (noting that all fifteen states surveyed authorize recovery of jail and prison costs);
111 See Peter R. Shults, Note, Calling the Supreme Court: Prisoners’ Constitutional Right to Telephone Use, 92 B.U. L. Rev. 369, 371 (2012) (noting that state prison systems receive over $132 million annually from the commissions and that the market itself yields more than $362 million in annual gross revenue).
3. Probation and Parole Fees

Jurisdictions also increasingly impose fees for community corrections services, with amounts tied to the duration of supervision.\textsuperscript{112} In Maryland, the parole supervision fee is $40 per month, which can amount to several hundred dollars during a parole term.\textsuperscript{113} In Pennsylvania, prisoners are ineligible for probation, parole or accelerated disposition unless they pay a $60 fee, not subject to waiver for indigents.\textsuperscript{114} In many states supervision periods can be extended for failure or inability to pay.\textsuperscript{115}

It is also common for profit-oriented private firms to contract with government to provide probation services.\textsuperscript{116} A court, for example, might place an offender on probation for public drunkenness and assess a fine of $270. The private probation company will then add a $15 enrollment fee and $39 per month for supervision and services.\textsuperscript{117} Use of Global Positioning System devices to track probationers, parolees and others (typically convicted sex offenders “off-paper”)\textsuperscript{118} and operation of halfway houses\textsuperscript{119} are other ways for private contractors to get involved. When individuals are sentenced to community service, they can be required to buy an insurance policy from a private provider.\textsuperscript{120} Finally, as with costs, governments frequently outsource the collection of supervision-related fees and allow private entities to levy significant additional surcharges.\textsuperscript{121}

4. Fines

Fines are intended to punish individuals for misconduct and are typically set by statute, tied to the severity of misconduct. They can be mandatory or discretionary, and the court can make individualized findings about the

\textsuperscript{113} Diller et al., Maryland’s Parole, supra note --, at 5.
\textsuperscript{114} Bannon et al., \textit{Criminal Justice Debt}, supra note --, at 22.
\textsuperscript{115} Id. at 7 n.19; id. at 25 n.170-176.
\textsuperscript{119} See, e.g., Fla. Stat. § 944.026 (2012) (authorizing contracts for community-based facilities to provide services for probationers).
\textsuperscript{120} Liptak, supra note --.
\textsuperscript{121} See Bannon et al., \textit{Criminal Justice Debt}, supra note --, at 17 (noting that Florida law allows private collection agencies to charge up to a 40% surcharge on amounts collected); id. at 17 n.94 (noting that Maricopa County, Arizona allows private agencies to collect an 18% surcharge); id. (20% private surcharge in Missouri).
offender’s ability to pay before setting the amount of the fine. While U.S. courts traditionally have relied less on fines than their western European counterparts, today fines are imposed on 33% of convicted felons and enjoy even greater use in lower-level courts of limited jurisdiction. While the law often specifies a fine amount, sometimes only a statutory-based range applies. In such instances, courts impose a “going rate” for a fine, assessing amounts based on local norms.

Fines can also serve as a trigger for “surcharges.” In California, a surcharge allocated to the “State Court Facilities Construction Fund” can amount to 50% of any fine imposed, and fines oblige six additional payments, based on state or local law.

Fines can fill major holes in budgets, especially for local governments. For instance, there is empirical support for the common anecdotal observation that local police departments use traffic fines to generate revenue needed to operate local governments. Recent controversy has swirled around aggressive towing for parking violations and traffic light cameras that generate automatic citations.

5. Forfeiture

Asset forfeiture laws allow governments to seize money and property from individuals or entities after proving some connection to commission of an offense. Such laws are commonly deployed in drug cases, with proceeds often

---

125 One study reported that fines are used in 86% of such courts. Id. at 754.
126 Id. at 755.
128 People v. Castellanos, 98 Cal. Rptr. 3d 1, 8 (Cal. Ct. App. 2009).
going directly to police\textsuperscript{132} and prosecutors.\textsuperscript{133} Some forfeitures only occur after a criminal conviction and are a component of the sentence. Others, however, go forward regardless of the outcome in criminal proceedings, and the government proves its case under specialized procedural rules drawn from the world of civil litigation.\textsuperscript{134} In some cases, the government dismisses criminal proceedings in exchange for a defendant’s agreement not to contest civil forfeiture claims.\textsuperscript{135}

An extensive scholarly literature examines the distorting influence of asset forfeiture laws.\textsuperscript{136} We note the laws here simply to call attention to the connection between them and various LFOs that create similar incentives.

III. Judicial Limits on Revenue Generation

Judges find themselves in the middle of this thicket of criminal justice LFOs. The judicial branch administers many of the collection systems and judicial budgets benefit from the funds generated. At the same time, defendants regularly ask judges to exempt them from payments on an individual basis or to invalidate or limit the entire payment system. In response, state and lower federal courts, building on Supreme Court precedent, have articulated principles that set some outer boundaries for revenue generation.

In this part, we review a complex and at times contradictory body of cases. For every theme that appears in the opinions, there often is a crosscurrent; the cases point to no single outcome. However, in the spirit of Restatement reporters or drafters of the Model Penal Code,\textsuperscript{137} we highlight nascent principles that can guide the creation of a fair, sensible and coherent system of LFOs. We begin with discussion of the handful of Supreme Court decisions on revenue generation. Discerning several themes in those cases, we examine how the principles have played out in decisions of state and lower federal courts over the years.


\textsuperscript{133} See, e.g., David B. Smith, \textit{New Jersey’s Statute Held Unconstitutional: Prosecutors May not Benefit from Forfeiture Cases}, 27 CHAMPION 12 (2003).


A. The Supreme Court Pushes Back

In the 1920s, money flowing into the coffers of criminal justice actors caught the attention of the U.S. Supreme Court. The Court first addressed the matter in the context of judicial payments, in *Tumey v. Ohio.*\(^{138}\) The general principles formulated in that context later shaped the judicial response to monetary benefits accruing to other criminal justice actors.

In *Tumey,* the Court unanimously condemned a local government arrangement involving a mayor, who also functioned as a judicial officer, receiving a salary that was paid in part by fees imposed on convicted defendants (but not those acquitted).\(^ {139}\) The *Tumey* Court condemned the practice on due process grounds, finding that the fee structure cast doubt on the impartiality of the judge-mayor, who had a personal pecuniary interest in each conviction ($12).\(^ {140}\) Writing for the Court, Chief Justice Taft stated that “the prospect of receipt or loss of such an emolument” in each case cannot be regarded as a “minute, remote, trifling, or insignificant interest.”\(^ \text{141}\) It is not fair to a defendant “that the prospect of such a prospective loss [of money] by the mayor should weigh against his acquittal.”\(^ {142}\) And while there were “doubtless” mayors whose judgment would not be affected, the “possible temptation to the average man”\(^ {143}\) raised constitutional concerns. Due process is violated, the Court held, when a judge “has a direct, personal, substantial pecuniary interest in reaching a conclusion against” a defendant.\(^ {144}\)

The *Tumey* Court, however, was concerned about more than personal financial interests. *Tumey* also addressed the incentives for judges whose decisions could affect the money flowing to local governments. In an effort to encourage localities to prosecute liquor violators more aggressively, Ohio’s Prohibition law gave local governments a share of any fines imposed after conviction,\(^ {145}\) and instructed judge-mayors not only to determine guilt, but also to set appropriate fine amounts.\(^ {146}\) The problem with this arrangement, according to the Court, was not the mingling of executive and judicial function.\(^ {147}\) The problem instead was the financial benefit to local government:

\(^{138}\) 273 U.S. 510 (1927).
\(^{139}\) Id. at 523.
\(^{140}\) Id.
\(^{141}\) Id.
\(^{142}\) Id.
\(^{143}\) Id.
\(^{144}\) Id.
\(^{145}\) Id. at 533. The fines provided revenue sufficient to obviate the need to raise taxes. Id.
\(^{146}\) Id. The statutory amounts ranged from $100 to $2,000. Id.
\(^{147}\) Id. at 534. The Court allowed that, “the legislature of a State may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people.” Id. at 535.
the “official motive to convict and graduate the fine to help the financial needs of the village.”\footnote{148}

One year later, in \emph{Dugan v. Ohio},\footnote{149} the Court somewhat qualified its views on the corrosive effects of money. In \emph{Dugan}, the judge-mayor presided over criminal liquor law violations and received a salary that was fixed, regardless of the number of convictions. While case outcomes could have affected the financial health of the city, the judge-mayor lacked “general responsibility” for the city’s fiscal balance, as he shared executive powers with others, including control over prosecutions.\footnote{150} Because of those shared powers, the Court held that the judge-mayor’s relationship to the city’s general fund was too “remote” to trigger constitutional concern.\footnote{151}

The Court did not return to the issue for over forty years. In \emph{Ward v. Village of Monroeville},\footnote{152} the Court continued to treat the issue of judicial financial motives as a matter of degree, but this time the incentives were enough to constitute a due process violation. In \emph{Ward}, a judge-mayor oversaw a court that generated fines, fees and costs accounting for a substantial portion of local government funds. Two facts distinguished \emph{Ward} from \emph{Dugan}. First, the judge-mayor in \emph{Ward} held greater executive duties alongside his judicial duties, making him more responsible for the overall fiscal health of local government. Second, the fees from convictions in \emph{Ward} added up to a larger portion of the local government’s budget, increasing the incentive for the judge-mayor to consider government finances when deciding cases.\footnote{153} This arrangement violated due process even though the Village judge-mayors had no direct financial stake in the cases before them.\footnote{154}

Five years later, in 1977, the Court addressed the propriety of judges receiving compensation for issuing search warrants. In a unanimous opinion in \emph{Connally v. Georgia},\footnote{155} the Court applied the \emph{Tumey} “possible temptation” test to invalidate a state regime that paid justices of the peace a fee ($5) only when they issued a warrant.\footnote{156} Despite the small size of any single fee, what mattered was that the judge’s “financial welfare” was enhanced by “positive action,” yet not by denials of warrants.\footnote{157}

\footnotesize
\begin{itemize}
\item \footnote{148} Id.
\item \footnote{149} 277 U.S. 61 (1928).
\item \footnote{150} Id. at 63.
\item \footnote{151} Id. at 65.
\item \footnote{152} 409 U.S. 57 (1972).
\item \footnote{153} Id. at 61-62.
\item \footnote{154} Id. at 59-60.
\item \footnote{155} 429 U.S. 245 (1977).
\item \footnote{156} Id. at 250; \textit{see also} id. at 246 (“The fee so charged apparently goes into county funds and from there to the issuing justice as compensation.”). At a pretrial hearing in the case, when litigated below, the justice of the peace testified that he served mainly because he was “interested in a livelihood,” that he received no salary, and that his compensation was “directly dependent on how many warrants” he issued. \textit{Id.}
\item \footnote{157} \textit{Id.} at 250.
\end{itemize}
In 1980, in *Marshall v. Jerrico, Inc.*, the Court turned its attention to potential pecuniary bias within the executive branch, in particular the collection of civil penalties by the U.S. Department of Labor for violations of the federal child labor laws. The Court found the *Tumey* neutrality principle to be inapplicable, reasoning that the Secretary of Labor was engaged solely in a prosecutorial or enforcement function, not a judicial one. However, the Court also emphasized that principles formed in the judicial context might be relevant, noting that a “scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.”

Just the same, the *Marshall* Court found it unnecessary to “say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function,” finding in the case at bar that no government official stood to benefit financially from vigorous enforcement of the Act. Moreover, the Court found no “realistic possibility” of a broader institutional incentive to take enforcement action, because penalties collected under the Act represented less than one percent of the budget for the agency charged with enforcement. The likelihood of institutional self-dealing was further undercut because agency headquarters, not a regional administrator, decided how to allocate penalties, meaning that local administrators had no assurance that any penalties they assessed would be remitted to their offices. Finally, the penalties allocated to regional offices were proportional to the Department’s expenses for investigating and prosecuting child labor violations. For this combination of reasons, the possibility of bias was “too remote to violate the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plaintiff-like functions.”

**B. Two Supreme Court Themes**

Viewed as a whole, the foregoing cases support some generalizations. Most apparent, *Tumey*, *Ward*, and *Connally* found it problematic that the neutrality of government officials, judges in particular, was possibly impaired. If a judge benefits personally from imposing a fee or setting its amount, that judge cannot make the “neutral decision” that due process requires. Furthermore, some LFOs that benefit a government or agency within it can create incentives just as troubling as those that personally benefit judges. If the LFO directly and substantially supports a government unit – for example, by

---

158 446 U.S. 238 (1980).
159 Id. at 249.
160 Id.
161 Id.
162 Id. at 251.
163 Id.
164 Id. at 252.
providing a significant portion of the overall budget – it poses a threat to neutrality. Similarly, if the government actor who imposes the LFO also holds responsibility for the overall fiscal health of the agency that receives its benefit, the arrangement creates a neutrality problem.

On the other hand, it is plain that these neutrality principles do not categorically prevent the government from benefiting from an LFO, as Dugan and Marshall attest. Over time, the Court’s lack of principled objection over financial benefit has been manifest in other contexts, for instance in its holding that convicted defendants can be required to pay a “surcharge” tied to the posting of bail.\(^\text{165}\) The Court has also long tolerated forfeiture actions,\(^\text{166}\) despite acknowledging their possible corrupting influence.\(^\text{167}\)

Alongside the traditional due process concern for neutrality, a second theme has emerged. That theme is individualization: an LFO should reflect the nature of the particular offender’s crime and the impact payment will have on the offender. The Supreme Court held in Bearden v. Georgia, for example, that a defendant who is unable to pay the amount that a court imposes as a probation term cannot be incarcerated for failure to pay.\(^\text{168}\) Only after finding that a defendant has the financial ability to pay, and willfully disobeys the judicial order to pay, is incarceration permitted.\(^\text{169}\) Similarly, a LFO structure must distinguish between acquitted and convicted defendants. A government cannot allow a jury to impose court costs on an acquitted defendant.\(^\text{170}\)

Each of these themes surfaces in the opinions of state courts and lower federal courts that have addressed LFO challenges. Faced with new and varied LFOs, courts have also moved beyond the straightforward application of Supreme Court precedent, fleshing out a broader range of concerns beyond the core themes of neutrality and individualization.

1. Elaboration of the Neutrality Theme

The neutrality theme makes frequent appearances in state and lower federal court decisions. Such courts have usually\(^\text{171}\) but not always\(^\text{172}\)

\(^\text{167}\) See United States v. James Daniel Good Retail Property, 510 U.S. 43, 56 (1993) (stating that procedural protections are especially important in forfeiture actions because “the Government has a direct pecuniary interest in the outcome of the proceeding”).
\(^\text{169}\) Id.; see also Williams v. Illinois, 399 U.S. 235, 243 (1970) (holding that a convicted defendant cannot be incarcerated beyond the statutory maximum time due to inability to pay court-imposed fine and court costs). As discussed later, however, the Bearden standard today is very often violated. See infra note – and accompanying text.
\(^\text{171}\) See, e.g., Brown v. Vance, 637 F.2d 272, 274-76 (5th Cir. 1981) (granting challenge to Mississippi system in which local judges were paid a fee per case, and their compensation would increase depending on the number of cases filed in their court); Doss v. Long, 629 F. Supp. 127, 130 (N.D. Ga. 1985) (holding same with respect to similar Georgia system); Rollo v. Wiggins, 5
condemned arrangements that provide direct financial benefits to judicial officers. Similarly, courts have invalidated systems when an LFO funds judge salaries more generally. On the other hand, courts tend to condone payments directed to the state general revenue fund. LFOs that land in the general treasury offer less reason to worry about parochial self-dealing motives of the government actors who request the LFO or order its payment.

It is important to note, however, that decisions on the beneficiary issue do not point in a single direction. The uncertainty is evident in the willingness of some courts to allow private entities to benefit from LFOs. In Jadeja v. Redflex Traffic Systems, Inc., for instance, a federal court rebuffed a claim against private companies that provided red-light enforcement cameras in various California towns. The plaintiff, who had received a $346 fine for running a red light caught on the defendants’ camera, claimed that the local governments’ contracts with the companies violated his freedom from “incentivized prosecution.” In particular, the plaintiff alleged that the contracts contained a “cost-neutral” provision leading the companies to produce a sufficiently high volume of infractions to cover their operating costs. Refusing to recognize the plaintiff’s “alleged interest in freedom from incentivized prosecution,” the court rejected any analogy to Tumey, finding that the private firm sending the plaintiff the ticket did not act as a “prosecutor for the state,” and that there was no allegation of partiality on the part of any judge or prosecutor.

When the recipient of money is a governmental actor other than a judge, courts sometimes minimize the risk that the LFO assessor will be influenced by

So. 458, 463 (Fla. 1942) (invalidating law allowing judge payment of $1 but only in the event of conviction, stating that “[t]he question is not what the effect may be on the conduct of any particular judge, but what the effect may be upon one who may easily yield to the temptation to feather his pocket even with a few extra dollars”).

In Allen v. State, 24 S.E.2d 61 (Ga. 1978), for instance, the Georgia Supreme Court held that the possibility that a JP might receive additional money by holding a committal hearing did not render the system unconstitutional. Id. at 63. This was because the judge did not determine fee amounts and there were no guarantees that the same judge would hold the fine amount hearing. Id.

See, e.g., DePiero v. City of Macedonia, 160 F.3d 770, 777 (6th Cir. 1999) (invalidating system when fees generated amounted to less than 10% of government budget); Rose v. Village of Peninsula, 875 F. Supp. 442, 452 (N.D. Ohio 1995) (invalidating mayors court system in which revenues were “substantial” and judge-mayor exercised executive function).

See, e.g., People v. Matthews, 508 N.W.2d 173, 178 (Mich. 1993) (interpreting Mich. Comp. Laws § 780.905 (imposing fees on felony and misdemeanor convictions and directing 90% of proceeds to the state treasury). For examples of state statutes specifying allocation to general revenue funds, see, e.g., Ala. Code § 12-19-152 (2012); Ga. Code Ann. § 42-8-34(d)(1)-(2) (West 2009). In North Carolina, the state constitution requires that “penalties” and “fines” shall “belong to and remain in the several counties, and shall be faithfully appropriated and used for maintaining free public schools.” N.C. Const. art IX, § 7 (West 2005).

764 F. Supp. 2d 1192 (N.D. Cal. 2011).

Id. at 1196.

176 Id. at 1194-95; see also id. at 1194 (quoting complaint: “if the fixed monthly fees charged by Defendants were to exceed the total revenue brought in by the cameras, Defendants would refund, credit, or otherwise repay [government] for the difference.”).

178 Id. at 1196.
the benefits of receiving the payment. The presence of a judge, these courts reason, protects against government self-dealing. For instance, in Brown v. Edwards, the Fifth Circuit was not troubled by the fact that local police received a $10 payment for each arrest resulting in conviction. To the court, what mattered was that any arrest was supported by probable cause, not the “officer’s motives in making the arrest.” A few years later, in Broussard v. Parish of Orleans, the Fifth Circuit approved a Louisiana law allowing sheriffs to impose a 2% fee on all bail amounts, again rejecting concern over conflicts because, unlike in Ward and Tumey, the sheriffs did not exercise a judicial function.

In short, case law on this point is expansive and inconsistent. At times, it recognizes the possibility that the recipient of a LFO could act contrary to the public interest, justifying intervention. If the recipient also has a hand in assessing the LFO, one also sees greater inclination for concern over self-dealing. Yet, as just discussed, courts at times remain insensitive to indirect and systemic conflicts of interest.

2. Elaboration of the Individualization Theme

Another major decisional seam in the current case law asks whether the LFO is sufficiently connected to the individual circumstances of the case or the offender. The precise framing of the question differs, depending on the nature of the LFO. A fine can serve as a mandatory part of the punishment for a conviction. On the other hand, a cost is meant to compensate government for expenses incurred during investigation, prosecution, conviction, and punishment, and a fee is tied to the expense of providing a specific program.

---

179 721 F.2d 1442 (5th Cir. 1984).
180 Id. at 1455.
181 Id. at 1452-53.
182 318 F.3d 644 (5th Cir. 2003).
183 Id. at 662. Similarly, the Mississippi Supreme Court has held that court clerks can be paid more for cases resulting in conviction than an acquittal, reasoning that clerks played no direct role in the resolution of cases. Nicholson on Behalf of Gollot v. State, 672 So. 2d 744, 751 (Miss. 1996).
184 People v. Jones, 861 N.E.2d 967, 975 (Ill. 2006). According to Jones: A “fine” is a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense. A “cost” is a charge or fee taxed by a court such as a filing fee, jury fee, courthouse fee, or reporter fee. Unlike a fine, which is punitive in nature, a cost does not punish a defendant in addition to the sentence he received, but instead is a collateral consequence of the defendant’s conviction that is compensatory in nature. A “fee” is a charge for labor or services, especially professional services. Id.
185 People v. Sulton, 916 N.E.2d 642, 646 (Ill. 2009). Therefore, credits to fines for time spent incarcerated did not apply to a $200 DNA analysis LFO, as it was not a fine, but was a fee. People v. Johnson, 959 N.E.2d 1150, 1155 (Ill. 2011).
or service. In short, fines are tied to the offender’s crime, while costs and fees are linked to the government’s responses to crime.

The characterization of a LFO can be important. Fine amounts, for instance, ostensibly reflect the nature of the defendant’s wrongdoing rather than the budgetary needs of criminal justice agencies. Fines are also a creature of statutory authority, and courts acting without such authority, no matter how commendable the beneficiary, are subject to reversal. Finally, fines are subject to constitutional regulation, via the Excessive Fines Clause and the right to a jury trial.

At the same time, owing to the limiting features just described, fines can be decoupled from the actual uses of the money. The courts do not insist on individualized connection between the offender and the beneficiaries of fines. Such decoupling is illustrated by an Illinois case, People v. Graves. In Graves, the Illinois Supreme Court upheld a $15 LFO that funded mental health and youth diversion courts. Even though the authorizing statute denominated the payment as a “cost,” the Graves court characterized the LFO instead as a “fine,” because it did not compensate the state for expenses. As a consequence, the government did not need to demonstrate any specific connection between the details of the crime and the amount of the assessment.

Other states adopt a similarly relaxed view. Florida allows fine monies to fund a public law library. In Arizona, a ten percent surcharge collected on all fines is directed to a “clean elections” fund. Illinois requires payment of a $5

---

186 See, e.g., People v. Pacheco, 187 Cal. App. 4th 1392, 1403 (Cal. Ct. App. 2010) (“court security fee” is to “finance the criminal justice system by funding the courts” and is thus not rehabilitative or restitutionary in nature, and so cannot be made a condition of probation); see also R. Barry Ruback & Mark H. Bergstrom, Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications, 33 CRIM. JUST. & BEHAV. 242, 253 (2006).
187 See, e.g., State v. Harwell, 515 N.W.2d 105, 110 (Minn. Ct. App. 1994) (invalidating trial court’s decision to impose $14 per month fine imposed for felony murder conviction, involving young victim who was a runaway, payable to private Missing Children’s Fund); State v. Cooper, 760 N.E.2d 34, 38 (Ohio Ct. App. 2001) (invalidating trial court decision to direct fine associated with DUI homicide to American Cancer Society).
189 See Southern Union Co. v. United States, 132 S. Ct. 2344 (2012) (holding that fines qualify as penalties subject to Apprendi v. New Jersey rule that any fact increasing authorized maximum must be established by a jury).
190 919 N.E.2d 906 (Ill. 2009).
191 Id. at 909.
192 Id. In addition, as a fine, the defendant was entitled to a “credit” of $5 for each day he remained in jail. Id. (citing 725 Ill. Comp. Stat. Ann. § 5/110-14(a)). See also State v. VanWinkle, 186 P.3d 1258, 1260 (Mont. 2008) (noting same).
193 Fla. Stat. § 939.185(1)(a) (2012); Farabee v. Bd. of Trustees, Lee County Law Library, 254 So. 2d 1, 5 (Fla. 1971); see also, e.g., Ali v. Danaher, 265 N.E.2d 103 (Ill. 1970);
Mercenary Justice

fine by defendants convicted of drug possession, payable to the state “Spinal Cord Research Fund.”

When it comes to costs, on the other hand, the courts usually demand some connection between the government’s expenses and the investigation or prosecution of a particular defendant. For instance, in contrast to the Florida Supreme Court’s approval of fines being allocated to a public law library, the Texas Court of Criminal Appeals invalidated use of court costs to fund creation and maintenance of a law library.

Likewise, at least for some courts, charging a defendant for a pro rata share of “overhead” – that is, costs imposed to maintain basic institutions of the justice system – does not pass muster. Courts, for instance, have disallowed costs when tied to the hours worked by prosecutors in a defendant’s case. As the Oregon Court of Appeals recently put it, in rebuffing a government effort to recover overtime payments associated with guarding a defendant in a hospital, the public “either must make an expenditure in order to maintain and operate a government agency, or not.”

Courts sometimes examine LFO connectedness through a constitutional lens. In State v. Lanclos, for instance, the Louisiana Supreme Court invalidated a statute allowing for assessment of a $5 LFO against traffic offenders directed to the Greater New Orleans Expressway Commission, which went to the state treasury’s special fund and supplemented police salaries and equipment expenses. The court found that the assessment violated separation of powers because it amounted to a “tax to be levied improperly through the judicial system.” The assessment, moreover, did not bear a “relation to an individual’s particular offense and [did] not help defray the costs of prosecuting that particular individual.” The Lanclos court found the connection between the police department and the criminal justice system to be too attenuated.

196 See supra note – and accompanying text.
197 Ex Parte Carson, 159 S.W.2d 126, 127 (Tex. Ct. Crim. App. 1942). The Carson court elaborated that if something “so remote as a law library may be properly charged to a litigant on the theory that it better prepares the courts and the attorneys for the performance of their duties,” then “we might as logically tax an item of costs for the education of such attorneys and judges and even the endowments of the schools which they attend.” Id.
200 Id. at 580. See also Arnold v. State, 306 P.2d 368, 376 (Wyo. 1957) (holding that “costs of prosecution do not include the general expense of maintaining a system of courts and administration of justice”). Also, costs typically are not available in the event of an acquittal or dismissal. See, e.g., People v. Palomo, 272 P.3d 1106 (Colo. Ct. App. 2011); Leyritz v. State, 93 So. 3d 1156 (Fla. 4th DCA 2012).
201 980 So. 2d 643, 653-54 (La. 2008).
202 Id. at 645.
203 Id. at 653.
204 Id. at 654. In an earlier case, the Louisiana Supreme Court invalidated a $3 filing fee funding domestic violence programs, stating that “our system of courts should not be made tax collectors…nor should the threshold to our justice system be used as a toll booth to collect money
Separation of powers concern also motivated the Hawaii Supreme Court to invalidate assessment of prosecution and investigative costs, where the municipality was not required to use the funds to defray actual costs incurred, reasoning that it functioned as an unauthorized tax. Different constitutional concerns figured in *LaRue v. State*, where the Florida Supreme Court found that a 5% bond surcharge allocated to the Crimes Compensation Trust Fund infringed the constitutional right to reasonable bail bond, because the surcharge neither related to the purposes of bond nor provided benefit to the bonding system.

Although lack of nexus can doom a LFO, courts still tend to defer to broad-gauged legislative judgments about when LFOs are permissible and their amount. Typically, courts rebuff challenges to required payment of “costs” incurred by government when they are statutorily authorized and satisfy procedural protections. The Oklahoma Court of Criminal Appeals, for instance, upheld a statute mandating that costs levied against defendants (including those involved in “victimless” crimes involving drugs) go into a victims’ compensation fund. In doing so the court rebuffed a separation of powers challenge, based on the assertion that the unconnected cost functioned as a tax, reasoning that courts over time have adopted a “more relaxed standard.”

---

206 397 So. 2d 1136 (Fla. 1981).
207 Id. at 1138.
208 See Broyles v. State, 688 S.W.2d 290, 291 (Ark. 1985) (noting that decisions “are not unanimous in deciding to what extent the costs in a criminal case must be directly related to that particular prosecution”).
209 See Fairmont Creamery v. Minnesota, 275 U.S. 70, 76 (1927) (“Costs in criminal proceedings are a creature of statute, and a court has no power to award them unless some statute has conferred it.”); see also United States v. Bevilacqua, 447 F.3d 124, 127 (1st Cir. 2006) (noting “[t]he American legal tradition [that] does not, absent specific authority, require defendants to reimburse the government for costs of their criminal investigations or their criminal prosecutions.”).
210 See, e.g., Bevilacqua, 447 F.3d at 129 (finding no statutory authority to assess the cost of specially appointed prosecutors against the defendant); United States v. Banks-Giombetti, 245 F.3d 949 (7th Cir. 2001) (vacating assessment of jury costs against the defendant where there was no statute or local practice and the defendant was not put on notice); Gooch v. State, 685 N.E.2d 152, 155 (Ind. Ct. App. 1997) (reversing jury costs in absence of statutory authority).
212 Id. at 171; see also id. (“[A]s long as a criminal statutory assessment is reasonably related to the costs of administering the criminal justice system, its imposition will not render the courts ‘tax gatherers’ in violation of separation of powers doctrine.”). One judge on the panel specially concurred with the result, noting that “we do not preclude the possibility that at some point the imposition to the Judicial branch by the Legislature of additional responsibilities in the form of collecting assessments may become so burdensome it will interfere with the court’s ability to perform its central functions.” Id. at 175 (Lumpkin, J., specially concurring). See also State v. Ballard, 868 P.2d 738, 743 n.7 (Okla. Crim. App. 1994) (upholding assessment yet noting same concern and offering same caveat).
When it is clear that the investigation or prosecution of a particular defendant prompts the government to use a given procedure, the courts are more willing to approve a LFO to compensate the government. This has occurred, for instance, with fees for DNA collection and analysis. Costs can be assessed to cover prosecution expert witness expenditures, although they have been held not to include pre-indictment investigation costs. Yet when an assessment is imposed on an individual who does not fall within the express terms of an authorizing statute, appellate courts can be quick to intervene.

With respect to defense counsel, the state can recoup costs associated with providing an indigent individual defense. Imposing such an obligation on an indigent defendant is thought to not chill exercise of the right to counsel. In addition, jurisdictions can require that individuals qualifying as indigent pay an up-front “application” fee or “co-payment” for appointed counsel, in an amount tied to the severity of the seriousness of the charge. Courts also typically reject challenges to provisions requiring payment of incarceration-related costs, so long as they are based on statutory authority.

C. Summary

As the preceding discussion suggests, state and lower federal courts, building on Supreme Court precedent, have created a disparate body of caselaw. On the whole, the courts defer to the legislature and enforce fines, fees and costs that the legislature has clearly authorized, and often look askance at LFOs that stray beyond the statutory terms. Such deference is especially evident with fines. With costs and fees, one sees more critical scrutiny, with courts from time to time relying on statutory interpretation or constitutional doctrine, including separation of powers, to find fault with LFOs.

213 See supra notes – and accompanying text.
218 Id. at 54. See also, e.g., State v. Casady, 210 P.3d 113 (Kan. 2009); Donovan v. Comm., 60 S.W.3d 581 (Ky. Ct. App. 2001).
219 See Wright & Logan, Application Fees, supra note --. The Court has, however, imposed limits on the use of fees seen as restricting the exercise of rights. See, e.g., Burns v. Ohio, 360 U.S. 252, 258 (1959) (requiring availability of waiver for indigent criminal defendants in payment of court docket and filing fees); Griffin v. Illinois, 351 U.S. 12, 16-17 (1956) (requiring that waiver be available to indigent criminal appellants for transcript preparation fees).
220 See, e.g., Slade v. Hampton Roads Reg'l Jail, 407 F.3d 243, 246 (4th Cir. 2005); Goad v. Florida Dept. of Corr., 845 So. 2d 880, 885 (Fla. 2003); Bouza v. Sheriff of Bristol County, 918 N.E.2d 823, 831-34 (Mass. 2010).
Ultimately, however, case law is only modestly helpful in lending principled order to the profusion of LFOs. As the Arizona Court of Appeals recently observed when assessing whether a “prosecution fee” imposed by a county was punitive in nature and essentially a fine, LFO categories and the analytic tests employed are “not black and white but rather include many shades of gray.” Much as courts have grappled in the constitutional arena with determining whether a sanction is punitive in nature, and hence subject to double jeopardy, ex post facto or other limits, they struggle to draw doctrinally meaningful distinctions among LFOs.

Case law also fails to account for the cumulative effect of LFOs. A challenge to an individual fee or fine, for instance, evaluates the practice in isolation, but the trend over time has been to multiply payments for defendants and offenders. As one California judge put it, “however laudable these charges may be, the patchwork nature of the ever-growing financial penalties in criminal actions has created a system that begins to match the complexity of the federal income tax.”

IV. Guiding Principles and an Institutional Response

Judicial doctrine starts with the recognition that the government benefits from LFOs. Such benefits present the risk of self-dealing, whether in structuring the payment system or in setting the payments in a particular case. As the Supreme Court put it in Harmelin v. Michigan, “[i]mprisonment, corporal punishment, and even capital punishment cost a State money…. [I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.”

Given the systemic risk they present, governments need principles to guide the creation, operation, and evaluation of criminal justice LFOs. We believe that such guidance can divide into two components: risk assessment and risk reduction.

222 Id. at 1141. Emblematic of this ambiguity even restitution can have a surcharge, in New York State, with an additional 5% of the restitution amount going to collecting agent. New York Bar Re-entry Report, supra note --, at 171. California allows a “restitution fine” to be assessed, tied to the seriousness of the offense. Cal. Penal Code § 1202.4 (West 2013).
225 See, e.g., People v. Guerrero, 904 N.E.2d 823, 825 (N.Y. 2009) (quoting legislative memorandum and noting that mandatory surcharges arose out of “a massive revenue-raising bill meant to ‘avert the loss of an estimated $100 million in State tax revenues’”)
226 501 U.S. 957, 979 n.9 (1991). The Court added that it has relied on “lack of incentive for abuse” in finding that punitive damages were not fines under the Excessive Fines Clause. Id.
A. Risk Assessment

LFOs operate in a charged environment, populated by legislators who are not shy about “sticking it” to criminal offenders and eager to give taxpayers more criminal enforcement for less public expense, and by judicial and executive actors who stand to benefit monetarily from LFOs. Two rules of thumb, derived from the major themes in the case law surveyed earlier, can help policy makers understand when the risk of distortion through self-dealing is highest.

1. How much does the payment resemble a traditional post-conviction fine?

The first risk factor that system actors should consider is the extent to which a payment is unlike a criminal fine, statutorily authorized and imposed by a judge after an adjudication of guilt. This risk factor is grounded in the common law insight discussed above, that an LFO deserves more deference when it is individualized for the offender and offense.

This guiding principle suggests that the timing of any payment is important: the earlier the payment, the more problematic it is. For instance, pre-adjudication payments of “diversion supervision” fees to prosecutors should prompt serious concern. These LFOs happen without the institutional checks and balances — that is, input from other players — that can make a governmental decision more reliable and tailored to the merits of an individual case. There is no judge to convince about the propriety of a diversion fee, and often no defense attorney to counterbalance prosecutorial prerogative.

Consider, for example, the practices of prosecutors in Tallahassee, Florida, where the office collected fees directly from defendants as a condition of entering plea bargains, and then kept the funds for itself.227 The strategy allowed the office to circumvent a state law requiring the court clerk to collect and distribute payments in accord with legislative priorities.228

The absence of checks and balances increases the risk that an LFO will be based on inaccurate facts, self-dealing, and even intemperate judgments. In this setting, defendants are vulnerable to coercion and unequal justice, with richer suspects better able to “buy” a favorable outcome and avoid the adverse personal consequences of a criminal charge.229 When the government is

---

227 Diller, Hidden Costs, supra note --, at 10.
228 Id. at 10-11 (requiring that clerk assign the first $50 of any fees or costs paid by an indigent person as payment of the public defendant application fee, which funds indigent defense). Moreover, when the office was unable to collect the monies at the outset, prosecutors would request that the court order the fee be paid within a specified time regardless of the defendant’s ability to pay. Id. at 10.
229 Equal justice concern has led some courts to reject such practices. See, e.g., Moody v. State, 716 So. 2d 562, 565 (Miss. 1998) (“one who is unable to pay will always be in a position of facing a felony conviction and jail time, while those with adequate resources will not…”).
permitted to generate revenue without investing much in the way of its own resources, net-widening also becomes a very real concern, as every potential arrestee becomes a potential source of revenue.

Just as LFOs become more suspect when they attach early with less input from other checking institutions, they should prompt concern when they apply automatically and in a uniform amount to large groups of people. LFOs respect the judicial principle of individualization when a judge or some other official can waive or adjust the amount of the payment. A sound system will test the strength of the connection between an offender and the purpose of the LFO in a particular case.

2. How prominent is revenue as a purpose?

Another risk factor turns on the popular phrase, “follow the money.” If the money that a LFO yields was an important reason for authorizing it, the risk increases that revenue considerations will distort justice concerns or public safety purposes. For instance, if a legislature creates or modifies a fee structure at the same time that it reduces the operating budgets for prosecutors or other criminal justice actors, that founding purpose is likely to dominate later applications. This point builds on the neutrality requirement built into the case law of the Supreme Court and other courts that have evaluated LFOs.

One red flag in the design of a LFO is the delegation of control over its imposition to the same actor or entity that benefits from its revenues. *Tumey* recognized this principle in its most overt form, but the risk also appears in less obvious contexts. In New Orleans, for instance, LFOs go to the Judicial Expense Fund, used to pay for courtroom improvements such as carpeting and audio systems. Anecdotal evidence suggests that the city’s judges pressured colleagues to collect LFOs and that judges who secured less than their “fair share” were allocated less in operating funds. Along these same lines, it is often the case that court clerks – typically a potent political force in states – stand to benefit from court cost payments.

The behavior pattern is predictable from a public choice perspective. Oklahoma’s “DA Supervision” program reflects the power of economic

---

230 This is the view of ABA and various advocacy groups. See, e.g., Bannon et al., Criminal Justice Debt, supra note --, at 30; Frances Zemans, Court Funding: Prepared for the American Bar Association on Judicial Independence 7 (2003), available at http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/courtfunding.authcheckd am.pdf. But courts have tended to require direct and unqualified pecuniary interest. See supra notes – and accompanying text.

231 ACLU, *In for a Penny*, supra note --, at 25.

232 *Id.* at 9.

233 See, e.g., Fla. Stat. § 938.06(2) (2012) (clerk shall retain $3 out of $20 assessed on all convictions and allocated to “crime stoppers programs”); Fla. Stat. § 938.194(4)(b) (2012) (clerk shall withhold 5% of all assessments imposed for “teen court” as “fee income” for the office).

234 As the American Probation and Parole Association notes, “[o]f all the factors affecting collections, the degree of access to fee payments is the most significant. Organizations which are able to keep part or all of the supervision fees collected, collect more.” American Probation and
incentives. In 2007, the legislature increased the length of deferred prosecution agreements from two to three years. Coupled with the then current $20 per month fee for supervision, this amendment increased the “earning potential” by $240 on each agreement. Then, in 2009, the legislature doubled the “potential” on each agreement by increasing the monthly fee from $20 to $40. As a result, each office could use a deferred prosecution agreement to net an increase of $960 per contract over what it could have before the amendment.

Risk also spikes when private vendors get involved. With contractors who operate halfway houses and other community-based treatment programs for offenders, it is worrisome when governments delegate work to politically connected parties without adequate contractual standards and monitoring. Contractors have also prompted concern in the context of probation services. In Georgia, three dozen for-profit companies are authorized to operate, tacking on “enrollment” and other surcharges that can together easily exceed fines and costs imposed on defendants. When more time on probation brings more revenue for the contractors an obvious moral hazard threat arises, one borne out in the practice of one provider requesting that defendants serve their sentences

236 Id.
237 Id.
240 See, e.g., Southern Center for Human Rights, Profiting from the Poor: A Report on Predatory Probation Companies in Georgia (2008), available at http://www.inthepublicinterest.org/sites/default/files/Profiting%20from%20the%20Poor.pdf; Bronner, supra note -- (discussing “money-starved towns across the country and the for-profit businesses that administer the system.”). The use of global positioning systems for monitoring offenders, a “techno-corrections” strategy that governments often favor as a cheaper alternative to brick-and-mortar incapacitation, is also a major money-maker for private companies. See Ian Herbert, Where Are We with Location Tracking: A Look at the Current Technology and the Implications on Fourth Amendment Jurisprudence, 16 BERKELEY J. CRIM. L. 440 (2011).
241 Bronner, supra note --.
consecutively, not concurrently. 242 The incentive system is reinforced when firms tie their evaluation of individual officer performance to the amount of money secured from probationers,243 not to the officer’s provision of service or the behavior of probationers.244

Private enterprise also makes its presence felt in the debt collection business, with over three hundred prosecutors’ offices now allowing private companies to use their letterhead to contact debtors, demanding payment on bounced checks. The companies collect the debt, which goes to the creditor, along with LFOs (including payments for a “financial accountability” class), some of which is funneled back to the prosecutors’ offices.245

Just as there are some indicators of high risk, there are also some contexts that suggest lower risk. In some settings, the entity that authorizes an LFO and its amount has nothing to do with the decision to assess LFOs in individual cases. It is often the case, for instance, that statutory law will predetermine the amount of costs that courts can assess.246 Such role differentiation, however, does not make the risk disappear completely. While LFO collectors might prove overly zealous when collecting funds that sustain their own operations, they might care too little if collection adds to their own workload and benefits flow to some other entity.247

The importance of financial motivation as a risk factor changes across time; it is especially pronounced in times of budgetary stress. When government budgets shrink, criminal justice actors predictably look for revenue sources to fill the gap. Just as the Supreme Court recognized from the beginning in Tumey, where revenue from LFOs constitutes a significant portion of the total budget for a criminal justice program, the risk of self-dealing is

242 ACLU, In for a Penny, supra note --, at 60.
243 Id. at 61.
244 Id. at 63. Adding to concern over the role of private companies is that fact that they are often exempt from the disclosure requirements imposed on public entities. The lack of routine reporting makes it difficult to determine whether outsourcing, such as for probation supervision, actually yields cost savings. ACLU, In for a Penny, supra note --, at 63.
247 For example, in Michigan’s rural areas, fines go to a state library fund, so courts are disinclined to impose them. Court costs and attorney-related LFOs, on the other hand, are set by the local courts, and they receive the money, leading judges to impose them more often. ACLU, In for a Penny, supra note --, at 38. See also Reynolds & Hall, supra note --, at 11 (noting “tendency for locally funded courts to prioritize local fees over legislative fees” and expressing concern that a judge could “use the threat of waiving fees to force local entities to conform to practices or fee schedules that the judge things are appropriate”).
high. Similarly, when revenue consistently exceeds the marginal costs of running a program, concern should arise.

Finally, and more subtly, LFOs can skew democratic accountability and decision-making. Funds collected from LFOs enable the nation’s criminal justice system to sustain itself. They thus permit legislators and other policy makers to avoid critical scrutiny of the system’s features and scope, with its difficult budgetary prioritizing and tradeoffs.\textsuperscript{248} They also allow the system to grow, as it does in the context of community-based supervision and services provided by private vendors.\textsuperscript{249} The fact that a particular LFO sustains criminal justice agencies – or even promotes growth in the system – is neither intrinsically good nor bad. As we discuss next, an LFO that might be justified in principle as to some defendants runs into problems when it applies too broadly or when it interacts with other LFOs operating at the same time. The entire pell-mell collection of LFOs should be the subject of democratic policy deliberation.

\textbf{B. Risk Reduction from Commissions}

Many of the risk factors we have discussed become visible only to those who understand the criminal justice system as a whole. A party or entity benefitting from a LFO, for instance, might not know or care about its negative effects. As a result, the people or institutions assigned to reduce the risks of LFOs should have a system-wide perspective, with the ability to appreciate how different pieces of the system interact. This takes us beyond the capacity of judges deciding individual challenges to the imposition of a particular LFO. The constitutional and common law principles surveyed in Part III help to identify high-risk areas, but they fall short in building a full, nuanced response to those risks.

For these reasons we recommend creation of an independent commission. The commission should comprehensively review existing LFOs, approve newly proposed LFOs, and monitor and collect data relevant to their legal and policy desirability. Sentencing commissions already operate in almost half of the states to develop, monitor and improve sentencing laws and practices.\textsuperscript{250} In those jurisdictions, the management of LFOs should become part of the portfolio for the sentencing commission.

In jurisdictions without a sentencing commission in place, a specialized commission should handle the job. Louisiana, for instance, operates a “Standing Committee to Evaluate Requests for Courts Costs and Fees,” which

\textsuperscript{248} See Baker, supra note --, at 24 (reflecting on practice from pre-colonial times that “[w]ithout income from the prisoners themselves, the Massachusetts colony never would have been able to keep its murderous, jerry-built, witch-hunting machine going for so long. Only a people that pay for its own system of justice can judge the true worth of its laws.”).

\textsuperscript{249} See supra notes – and accompanying text.

works under the auspices of the Judicial Council of Louisiana.251 The thirteen-member committee evaluates all LFO proposals by Louisiana state agencies and local governments, and makes a recommendation to grant or deny each LFO proposal. The Standing Committee forwards its report to the Judicial Committee and ultimately to the legislature for final approval.252

Whether the work ultimately stays in the hands of a pre-existing unit of government or goes to a new specialized body, the entity should reflect the lessons learned in the sentencing commission context. Sentencing commissions operate best when their members come from a broad array of interested groups.253 Although supporters of commissions often hope for a body insulated from ordinary political pressures,254 the most effective policy comes from a commission that is well connected and able to produce politically feasible information and proposals.255

As with any regulatory agency, an LFO Commission would face the risk of capture by private for-profit entities256 and others with a personal stake in outcomes.257 Administrative law doctrines normally address this risk through transparent procedures, limits imposed on the work of lawyers as they pass through the revolving door from government back into private industry, and other measures.258 Those same policies would be wise and feasible in the context of an LFO Commission.259

251 See General Guidelines of the Standing Committee to Evaluate Requests for Court Costs and Fees, available at http://www.lasc.org/la_judicial_entities/Judicial_Council/CourtCostGuidelines.pdf [hereinafter Standing Committee Guidelines]. The Committee’s guidelines provide that the Committee is the “information-gathering and advisory arm of the Judicial Council created to develop and apply guidelines for evaluating requests for new court costs and fees or increases in existing court costs and fees prior to the submission of such requests to the legislature, and to report the Committee’s findings to the legislature.” Id.

252 Id.


254 Id. at 813-14.

255 Louisiana’s Standing Committee, for instance, is comprised of members of the private bar, judges, court administrators, court clerks, and prosecutors. See Standing Committee Guidelines, supra note --.

256 Such a concern is especially salient today, a time unlike the past when private business interests pushed back against government revenue generation, such as when businesses successfully curtailed prisoner-related industries that were undercutting their market share. See supra note --. Today, private business interests directly benefit, courtesy of government policy, and thus cannot reasonably be expected to exercise countervailing influence.

257 See, e.g., ACLU, In for a Penny, supra note --, at 63 (reporting that in 2007 private probation companies pushed a bill that sought to expand their scope of offender coverage and an increase in supervision fees); Dolnick, Prove Lucrative, supra note – (noting concern over political influence enjoyed by New Jersey halfway house operator).


259 The guidelines for Louisiana’s Standing Committee, for instance, expressly require recusal of any member with a “personal, family or financial interest in the new court cost or fee,” and impose limits on “[a]dvocacy and [l]obbying.” Standing Committee Guidelines, supra note --.
1. Commissions Taking Stock

As an initial matter, the work of the commission would require an inventory of all LFOs authorized or used in a jurisdiction, whether emanating from state or local government. Such an inventory is no trivial task given their large number and dispersion throughout the statutory, regulatory and ordinance codes.\(^\text{260}\) Effective assessment of LFOs first requires that the commission know which are potentially in play and how often they are used.\(^\text{261}\)

With the inventory in place, commission members, supported by staff, would evaluate each LFO, mindful of the two major risk factors noted earlier. The commission could either carry its own authority to revise current law, or it could recommend changes to the legislature or any other body empowered to change the law.

Consistent with its quasi-legislative design, the commission’s work would unavoidably address policy questions. A major threshold question the commission might address is whether to repeal all LFOs that are designed to maintain ordinary criminal justice system operations, and insist that government absorb such costs from general tax revenue rather than passing them on to individuals that the system targets. This basic issue, implicating the neutrality norm, is contestable and should be the subject of transparent deliberation.\(^\text{262}\) A jurisdiction might or might not, for instance, philosophically favor imposing “costs” on offenders, because a guilty party put government to an expense it would not otherwise have incurred.\(^\text{263}\) By the same token,

While advocates or opponents of a proposal can make their position known in writing, they are prohibited from making personal contact with a Committee or Council member and any such contact must be publicly acknowledged by the member. Id.\(^\text{260}\) See, e.g., Report of the California Performance Review, Issues and Recommendations (CPR Vol. IV): GG34 Simplify and Consolidate Court-Ordered Fines (2004), available at http://www.cpr.ca.gov/report/crrpt/issec/gg/part/gg34.html (noting existence of over 3100 LFO’s scattered among 27 different State of California codes); see also People v. Gardner, 2012 WL 5507089 * (Cal. Ct. App. 2012) (noting that ascertainment of LFOs “is consuming considerable time and resources at both the trial and appellate levels”).\(^\text{261}\) A kindred inventory effort is now taking place with collateral consequences, under the auspices of the American Bar Association. See American Bar Association: Criminal Justice Section, Choose a Jurisdiction, http://www.abacollateralconsequences.org/CollateralConsequences/map.jsp.

Given the vicissitudes of revenue flowing from LFOs, a government might also prefer a more stable source of revenue. New Orleans, in the wake of Hurricane Katrina, serves as a prime cautionary example. Bannon et al., Criminal Justice Debt, supra note --, at 20 n.220.\(^\text{263}\) Compare Robert Tobin, National Center for States Courts, Funding the State Courts: Issues and Approaches 50 (1996) (“It is beyond dispute that [the concept of self-supporting courts] is not consistent with judicial ethics or the demands of due process.”) and Or. Rev. Stat. Ann. § 61.655(1) (West 2012) (excluding from payable costs supporting “expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law”) with State v. Young, 238 So. 2d 589, 590 (Fla. 1970) (“It is not unreasonable that one who stands convicted…should be made to share in the improvement of the agencies society has had to employ in defense against the very acts for which he has been convicted.”), and Wash. Rev. Code § 7.68.035(2) (West 2011) (endorsing view of
consistent with the individualization norm, the commission might ask whether
government should be permitted to use criminal justice revenues to fund causes
or functions only weakly or entirely unrelated to criminal justice or in excess of
cost recovery.\textsuperscript{264}

After resolving the threshold questions and moving ahead to evaluate
individual LFOs, the commission should be mindful of the neutrality
considerations driving \textit{Tumey} and its progeny, encompassing benefits to
individuals and the broader system in which they play a part. As the Supreme
Court noted in its recent decision concerning warrantless use of GPS tracking
devices, easing the financial way of the criminal justice system is not cost-
free.\textsuperscript{265} LFOs underwrite the maintenance and growth of criminal justice, a
matter worthy of conscious and deliberate democratic consideration.

Ideally, the LFO Commission (or the legislature that creates the
commission) would articulate such judgments when evaluating LFOs. In
Louisiana, for instance, the Standing Committee’s authorizing legislation
directs the committee to ask whether proposed LFOs are “reasonably related to
the operation of the courts or court system.”\textsuperscript{266} Committee guidelines specify
that the analysis should turn on whether the revenues from the proposed cost or
fee will be used:

- to support a court or the court system or to help defray the court-related
  operational costs of other agencies; or
- to support an activity in which there is a reasonable relationship between the
  fee or court cost imposed and the costs of the administration of justice.\textsuperscript{267}

The commission should also evaluate the effects of a LFO on the criminal
suspect, defendant, or offender. Imposing costs, much like the payment of

\textsuperscript{264} Recent experience in Ohio highlights the decidedly political quality of the issue. The Ohio Judicial Conference, while opposing use of court costs to fund programs “unrelated to the direct operation of maintenance of courts,” in late 2012 recommended demurring on any recommendation to the legislature, noting that “we think it would be difficult to gain support of the Ohio General Assembly for such an effort, especially given the economic restraints on the state budget.” Court Administration Committee, \textit{Ohio Judicial Conference Executive Committee Report} 2 (2012), http://www.ohiojudges.org/_cms/tools/act_Download.cfm?FileID=4306&/2012-11-02%20Court%20Administration.pdf.


\textsuperscript{267} See Standing Committee Guidelines, \textit{supra} note --. The criteria reflect a 2011 statutory
amendment, directing the Judicial Council (and hence Committee) to assess “whether the cost or fee is reasonably related to the operation of the courts or court systems.” La. Rev. Stat. Ann. § 13:62(B) (2011). Based on the standard set forth in the text, in 2012 the Committee recommended adoption of seven of eight proposals that came before it (one of the eight was reported without committee action). \textit{See Supreme Court of Louisiana, Report of the Judicial Council to the Louisiana State Legislature Regarding Requests for Court Costs and Fees} 4 (Mar. 12, 2012) [hereinafter \textit{Standing Committee Report, March 2012}] (on file with authors).
restitution,\textsuperscript{268} might have penological or therapeutic value, promoting self-responsibility. The commission, by virtue of its institutional distance,\textsuperscript{269} would also be well situated to assess the combined effects of all LFOs operating on a single offender.\textsuperscript{270} Numerous studies have chronicled the crushing effect that accumulated LFOs can have on individuals, creating bars to successful reentry\textsuperscript{271} and possibly promoting recidivism.\textsuperscript{272}

As part of this process, the commission should consider the hedonic consequences of LFOs, individually and combined, with sensitivity for how individuals experience them subjectively.\textsuperscript{273} This concern is especially salient with costs and fees, which unlike fines are not tied to the seriousness of the offense. The teachings of procedural justice\textsuperscript{274} suggest that defendants – and communities – might view such LFOs as opportunistic and “piling on” an already poor and disadvantaged subpopulation.\textsuperscript{275} Pre-trial abatement payments, such as the “post and forfeit” regime used in the District of Columbia, and the “prosecution cost” strategy in Minnesota,\textsuperscript{276} in particular, might be perceived as government extortion.

The commission should also examine LFO collection methods. Methods such as revocation of drivers’ licenses, extending probation, precluding voter re-enfranchisement, and sending non-payers to jail (even though Supreme Court precedent prohibits this latter technique) could well inspire ill-will.\textsuperscript{277} When offenders and their communities believe that they have been treated unfairly, re-integration into society becomes more difficult.\textsuperscript{278}

\begin{itemize}
\item \textsuperscript{268} Pritikin, \textit{supra} note --, at 351.
\item \textsuperscript{269} Cf. Brandon Garrett, \textit{Aggregation in Criminal Law}, 95 CALIF. L. REV. 383, 393 (2007) (noting that criminal courts handling individual cases lack the institutional perspective to address broader systemic problems).
\item \textsuperscript{270} Taking account of the cumulative effect of LFOs would not lack precedent, as the Supreme Court has acknowledged the propriety of doing so in the “stacking” of non-prison sanctions in determining whether a jury trial is constitutionally required. \textit{See} Blanton v. City of North Las Vegas, 489 U.S. 538, 542-43 (1989).
\item \textsuperscript{271} \textit{See supra} note --.
\item \textsuperscript{272} \textsuperscript{See, e.g.,} Diller et al., \textit{Maryland’s Parole}, \textit{supra} note --, at 17 (quoting parole agent to effect that computer-generated dunning letters “pose a constant threat” that can promote reoffending); \textit{id.} at 18 (commit new crimes to get money); \textit{id.} at 20 (“the financial burden gives individual the sense that the system is not interested in having him or her succeed; that punishment just continues in a new form after time in prison has been served.”).
\item \textsuperscript{273} \textsuperscript{See, e.g.,} John Bronsteen et al., \textit{Retribution and the Experience of Punishment}, 98 CAL. L. REV. 1463 (2010).
\item \textsuperscript{274} \textit{See generally} TOM R. TYLER & YUEN J. HUO, \textit{TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS} (2002).
\item \textsuperscript{276} \textit{See supra} notes – and accompanying text.
\item \textsuperscript{277} Bannon et al., \textit{Criminal Justice Debt}, \textit{supra} note --, at 22-24, 57-59.
\item \textsuperscript{278} \textit{See} TYLER & HUO, \textit{supra} note --.
\end{itemize}
criminal punishments on targeted populations.\textsuperscript{279} That research and evaluative
capacity should transfer readily to LFOs.

The commission could also answer basic practical questions, such as the
revenue that actually flows from existing LFOs. Research suggests that LFOs
often suffer from low collection rates and that collection expenses can exceed
the revenue they bring in.\textsuperscript{280} Perhaps the public benefits of LFOs do not exceed
their operating costs.\textsuperscript{281} In a jurisdiction that runs these payment systems
without assigning anybody to audit the books, it is hard to know.

If the LFO Commission endorses an expansive menu of LFOs, it still
should think about ways to set priorities among the different devices. A similar
scheme sets priorities that favor restitution vis-à-vis other payments such as
fines.\textsuperscript{282} The commission might also take into account performance effects on
front-line actors. Requiring probation and parole officers, for instance, to spend
their time collecting LFOs might detract from their primary service mission.\textsuperscript{283}

\textsuperscript{279} See, e.g., North Carolina Sentencing and Policy Advisory Commission, \textit{Correctional Program
Evaluation: Offenders Placed on Probation or Released from Prison in Fiscal Year 2008/2009}
\textsuperscript{280} The timing of an LFO may prove important to its revenue effects: research suggests that
governments recover less with respect to parole fees but higher amounts (based on higher
collection rates) for probation-related LFOs. \textit{New York Bar Re-entry Report, supra note --, at 180. LFO amount could also have some bearing on the success of collection efforts: smaller fees increase chance of collection and removal or reentry barriers will save money in the long-term. Rosenthal & Weissman, supra note --, at 21, 34.}
\textsuperscript{281} In 1994, Virginia abolished its parole supervision fee for this reason. Diller, \textit{Maryland Parole, supra note --, at 22.}
\textsuperscript{282} See, e.g., Minn. Stat. § 609.10 sub. 2(b) (2009); Mo. Rev. Stat. § 560.026(1) (2012). Doing so,
given the limited financial resources of most criminal defendants, would oblige conscious
evaluation of the relative costs and benefits of particular LFOs.
\textsuperscript{283} See American Probation and Parole Association, \textit{Issue Paper, supra note --, at 3
(“[C]ollections can easily become the measure of officer and offender performance…[T]he
quality and direction of community supervision may be adversely affected, particularly in LFO
dependent organizations. Direct responsibility for LFO collections compromises the primary role
of probation and parole officers.”).
2. Commissions Looking Forward

Once the LFO commission completes its inventory and evaluation of past practices, it will also need to respond to proposals for new and amended LFOs going forward. Again, it should evaluate potential new LFOs in light of the judicial principles that favor individualization and disfavor self-dealing incentives. In practical terms, this means a preference for LFOs that draw a clear connection between offender conduct and the government expense involved. It also cuts against LFOs that are proposed for purposes of generating revenue and those that are enforced by government units benefiting from the proceeds.

The Louisiana Standing Committee offers an interesting case study in the power of evaluating government revenue incentives. Under its original guidelines, the Committee often rejected proposals because the financial information of the applicant failed to demonstrate “the need for revenues generated by the imposition of any proposed cost or fee.”

Indeed, in its 2010 report, the Committee rejected 5 of 7 requests because the unit of government making the request had not explained the connection between anticipated LFO proceeds and the government’s averred need for revenue. After the legislature amended the standards to exclude consideration of the match between the government’s stated revenue needs and the likely monetary benefit of a proposed LFO, Committee approval became more routine and its scrutiny less vigorous.

The commission’s best tool, as it resists the gravitational pull of incentives for self-dealing that are built into so many LFOs, will be transparency. Payments are more likely to serve the proprietary interests of government actors – and thus violate the judicial neutrality principle – when they are set and

---

284 Standing Committee Guidelines, supra note --, at 3.
285 See, e.g., Supreme Court of Louisiana, Report of the Judicial Council to the Louisiana State Legislature Regarding Requests for Court Costs and Fees 1 (Mar. 29, 2010) (rejecting 5 of 7 requests on this basis) (on file with authors). The Committee denied requests when it had record evidence of improved government budgetary circumstances; projected revenue generated would far exceed costs being sought to be recovered; explicit need was not established, such as to secure new office space or a raise for a government official; and when costs were sought to cover a government’s general operating expenditures. Id. at 3, 4, 6, 11.

In 2011, the Committee rejected a proposal from a state representative seeking increased criminal court costs, by a maximum amount of $5, to fund the state’s Witness Protection Services Board, which the proposal suggested would eliminate the need for an annual supporting appropriation from the legislature. In recommending against approval, the Committee noted that the Board in 2010-2011 had used only a small fraction of its $140,000 appropriation and that the new cost would yield approximately $4.1 million in the coming fiscal year. See Supreme Court of Louisiana, Report of the Judicial Council to the Louisiana State Legislature Regarding Requests for Court Costs and Fees 4 (Apr. 12, 2011) (on file with authors).

Despite the best efforts of the authors, it remains unclear how and why the 2011 legislative amendment came about; the Committee’s restricted scrutiny over governments’ financial needs and justifications of proposed costs and fees, however, has had palpable effect. With the more hands-off review, the success rate of proposals has significantly improved.
collected invisibly. A commission, through exercise of its ongoing duty to monitor and improve the system of LFOs, would routinely collect information about these practices. As important, the commission would publish this information in a format that facilitates comparisons across time and across different units of government. A locality or division of government that appears to use LFOs in a manner out of line with the rest of the state should be subject to closer scrutiny.

The fact that so many LFOs operate at the local level is important when it comes to transparency. The late Professor William Stuntz, in his book *The Collapse of American Criminal Justice*, extols the localization predominant in earlier era American criminal justice systems for what he sees as their enhanced democratization, fairness and lenience. But as one of us has pointed out elsewhere, localization carries with it the risk of parochial excess. The low visibility practices of local officials, sometimes based on murky legal authority and proceeding without regular public scrutiny, make this danger a vivid one for LFOs.

Local actors with the incentive to move aggressively in collecting funds can do so more easily when nobody is watching closely. By way of example, for many years the sheriff of Clinch County, Georgia charged room and board for jail without any statutory authority to do so. Only judicial intervention put an end to the practice. Similar excesses occur at the hands of local prosecutors and trial courts, and the strong appeal of added revenue keeps

---


288 STUNTZ, supra note --, at 311-12.


292 Experience in Louisiana again affords an instructive example. As a result of a legislative change in 2011, the Standing Committee was expressly stripped of purview over proposals by “mayor’s courts,” which the Committee called “essentially revenue generators for local public safety and other municipal operations that may not be associated with the administration of justice...[and therefore] generally not likely to receive a recommendation from the Judicial Council.” Standing Committee Report, March 2012, supra note --, at 2.

293 See Rosenthal & Weissman, supra note --, at 26. In Massachusetts, a county sheriff, functioning as jailer, charged inmates for haircuts at a rate far above the state-set amount and imposed other statutorily unauthorized costs for services such as GED testing. Bouza v. Sheriff of Bristol County, 918 N.E.2d 823, 831-34 (Mass. 2010).

these practices alive. The need to monitor localization will become even more important if other states follow the lead of California’s “realignment” policy, which would usher into local jails more of a state’s criminal offenders.

A commission, serving as the institutional gatekeeper of LFOs and charged with continued monitoring, could protect against such local excesses. State policy positions will result from evidence-based conscious choices, not haphazard reactions to uncoordinated funding requests from system actors under political and financial pressure. While judicial challenges still can play a role to keep matters in check, the commission would have main institutional responsibility over LFOs.

Finally, by collecting and rationalizing LFOs, a commission could improve plea-bargaining, by far the most common mechanism used to resolve criminal cases today. The Supreme Court, with Padilla v. Kentucky and

---

295 Experience in New York State highlights this strong pull. There, in the 1990s after the state allowed localities to impose and keep an administrative fee of $30 a month on each DWI probationer, localities enacted laws of their own allowing for fees to be collected from non-DWI probationers. New York Bar Re-entry Report, supra note --, at 167. In 2003, an Opinion by the State Attorney General concluded that the local initiatives were unlawful, as they were preempted by state law; nevertheless, local practice continued, along with the revenue stream afforded. Id. at 167-68. For examples of similarly aggressive behaviors by localities see John Gibeaut, Get Out of Jail—But Not Free: Courts Scramble to Fill Their Coffers by Sticking Ex-Cons with Fees, ABA J., July 2012, at 54; Bannon et al., Criminal Justice Debt, supra note --, at 10 & n.26; Reynolds & Hall, supra note --, at 10-11; New York Bar Re-entry Report, supra note --, at 87-89; R. Barry Ruback et al., Economic Sanctions in Pennsylvania: Complex and Inconsistent, 49 DUQ. L. REV. 751 (2011).


297 The commission could also identify the variations in burdens (and services) that flow from fragmented enforcement, judicial and corrections systems. See Reynolds & Hall, supra note --, at 10 (quoting A.B.A., STANDARDS RELATING TO COURT ORGANIZATION 99 (1974)) (“Local financing contributes to a fragmented court system where ‘services vary according to a locality’s ability to pay.’”).

298 See New York Bar Re-entry Report, supra note --, at 169 (“The creation and increase of fees, surcharges, or other financial penalties [occurs] in a vacuum. They are seldom, if ever, seen by the legislature in the context of the sum of all penalties. Each increased financial penalty viewed in isolation appears to be a good idea for revenue production.”); Koppel, supra note – (noting that head of local Oklahoma “DA Probation Supervision” was “slow to implement the program because he was worried that some [sic] could raise conflict concerns. But budgetary pressures prompted him to launch the program.”).

299 See, e.g., State v. Payne, 225 P.3d 1131, 1145 (Ariz. Ct. App. 2009) (invalidating on preemption grounds county “prosecution fee” not authorized by state statute). For examples from an earlier era, evincing concern for disparate intra-state applications, see, e.g., State v. Gregori, 2 S.W. 2d 748 (Mo. 1928) (invalidating $1 assessment in criminal cases only in counties having eight or more district courts); Ex Parte Ferguson, 132 S.W.2d 132 S.W.2d 408, 410 (Tex. App. 1939) (invalidating on equal protection grounds a statute that assessed a varying fee upon defendants based on county population).

300 See Stuntz, supra note --, at 7 (noting that over 95% of all criminal cases today are resolved by pleas).
Missouri v. Frye, has begun to specify the duties of defense lawyers, during plea negotiations, to give their clients adequate advice about sentencing and other consequences of a conviction. An attorney’s full and open discussion of the LFOs at stake in a given case will not likely become a Sixth Amendment requirement any time soon. Professional ethics, however, can pick up where Sixth Amendment doctrine leaves off. Providing defendants a forthright explanation of the nature and extent of LFOs aligns with the ethical duty of defense counsel to ensure that clients fully understand plea consequences. A commission, by collecting LFO information and making them more salient, will make it realistic to expect such advice from defense attorneys.

Wider access to LFO information could also encourage prosecutors to consider during plea negotiations the combined effects of LFOs that flow from convictions. While judges play a decidedly secondary role in the plea-bargaining process, plea colloquies can reinforce to defendants the true consequences of a guilty plea. Such judicial involvement is especially important with indigent defendants charged with minor offenses. These defendants, who are common targets of LFOs, typically lack the input of counsel because they do not face actual imprisonment.

301 130 S. Ct. 1473 (2010) (holding that defense counsel’s failure to inform client of likely deportation consequence of conviction constituted ineffective assistance of counsel). See also Stephanos Bibas, Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection, 99 CAL. L. REV. 1117, 1147 (2011) (noting that Padilla requires courts to “focus[] on the importance of particular consequences rather than their criminal or civil label.”); id. (“The Sixth Amendment test should not be whether a consequence is labeled civil or collateral, but whether it is severe enough and certain enough to be a significant factor in criminal defendants’ bargaining calculus.”).

302 132 S. Ct. 1399 (2012) (holding that defense counsel’s failure to inform a client of a favorable plea offer constituted ineffective assistance of counsel).

303 Lower courts, addressing the Sixth Amendment duties of defense counsel to advise their clients about collateral consequences, are now extending Padilla’s logic beyond the immigration/deportation context in which it arose. See Margaret Colgate Love, Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation, 31 ST. LOUIS UNIV. PUB. L. REV. 105-11 (2011).

304 However, LFOs, certainly when statutorily required, have a “close connection to the criminal process,” as required by Padilla. See Padilla, 130 S. Ct. at 1482.

305 See, e.g., Liberti v. United States, 516 U.S. 29, 50 (1995) (“It is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement.”).

306 See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2010) (prosecutors have “specific obligations to see that the defendant is accorded procedural justice”); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION STND. 3-1.2(c) (3d ed. 1993).


308 At least in one jurisdiction, however, the scale of LFOs has become so burdensome that judges who formerly specified each LFO in court now only indicate the total aggregated amount owed by defendants. See Mary Katzenstein & Mitali Nagrecha, A New Punishment Regime, 10 CRIMINOLOGY & PUB. POL’Y 555, 559 n.7 (2011).

309 See Alabama v. Shelton, 535 U.S. 654, 662 (2002) (reaffirming the “actual imprisonment” standard” for entitlement of publicly paid counsel under the Sixth Amendment); see also Justin Marceau & Nathan Rudolph, The Colorado Counsel Conundrum: Plea Bargaining,
CONCLUSION

Pecuniary benefits for enforcers have always figured in criminal justice. In the 1920s, the Supreme Court saw the need to discipline a system of incentivized criminal justice. Today, in an environment marked by less brazen and direct financially motivated behaviors, we see a profusion of techniques, yielding monetary benefit, again complemented by private interests with profit motives. The modern conditions for unchecked growth are evident: low visibility choices made by many different actors, often operating unaware of or in disregard for one another.

In some ways, today’s LFO-dominated criminal justice system seems like a throwback. At the same time, the nation now finds itself on the verge of something new in criminal justice. Having at last awakened to the adverse human and fiscal consequences of mass incarceration, criminal justice policy makers are showing greater willingness to pursue alternative approaches at less expense to taxpayers. In the midst of this long-term shift, revenue from LFOs will continue to have strong appeal, especially given ongoing budget problems.

An LFO Commission, along the lines suggested here, would temper this pressure. A commission will enable the development of coherent, fair and thoughtful options, offering a system-wide vantage point and a systematic mechanism for ongoing evaluation. Because it would evaluate LFOs in light of insights developed over time in judicial challenges to the validity of LFOs, the commission will be able to make these judgments on a principled basis. In so doing, it will check the mercenary tendency of American criminal justice, and help fulfill the hope of the Supreme Court, expressed in its earliest encounter with mercenary criminal justice: to “hold the balance nice, clear, and true” between governments and those they seek to convict and punish.


Such transparency assumes even greater importance given the increasing practical irrelevance of Bearden v. Georgia, 461 U.S. 660 (1983), which held that a criminal justice debtor can be imprisoned only upon a finding of “willful” failure to pay. Today, the case is often construed narrowly or disregarded altogether. See Ann K. Wagner, Comment, The Conflict over Bearden v. Georgia in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors’ Prisons, 2010 U. CHI. LEGAL F. 383, 391-96 (noting tendency of courts to not apply Bearden in instances of plea bargains); Harris et al., Drawing Blood, supra note --, at 1784 (surveying instances in which the Bearden rule is ignored altogether); ACLU, In for a Penny, supra note --, at 34-35, 47-52 (same); Diller, Hidden Costs, supra note --, at 20 (same). Worse yet, it is not unusual for jurisdictions to also charge for the rearrest and reincarceration resulting from failure to pay. See Harris et al., Drawing Blood, supra note --, at 1784; ACLU, In for a Penny, supra note --, at 43.

See, e.g., Jan Moller, Prison Sentence Reform Efforts Face Tough Opposition in the Legislature, TIMES-PICAYUNE (New Orleans), May 16, 2012.