4-2023

Reflections on Fees and Fines as Stategraft

Rebekah Diller
Benjamin N. Cardozo School of Law, rebekah.diller@yu.edu

Mitali Nagrecha
Justice Collective

Alicia Bannon
Brennan Center for Justice

REFLECTIONS ON FEES AND FINES AS STATEGRAFT

REBEKAH DILLER,* MITALI NAGRECHA† & ALICIA BANNON‡

In A Theory of Stategraft*, Bernadette Atuahene advances the concept of "stategraft" to describe situations in which "state agents transfer property from persons to the state in violation of the state's own laws or basic human rights." This Essay delineates the ways in which criminal legal system fees and fines can be characterized as stategraft and explores the value of this concept for social movements. In many ways, the stategraft frame, with its focus on illegality, fits well with much of the litigation and advocacy against unconstitutional fees-and-fines practices that have occurred over the last decade. Exposing illegal practices such as the operation of debtors' prisons laid the groundwork for a more fundamental critique of the use of the criminal legal system as a revenue generator for the state. The Essay cautions, however, against relying too heavily on illegality to describe what is wrong with fees-and-fines regimes in light of courts' reluctance to impose robust legal protections against state practices that saddle those who encounter law enforcement with debt. Relying on an illegality critique may make it harder to attack entrenched practices that courts are inclined to bless as legal and obscure more fundamental dynamics of predation and regressive revenue redistribution. At this juncture, calling attention to these structural issues is likely to be more fruitful*

* Clinical Professor of Law, Benjamin N. Cardozo School of Law.
† Director, Justice Collective, Berlin, Germany.
‡ Director, Judiciary Program, Brennan Center for Justice at New York University School of Law. The authors previously collaborated on ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), https://www.brennancenter.org/media/275/download. The authors wish to thank Lauren-Brooke Eisen, Lisa Foster, and Brian Highsmith for their helpful comments on earlier drafts. We also thank Gabrielle Fressle and the other editors of the *New York University Law Review* for their valuable editorial suggestions.

both as an organizing tactic and as a description of the harms posed by fees and fines.

INTRODUCTION

"Fees and fines" refers to a complex system of laws, court rules, and other policies that, together, authorize the state to extract financial resources from people facing criminal charges or traffic and municipal code violations. This system also permits the state to pursue the collection of fees and fines using its coercive power, including through arrest and incarceration. Fines are justified by the state as serving the purposes of punishment and deterrence.[1] Fees, in contrast, are imposed to raise revenue. They often are denominated as "user" fees that pay for particular government services,[2] though the person assessed the fee may not actually "use" those services and the revenue collected may go to fund an entirely different governmental function.[3] In practice, both fees and fines operate as a regressive tax that bolsters state coffers.

In *A Theory of Stategraft*, Bernadette Atuahene advances the concept of "stategraft" to describe situations in which "state agents transfer property from persons to the state in violation of the state's own laws or basic human rights."[4] This Essay assesses the applicability of the stategraft framework to fees-and-fines systems and reflects on the utility of stategraft as a tool for mobilization and reform. Stategraft, with its emphasis on budget incentives for illegal conduct, captures many of the most egregious abuses in fees-and-fines systems and illuminates the underlying corruption at their root. However, there are limits to its descriptive power in this context because the law gives jurisdictions significant latitude to extract revenues in regressive, racialized, and punitive ways. Evidence is also emerging that, on balance, fees and fines often may not actually yield net revenue for the state. While early fees-and-fines advocacy often focused on illegal conduct, as the movement matures and focuses on broader systemic reform, calling attention

---

1 MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 6 (2019), https://www.brennancenter.org/media/5290/download [https://perma.cc/B2DW-E5ZX].

2 *See id.* (noting that fees are meant to shift the burden of the criminal legal system from taxpayers to the "users" of the system). We use the term "fees" here to broadly encompass surcharges, assessments, court costs, and other economic sanctions whose purpose is to raise revenue for the state. In addition to fees and fines, other economic sanctions include asset forfeiture, which involves the seizure of assets (including cash, cars, and real property) alleged to be involved in a crime, and restitution, which is supposed to compensate victims for damages related to a criminal offense. *See* MODEL PENAL CODE: SENTENCING § 6.04(A)-(D) (AM. L. INST. 2017). While restitution can result in substantial debt for persons with criminal convictions and the state often uses asset forfeiture to raise revenue, they are not our primary focus here.

3 *See, e.g.*, MENENDEZ ET AL., *supra* note 1, at 6 (describing use of criminal fees in certain states to fund general state budgets, perks for the judiciary, and public buildings, including a museum).

4 Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 1 (2023).

to more fundamental dynamics of predation[5] and regressive revenue redistribution may be a more fruitful line of critique.

As with the rest of the United States's punishment system, criminal legal debt most acutely affects Black and Brown communities.[6] This is partly a function of the disproportionately heavy policing of Black and Brown communities,[7] as well as the fact that these communities have higher rates of poverty on average.[8] In addition, many majority Black suburbs face unique budgetary constraints due to a lack of revenue-generating commercial investment that can heighten the pressure to collect fees and fines to close budget gaps.[9]

The use of the criminal legal apparatus to extract resources from Black communities is not a new phenomenon. After the end of slavery, southern states extracted labor from Black individuals through the convict leasing

---

[5] *See infra* note 12 and accompanying text (introducing the concept of predation).

[6] CORTNEY SANDERS & MICHAEL LEACHMAN, CTR. ON BUDGET AND POL'Y PRIORITIES, STEP ONE TO AN ANTIRACIST STATE REVENUE POLICY: ELIMINATE CRIMINAL JUSTICE FEES AND REFORM FINES (2021), https://www.cbpp.org/research/state-budget-and-tax/step-one-to-an-antiracist-state-revenue-policy-eliminate-criminal [https://perma.cc/W3A7-YGQ3] (describing how the fees-and-fines regime arose from an effort to reestablish racial oppression after slavery was abolished and how therefore the fiscal policies of these efforts disproportionately affect people of color); *e.g.*, CHRIS MAI & MARIA RAFAEL, VERA INST. OF JUST., THE HIGH PRICE OF USING JUSTICE FINES AND FEES TO FUND GOVERNMENT IN FLORIDA 2 (2020), https://www.vera.org/downloads/publications/the-high-price-of-using-justice-fines-and-fees-florida.pdf [https://perma.cc/G65G-62WE] (noting that fines and fees in Florida disproportionately affect Black, Brown, and low-income families because of the racial and economic disparities in arrests and policing).

[7] *See* Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system [https://perma.cc/762R-SSH2] (collecting and summarizing numerous studies showing racial disparities in police stops and arrests); *see also* Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1475 (2021) (collecting studies showing that "Black and Latinx motorists in particular are disproportionately stopped by police for traffic violations and disproportionately questioned, frisked, searched, cited, and arrested during traffic stops"); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1486 (2016) ("[N]eighborhoods consisting of predominantly black residents are more likely to be deemed disorderly and subject to broken windows policing than predominantly white neighborhoods.").

[8] John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html [https://perma.cc/S8ZQ-9PE9] ("Blacks and Hispanics continue to be over-represented in the population in poverty relative to their representation in the overall population.").

[9] *See* Josh Pacewicz & John N. Robinson III, *Pocketbook Policing: How Race Shapes Municipal Reliance on Punitive Fines and Fees in the Chicago Suburbs*, 19 SOCIO-ECON. REV. 975, 987–88 (2021) (finding that use of fines and forfeitures was most pronounced in relatively affluent Black suburban areas).

system.[10] Fees, fines, and other similar practices represent the monetization of longstanding extractive relationships, which scholars have termed "predation," between agents of the criminal justice system and Black communities.[11] Since at least the 1980s, fees and fines have proliferated[12] and impacted more and more people as the United States's criminal punishment apparatus has grown.[13] In today's bloated system, state courts each year consider about 13 million misdemeanor filings and roughly 44.4 million citations for traffic and other municipal offenses.[14] These cases often arise from selective, revenue-driven policing that targets Black and Brown communities, and they frequently result in the imposition of fees and fines.[15] In addition, felony convictions, which apply to an estimated eight percent of

---

10 *See* Atuahene, *supra* note 4, at 46. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (describing the pervasive practice throughout the South of arresting Black people for petty offenses and then "leasing" them to local business interests to perform forced labor).

11 Joshua Page & Joe Soss, *The Predatory Dimensions of Criminal Justice*, 374 SCIENCE 291, 291 (2021) (introducing the concept of predation, which describes "relations and practices that (i) are based on a subordinated group's oppression and marginalization and (ii) leverage the group's vulnerabilities and needs to pursue projects of expropriation, extreme exploitation, and/or dispossession").

12 Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1758 (2010) (describing how monetary sanctions in the criminal process have existed since the end of slavery and had grown dramatically by the late 1980s).

13 *See* Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing—Workable Limits on Mass Punishment*, 48 CRIME & JUST. 255, 260 (2019) (describing the period from the early 1970s to the late 2000s as America's "punishment buildup period," during which "all American states expanded the per capita use and severity of every major form of criminal punishment—by stunning amounts").

14 CT. STAT. PROJECT, STATE COURT CASELOAD DIGEST: 2018 DATA, at 7, 17 (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf [https://perma.cc/YS2Y-USK5] (providing the estimate of total traffic/violations cases and describing the constituent case types, which include non-criminal traffic violations, ordinance violations, parking violations, and a residual "other" category, with non-criminal traffic comprising approximately seventy-one percent of total traffic/violations cases); *see* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 41 (2018) (concluding that over 13 million misdemeanor cases were filed in 2015 based on original research); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018) (estimating that 13.2 million misdemeanor cases are filed each year).

15 *See supra* notes 6–8 and accompanying text; Sharon Brett, *Reforming Monetary Sanctions, Reducing Police Violence*, 4 UCLA CRIM. JUST. L. REV. 17, 25 (2020) (discussing how police deploy broken windows policing to generate fees and fines in low-income and Black and Brown communities); *see, e.g.*, U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015) [hereinafter FERGUSON REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/5MS9-XBKL] (concluding that Ferguson's law enforcement practices focused on generating revenue, rather than public safety needs, and both reflected and exacerbated racial bias).

U.S. adults,[16] are often accompanied by substantial criminal legal debts.[17]

Fees and fines, along with asset forfeitures, operate as a form of revenue extraction across the country and generated a total of $16 billion for state and local governments in fiscal year 2019.[18] On average, approximately 3.3% to 4.3% of revenue generated by municipalities comes from fines and forfeitures, depending on the size of the municipality.[19] Hundreds of municipalities rely even more heavily on fees-and-fines revenue,[20] including Ferguson, Missouri, whose practices brought the issue of fees and fines onto the national agenda.[21] In 2012, fines and forfeitures in Ferguson brought in approximately $2.2 million in revenue, or about $105 per capita, and made up twenty percent of the city's own-source revenue.[22] In addition to funding municipal budgets, fees and fines also fund state budgets, including state

---

16 Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1795 (2017).

17 *See, e.g.*, MENENDEZ ET AL., *supra* note 1, at 40 (noting that in Florida, fines for a felony start at $5,000); Harris et al., *supra* note 12, at 1773–74 (finding mean amount of court debt owed by persons with felony convictions in Washington State was $10,840).

18 ARAVIND BODDUPALLI & LIVIA MUCCIOLO, URB. INST., FOLLOWING THE MONEY ON FINES AND FEES: THE MISALIGNED FISCAL INCENTIVES IN SPEEDING TICKETS 1 (2022) (reporting U.S. Census Bureau data on fees, fines, and forfeiture revenue collected by state and local governments).

19 April D. Fernandes, Michele Cadigan, Frank Edwards & Alexes Harris, *Monetary Sanctions: A Review of Revenue Generation, Legal Challenges, and Reform*, 15 ANN. REV. L. & SOC. SCI. 397, 398 tbl.1 (2019). Census Bureau data shows that cities in large central metropolitan areas collected approximately $40 per capita from fines and forfeitures in 2012 and that rural municipalities collected approximately $25 per capita. *Id.* at 398–99. However, it is important to note that these sanctions are not distributed evenly in a per capita way, but rather are "concentrated on a much smaller group (those who have contact with the legal system), compared to the broad group of taxpayers who pay for government operations under public financing models." BRIAN HIGHSMITH, NAT'L CONSUMER L. CTR., COMMERCIALIZED (IN)JUSTICE: CONSUMER ABUSES IN THE BAIL AND CORRECTIONS INDUSTRY 23 (2019), https://www.nclc.org/wp-content/uploads/2022/09/report-commercialized-injustice.pdf [https://perma.cc/R67Q-VGHA].

20 *See* Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html [https://perma.cc/T35F-H8ZU] (finding that more than 730 municipalities rely on fines and fees for at least ten percent of their revenue); *see also* Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1090 (2017), https://www.journals.uchicago.edu/doi/10.1086/691354 [https://perma.cc/NW2W-S3FD] (finding that eighty-six percent of the over nine thousand U.S. cities studied obtain at least some revenue through fines and fees).

21 *See* U.S. COMM'N. ON C.R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 1 (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf [https://perma.cc/4NZC-7S42] (noting that the Department of Justice investigation into Ferguson's police force, municipal court system, and fines and fees "brought nationwide attention to these issues").

22 Fernandes et al., *supra* note 19, at 399.

general funds, schools, and specific criminal legal agencies such as courts and probation departments.[23] Usually, reported revenue figures reflect money flowing into the system but not the costs of collection—a task complicated by the fact that many different entities are involved in enforcement and each operates at different levels of government.[24] As a result, it is often unknown whether a given jurisdiction is, in fact, profiting from its fines and fees.[25]

As we detailed in our 2010 report, *Criminal Justice Debt: A Barrier to Reentry*, many states assess fines, fees, and surcharges without adequate consideration of a defendant's ability to pay, often resulting in defendants owing significant sums.[26] For example, a recent article about the harms of fees and fines in New Orleans featured the case of a person who was waiting for his disability benefits to be approved and therefore had limited income, yet owed $1,051 in court costs.[27] In an opinion piece in a New Jersey paper, two activists personally affected by court debt shared that one of them owed $56,000 in debt.[28] Even when fees and fines do not amount to eye-popping totals, they can still be unpayable, especially in light of the disproportionate way the criminal legal system targets the poor.[29] Despite reforms in some jurisdictions requiring courts to consider an individual's ability to pay before assessing fees and fines, the national norm is still to impose these sanctions without regard for a person's financial circumstances.[30]

Once assessed, fees and fines trap individuals in a vicious cycle of debt

---

23 *See* MENENDEZ ET AL., *supra* note 1, at 6 (summarizing the sources funded by revenue from fines and fees); *see, e.g.*, MAI & RAFAEL, *supra* note 6, at 2 (describing how revenues generated by fines and fees in Florida fund the budgets of certain agencies, such as court clerks).

24 *See* MENENDEZ ET AL., *supra* note 1, at 5, 10.

25 *See id.*

26 ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 13 (2010), https://www.brennancenter.org/media/275/download [https://perma.cc/GVJ9-LSWT] (finding that at least fourteen of the fifteen states examined had at least one mandatory fee that courts are required to impose on defendants regardless of their financial resources).

27 Kalena Thomhave, *Louisiana Court Officials Resist Reforms to End the Predatory Fines and Fees that Fund Their Offices*, BOLTS MAG. (Apr. 1, 2022), https://boltsmag.org/louisiana-reforms-stall-for-predatory-fines-and-fees [https://perma.cc/9EV5-8JSP].

28 Stephon Whitley & Boris Franklin, *Opinion*: *How Fines and Fees Stop Us from Paying Our Debt to Society*, NJ.COM (Aug. 7, 2022), https://www.nj.com/opinion/2022/08/how-fines-and-fees-stop-us-from-paying-our-debt-to-society-opinion.html [https://perma.cc/2PMD-PNFA].

29 *See supra* note 8 and accompanying text.

30 In its comprehensive survey of fees-and-fines policies across the country, the National Center for Access to Justice found that just twelve states had a law or policy requiring courts to assess ability to pay before imposing a financial sanction. *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., https://ncaj.org/state-rankings/justice-index/fines-and-fees [https://perma.cc/PP77-P3RQ]. The NCAJ study notes that it did not assess whether "practice on the ground" conformed to policies on the books. *Id.*; *see also* Fernandes et al., *supra* note 19, at 404 (describing recent legal challenges to jurisdictions' failure to assess ability to pay).

and punishment. Jurisdictions often add additional surcharges for late payment and/or extended payment timelines, revoke or block eligibility for driver's licenses and professional licenses, and engage private debt collectors who add additional collection fees.[31] So-called "alternatives," such as community service, often serve as a similar trap to criminal justice debt, imposing burdensome requirements that are hard to comply with while also trying to meet life's other obligations.[32] When debts are not paid all at once, courts, probation officers, or parole officers monitor payment and respond to failures to pay.[33] This reality traps many in cycles of reporting obligations, warrants, arrests, court hearings, probation violations, and new sanctions.[34] It is not infrequent that people are jailed as a result of their inability to pay court debts, notwithstanding the formal prohibition against debtors' prisons.[35]

This Essay considers the applicability and utility of employing the stategraft framework when considering these complex systems of fees and fines. Part I describes fees-and-fines practices that most align with the stategraft definition. Part II examines some of stategraft's descriptive limits when applied to fees and fines. Finally, Part III reflects on the value and limits of stategraft as a framework to mobilize reform at this juncture.

---

31 BANNON ET AL., *supra* note 26, at 5, 17–18; *see also* CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 15 (2016), https://cjdebtreform.org/sites/criminaldebt/themes/debtor/blob/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform.pdf [https://perma.cc/92PP-XH2E] (introducing the concept of a "poverty trap," a policy that disproportionately affects the poor and inhibits the person's "ability to make a living or meet basic needs and obligations," such as suspending the driver's license of a person who cannot afford to pay a fine).

32 *See* LUCERO HERRERA, TIA KOONSE, MELANIE SONSTENG-PERSON & NOAH ZATZ, UCLA LAB. CTR., WORK, PAY, OR GO TO JAIL: COURT-ORDERED COMMUNITY SERVICE IN LOS ANGELES 3 (2019), https://www.labor.ucla.edu/wp-content/uploads/2019/10/UCLA_CommunityServiceReport_Final_1016.pdf [https://perma.cc/7JB7-XQME] (describing the barriers to completing community service that "frequently result[] in arrest, incarceration, and deepening debt").

33 *See* BANNON ET AL., *supra* note 26, at 21–25 (describing the roles of courts and probation and parole agencies in debt collection); *see also* SHARON BRETT, NEDA KHOSHKHOO & MITALI NAGRECHA, CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., PAYING ON PROBATION: HOW FINANCIAL SANCTIONS INTERSECT WITH PROBATION TO TARGET, TRAP, AND PUNISH PEOPLE WHO CANNOT PAY 7 (2020), https://mcusercontent.com/f65678cd73457d0cbde864d05/files/f05e951e-60a9-404e-b5cc-13c065b2a630/Paying_on_Probation_report_FINAL.pdf [https://perma.cc/7N6M-PF7S].

34 *See* Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. MIA. RACE & SOC. JUST. L. REV. 1, 17–18 (2020) (describing examples of these cycles in Georgia and Mississippi).

35 *See id.*; AM. C.L. UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 5 (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [https://perma.cc/TWS4-RA8B] (noting that despite the Supreme Court's ruling in *Bearden v. Georgia* that imprisoning a probationer who failed to pay his criminal debts violated the Equal Protection Clause, indigent defendants continue to be imprisoned for this reason).

I
FEES AND FINES AS ILLEGAL "STATEGRAFT"

Professor Atuahene has advanced the concept of "stategraft" to describe a unique type of corruption in which "state agents transfer property from persons to the state in violation of the state's own law or basic human rights."[36] As Professor Atuahene explains, fees-and-fines practices can be instances of stategraft.[37] In this section, we describe some of the fees-and-fines practices that most align with the stategraft definition, in that they entail the extraction of funds from persons involved with the criminal legal system in ways that have been recognized as illegal. In the past decade, advocates have succeeded in calling attention to some of the worst excesses of fees-and-fines regimes by demonstrating their illegality. And by applying fundamental constitutional principles—whether through litigation or other advocacy tools—to entrenched criminal system practices that had evaded review, the movement has shifted the policy discourse about what fees and fines may be assessed and how they may be collected.

It is widely accepted that the operation of debtors' prisons is illegal.[38] In the criminal debt context, the Supreme Court has established in a series of cases, culminating in *Bearden v. Georgia*, that it violates the Fourteenth Amendment to incarcerate people solely because they are unable to pay a fee or fine.[39] Fairly read, *Bearden* may also limit other harsh collection mechanisms, such as driver's license suspensions and the issuances of arrest warrants based on the failure to meet a payment plan deadline.[40] Nonetheless, many jurisdictions continue these practices, including incarcerating

---

36 Atuahene, *supra* note 4, at 3.

37 *Id.* at 4–6, 45.

38 *See* BANNON ET AL., *supra* note 26, at 19 (noting that the Supreme Court has issued protections limiting the use of debtors' prisons); *see also* Nino C. Monea, *A Constitutional History of Debtors' Prisons*, 14 DREXEL L. REV. 1, 3 (2022) (describing how forty-one state constitutions have provisions banning or limiting debtors' prisons).

39 Bearden v. Georgia, 461 U.S. 660, 672–73 (1983) (holding that the Fourteenth Amendment bars courts from revoking probation for failure to pay a fine without first inquiring into whether the individual has the ability to pay and willfully failed to do so); *see also* Tate v. Short, 401 U.S. 395, 398 (1971) (holding that the Constitution prohibits states from imprisoning an individual solely because that individual is unable to immediately pay a fine); Williams v. Illinois, 399 U.S. 235, 242–43 (1970) (holding that states cannot imprison someone who is financially unable to pay a fee or fine beyond the maximum duration fixed in the statute).

40 *See* Beck v. Elmore Cnty. Magistrate Ct., 489 P.3d 820, 834 (Idaho 2021) (holding that it violated the Equal Protection Clause for a state to issue a warrant for an individual's failure to make payment under a fines-and-fees payment plan without first conducting an inquiry into the individual's ability to pay); VANITA GUPTA, PRINCIPAL DEPUTY ASST. ATT'Y GEN., C.R. DIV. & LISA FOSTER, DIR., OFF. FOR ACCESS TO JUST., DEAR COLLEAGUE LETTER 6 (Mar. 14, 2016) [hereinafter DOJ 2016 DEAR COLLEAGUE LETTER], https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf [https://perma.cc/HH27-9VYN] (warning courts that *Bearden* and its progeny prohibit automatic driver's license suspensions without a determination of an individual's ability to pay).

individuals without conducting ability-to-pay hearings (in violation of *Bearden*), issuing arrest warrants for missed payments, or jailing individuals for non-payment.[41]

Targeting Black and Brown communities for revenue extraction is similarly illegal when sufficient evidence of racial bias can be brought to light. After the 2014 Ferguson uprisings, the Department of Justice conducted an investigation and found in its report (the "Ferguson report") that "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs."[42] Those practices occurred, according to the Ferguson report, "at least in part, because of unlawful bias against and stereotypes about African Americans."[43] In addition, jurisdictions' fees-and-fines practices may have disparate racial impacts that implicate civil rights laws.[44]

Fees and fines may also present conflicts of interest that rise to the level of due process violations when courts, police departments, prosecutors, and other system actors directly financially benefit from them.[45] For example, the Fifth Circuit has twice held that criminal defendants in New Orleans criminal courts had their due process rights violated because the judges setting bail and determining the defendants' ability to pay fees and fines benefited from and administered judicial expense funds, which received financing from a

---

41 *See, e.g.*, Carter v. City of Montgomery, 473 F. Supp. 3d 1273, 1289 (M.D. Ala. 2020) (describing the city agency practice of seeking probation revocation for missed payments despite being on notice that the individual was disabled or unemployed and describing the municipal court practice of issuing arrest warrants for the failure to appear at a probation revocation hearing); Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons [https://perma.cc/YY4E-RST2] (noting that courts struggle to interpret and apply *Bearden* and that jailing for non-payment is still a prevalent practice).

42 FERGUSON REPORT, *supra* note 15, at 2.

43 *Id.* at 5; *see also* Atuahene, *supra* note 4, at 4–5.

44 *See, e.g.*, Ga. State Conf. of the NAACP v. City of LaGrange, 940 F.3d 627, 630 (11th Cir. 2019) (holding that the district court erred in dismissing the plaintiffs' claim, which alleged that a municipal policy prohibiting residents from opening utility accounts if they had outstanding court debt had a disparate impact on Black residents in violation of the Fair Housing Act).

45 *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 523 (1927) (establishing that it violates due process to subject a criminal defendant to a "judge [that] has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case"); Ward v. Vill. of Monroeville, 409 U.S. 57, 59–60 (1972) (holding that it violated due process to compel the petitioner to stand trial for traffic offenses before the mayor, as the mayor was responsible for village finances, and financial penalties formed a major part of the village's funding); Caliste v. Cantrell, 937 F.3d 525, 531–32 (5th Cir. 2019) (holding that a judge's dual role in co-administering the judicial expense fund and presiding over bail hearings created a conflict of interest that violated due process); Cain v. White, 937 F.3d 446, 448–49, 454 (5th Cir. 2019) (holding that it violated due process for judges to make ability-to-pay determinations for defendants when the judges also controlled an expense fund supported by fines-and-fees revenue and the expense fund paid the salaries of court staff).

bail bond surcharge and court fees and fines.[46] Advocates have also challenged ticketing, forfeiture, and other practices as violating due process, particularly when municipal actors garner an excessive amount of their budgets from fees and fines.[47]

The Eighth Amendment's prohibition against imposing "excessive fines" also can give rise to claims of illegal extraction when the fine is "grossly disproportional to the gravity" of the offense.[48] The Supreme Court has not yet decided—and lower courts have taken a variety of approaches to—the question of whether an individual's ability to pay should factor into a determination of whether the fine is excessive.[49] The Washington State Supreme Court recently held that ability to pay should factor into the analysis of what is disproportional and found that costs of $547.12 violated the Excessive Fines Clause given the defendant's circumstances.[50]

In a recent "Dear Colleague" letter to state and local courts, the Department of Justice reminded jurisdictions of their obligations to abide by these federal constitutional and statutory requirements when imposing and collecting fees and fines.[51] In addition to the limits described above, the letter cautions jurisdictions that access to courts may not be denied based on an individual's inability to pay court costs, pointing to the example of requiring the prepayment of a traffic violation fine in order to schedule a court date to challenge that very violation.[52] The letter also outlines further due process requirements for fees and fines collection such as proper notice as well as the appointment of counsel when proceedings could result in incarceration.[53]

---

46 *Caliste*, 937 F.3d at 531–32 (bail hearings); *Cain*, 937 F.3d at 448–49, 454 (ability-to-pay determinations).

47 *See, e.g.*, Harjo v. City of Albuquerque, 326 F. Supp. 3d 1145, 1194–95 (D.N.M. 2018) (holding that the city's forfeiture program produced an unconstitutional incentive to prosecute when revenues generated paid all the program's major expenses and excess revenue could be used for discretionary expenses).

48 U.S. CONST. amend. VIII; United States v. Bajakajian, 524 U.S. 321, 334 (1998) (holding that the forfeiture of more than $350,000 for the failure to report the transport of currency would be grossly disproportional and a violation of the Excessive Fines Clause). *See generally* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014) (disputing the Court's definition of "excessive" as referring either exclusively or primarily to the proportionality between the crime's gravity and the fine amount).

49 *See, e.g.*, City of Seattle v. Long, 493 P.3d 94, 114 (Wash. 2021) (considering a person's ability to pay the fine as part of the court's analysis under the Excessive Fines Clause).

50 *Id.* at 114–15.

51 Kristin Clarke, Asst. Att'y Gen., C.R. Div., Amy L. Solomon, Principal Deputy Asst. Att'y Gen., Office of Justice Programs & Rachel Rossi, Dir., Off. for Access to Just., Dear Colleague Letter 6 (Apr. 20, 2023) [hereinafter DOJ 2023 Dear Colleague Letter], https://www.justice.gov/opa/press-release/file/1580546/download. The DOJ 2023 Dear Colleague Letter updated and expanded a 2016 Dear Colleague letter that had been rescinded during the Trump Administration. *See infra* note 89.

52 *Id.* at 12.

53 *Id.* at 13

Violations of these additional constitutional principles may also constitute incidents of stategraft.

In addition to federal limits on fees and fines practices, state law may proscribe some fees, such as those that are added on by courts and municipalities without authorization. For example, a litigant in Michigan who owed $1,000 in unspecified court costs after pleading guilty to a drug offense successfully challenged the costs as unauthorized by state statute.[54]

All of these practices can be usefully critiqued as stategraft. The concept highlights the inherent corruption of commandeering the state's law enforcement apparatus to extract revenues from low-income individuals, disproportionately persons of color, especially when incarceration is used as a collection mechanism. The stategraft concept helps shift the focus from "blaming the victim," who did not pay a debt associated with a criminal or traffic offense, to the corruption of a state that violates or circumvents the law in order to raise revenue. Stategraft also centers the state's budget motives, highlighting the notion that the state aggressively targets people in criminal courts for money.

II
THE COMPLICATED CORRUPTION OF FEES-AND-FINES REGIMES

While the stategraft framework describes some important dimensions of fees-and-fines systems, there are several ways in which the complicated dynamics of fees and fines make the framework harder to use as a heuristic: the existence of multiple systems and system actors operating within "the state," the growing body of research calling into question whether fees-and-fines regimes actually generate net revenue, and the relatively narrow set of conduct that is considered illegal under existing law.

While fees-and-fines systems transfer revenues to the state, the state consists of multiple systems and system actors. Revenue from fees and fines can accrue to either state or local governments, and, at either the state or local level, fees and fines can provide general revenue support, be allocated to particular government agencies, or fund specific programs.[55] These different state beneficiaries impact the incentives at play in fees-and-fines systems, as well as the reform landscape.

In North Carolina, for example, fees pay for half of the state's judiciary budget and also provide funding to jails and law enforcement.[56] Fine and

---

54 *See* People v. Cunningham, 852 N.W.2d 118, 125–26 (Mich. 2014) (striking down the imposition of court costs because they were not separately authorized by statute).

55 *See* MENENDEZ ET AL., *supra* note 1, at 7; BANNON ET AL., *supra* note 26, at 30.

56 RAM SUBRAMANIAN, JACKIE FIELDING, LAUREN-BROOKE EISEN, HERNANDEZ STROUD & TAYLOR KING, BRENNAN CTR. FOR JUST., REVENUE OVER PUBLIC SAFETY 12 (2022),

forfeiture revenue is also used to fund North Carolina public schools.[57] In Florida, $256 million of the state's $311 million in fees-and-fines revenue in 2018 went to the state's General Revenue Fund and nearly thirty state trust funds, some supporting criminal justice operations and others with unrelated purposes.[58] In one Michigan county, fees were used to pay for courthouse employee salaries, telephones, heating, copy machines, and even an employee gym.[59] Fees are also regularly used to compensate private actors performing government functions, such as private supervision companies, in lieu of payment by the government.[60]

These different structures complicate the *Theory of Stategraft* narrative because the state actors involved in imposing and collecting fees and fines may not be part of the same level of government that benefits from extraction.[61] Different parts of the government may operate at cross purposes, such as when local officials seek to direct fees-and-fines revenue to local coffers, rather than to the state's. For instance, a task force studying New York's town and village courts found that, in 2006, thirty-three percent of local courts reduced moving violations (where fines are allocated to the state) to parking violations (where fines go to the locality) in at least one-third of all cases.[62]

Similarly, more than a dozen states allow localities to contract with for-profit firms to provide community supervision in lieu of incarceration.[63] These services are funded by the individuals subject to supervision, typically with fees ranging from thirty to sixty dollars, while the locality pays little or nothing.[64] These systems incentivize prioritization of private profit at the expense of the public budget (to say nothing of the rights of individuals subject to supervision).[65] A 2014 Human Rights Watch report found that

---

https://www.brennancenter.org/our-work/research-reports/revenue-over-public-safety [https://perma.cc/7XZ8-Z2TV].

57 *Id.*

58 MAI & RAFAEL, *supra* note 6, at 8.

59 Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/PJG9-6JXK].

60 SUBRAMANIAN ET AL., *supra* note 56, at 16–17.

61 Atuahene also mentions multiple actors as playing a role in her case study of stategraft. Atuahene, *supra* note 4, at 11–12 (describing the multiple actors involved in perpetuating property tax malfeasance in Detroit). We lay out here how fees and fines present an arguably more complex system, with dozens of laws, agencies, and budgets implicated.

62 SPECIAL COMM'N ON THE FUTURE OF THE N.Y. STATE CTS., JUSTICE MOST LOCAL: THE FUTURE OF TOWN AND VILLAGE COURTS IN NEW YORK STATE 78 (2008), http://www.nycourtreform.org/Justice_Most_Local_Part1.pdf [https://perma.cc/56A4-WH9Z] (reviewing data from 890 local courts).

63 SUBRAMANIAN ET AL., *supra* note 56, at 16.

64 *Id.*

65 *Id.* at 16–17.

many private probation officers regularly threaten to jail people who fall behind on probation fee payments—creating a cost borne by the state and a benefit accruing to the for-profit company.[66] These companies also often structure payments to ensure that fees owed to the government are not paid off prior to private supervision fees because courts will not issue arrest warrants when the only debt owed is to a for-profit firm.[67]

The presence of multiple systems and system actors within the state helps explain one of the most striking elements of many fees-and-fines regimes: They are often not cost effective and may even cost the state money in the aggregate. For example, a Brennan Center study found that the use of incarceration as a debt collection tool was "irrational" because it sometimes costs as much as 115% of the amount collected.[68] In some jurisdictions, fees-and-fines regimes were aggregate money losers: One New Mexico county spent at least $1.17 to collect every dollar of revenue it raised through fees and fines.[69] Some states, including Alabama, Michigan, and Texas, may jail individuals for their failure to pay delinquent debts and issue "credits" for each day spent in jail—effectively exchanging incarceration for debt reduction.[70] This practice generates no actual revenue. The government is just footing the bill for the cost of incarceration.[71] It is hard to understand such systems as generating a financial benefit to the state, but they persist because the state actors implementing the system do not experience, much less internalize, the state's costs.

The final component of stategraft, illegal conduct, is likewise challenging in the context of fees-and-fines systems. Fees and fines have proliferated in part because there are relatively few legal prohibitions against them and the constitutional limits described above require fact-intensive inquiries rather than providing bright line rules.[72] The U.S. Constitution does not broadly protect people from incurring high debts at the hands of the

---

66 CHRIS ALBIN-LACKEY, HUM. RTS. WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 49–50 (2014), https://www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry [https://perma.cc/LHR8-EG5K].

67 *See id.* at 51 (explaining that probation officers often split each payment made by a probationer between their private company and the court to guarantee that the two debts will be paid down simultaneously).

68 MENENDEZ ET AL., *supra* note 1, at 5.

69 *Id.*

70 *Id.* at 8. Despite the constitutional requirement of ability-to-pay determinations, many courts still fail to make those determinations and permit this jail "credits" practice. *Id.*; *see also supra* notes 38–41 and accompanying text (discussing *Bearden*).

71 MENENDEZ ET AL., *supra* note 1, at 8.

72 *See supra* Part I (summarizing the legal prohibitions on fees and fines and reviewing applicable caselaw).

government.[73] Fees may be occasionally attacked on the ground that they lack statutory authorization,[74] but it is far more common that legislatures themselves authorize all manner of fees and fines, thereby insulating their assessment from legal challenges other than constitutional claims.[75] Illegality is frequently difficult to establish—but often, the greatest injustices are perpetrated by legal acts.

Claims of illegality are rarely successful when directed at whether fees and fines should be imposed in the first place. To our knowledge, no jurisdiction uniformly and meaningfully tailors court debts to a person's ability to pay, and so fees-and-fines debts are often too high for most low-income people facing them.[76] Even when courts consider ability to pay, these assessments are riddled with problems, as peoples' ability to pay is often overestimated[77] or courts simply extend the time people have to pay high debts, rather than tailoring the amounts.[78] Absent direct conflicts of interest or penalties that are so high as to implicate state or federal constitutional protections against excessive fines,[79] courts are unlikely to question the

---

73 *But see* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019) (holding that the Eighth Amendment's Excessive Fines Clause applies to the states and thereby provides some constitutional limit to high debts). How far the protections from *Timbs* extend remains to be seen, as explained above in our discussion of the Excessive Fines Clause. *See supra* notes 48–50 and accompanying text.

74 *See, e.g.*, People v. Cunningham, 852 N.W.2d 118, 119–20 (Mich. 2014) (striking down court costs not authorized by statute).

75 For illustrative lists of statutes authorizing court fees, surcharges, supervision fees and jail and prison fees, see BANNON ET AL., *supra* note 26, at 7 nn.18–20.

76 *See* Brittany Friedman, Alexes Harris, Beth M. Huebner, Karin D. Martin, Becky Pettit, Sarah K.S. Shannon & Bryan L. Sykes, *What Is Wrong with Monetary Sanctions? Directions for Policy, Practice, and Research*, 8 RUSSELL SAGE FOUND. J. SOC. SCI., no. 1, 2022, at 224–26, 225 tbl.2 (describing inconsistencies in how ability to pay determinations are made across the authors' eight-state study and noting that even in jurisdictions with recent reforms requiring an upfront ability to pay determination, such as Washington, high fees are still imposed).

77 *See, e.g.*, MITALI NAGRECHA, CRIMINAL JUST. POL'Y PROGRAM, HARVARD L. SCH., THE LIMITS OF FAIRER FINES: LESSONS FROM GERMANY 44–48 (2020) (noting that judges and prosecutors in Germany often estimate income based on a person's profession, and may not consider costs of living, debt, support of family members, or other expenses); Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 204 (2019) (discussing how statutory definitions of indigency based on public benefits assistance fail to consider variations in regional costs or limits on earning potential due to the collateral consequences of a criminal conviction); Mitali Nagrecha, Sharon Brett & Colin Doyle, *Court Culture and Criminal Law Reform*, 69 DUKE L.J. ONLINE 84, 107 (2020) (theorizing that judges' misconceptions of poverty and what constitutes an affordable bail amount may influence how they set bail).

78 *See* SHARON BRETT & MITALI NAGRECHA, CRIMINAL JUSTICE POLICY PROGRAM, HARVARD L. SCH., PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 6 (2019).

79 *See supra* notes 44–50 and accompanying text (reviewing the constitutional limits on conflicts of interest and excessive fines); *see, e.g.*, City of Seattle v. Long, 493 P.3d 94, 112–14

legality of fees-and-fines systems that are authorized by statute, even those that impose onerous burdens or where debt is used as a regressive tax to fund local governments.[80]

And even in the context of debt collection, while the law offers limited guardrails, courts have been reluctant to respond to many pervasive practices. For example, according to one estimate, eleven million people currently have a suspended driver's license due to unpaid fees and fines.[81] Such practices can have devastating implications—limiting access to employment, medical care, and other necessities—and, if an individual drives when a license has been suspended, can create a pathway to prison.[82] And while the law is clear that individuals cannot be incarcerated without determining that they had an ability to pay, courts have been hostile to adopting similar protections for driver's license suspensions, despite the stakes for individuals' health, safety, and livelihood.[83]

As Professor Atuahene notes, a credible claim of illegality can have rhetorical force even when not recognized by a court.[84] However, though advocates may make aspirational claims about what the constitutional protections of equal protection, due process, and the Excessive Fines Clause should render illegal, the credibility of such claims is necessarily constrained by court decisions.

(Wash. 2021) (surveying state and federal caselaw on excessive fines and concluding that the determination of whether a fine is excessive should include consideration of a person's ability to pay).

80 *See* BANNON ET AL., *supra* note 26, at 30 (noting that at least eleven of fifteen states studied use some fines and fees to support governments' general revenue budgets unrelated to the administration of justice); *see, e.g.*, Brucker v. City of Doraville, 38 F.4th 876, 880 (11th Cir. 2022) (finding Doraville's fines-and-fees system constitutional despite its importance to funding the city's budget). Fines and fees collected by municipal courts funded between eleven percent and twenty-five percent of Doraville's general fund in the five prior years to the case, and half of those revenues went to Doraville's police department. *Id.* at 888. Yet the court in *Doraville* found that this statistic alone could not establish a conflict of interest implicating constitutional due process concerns. *Id.*

81 Joni Hirsch & Priya Sarathy Jones, *Driver's License Suspension for Unpaid Fines and Fees: The Movement for Reform*, 54 U. MICH. J.L. REFORM 875, 876 (2021); *see also Maps*, FREE TO DRIVE, https://www.freetodrive.org/maps/#page-content [https://perma.cc/6BUP-ZEVX].

82 BANNON ET AL., *supra* note 26, at 24–25.

83 *See* Hirsch & Jones, *supra* note 81, at 883–84 (describing litigation losses in challenges to driver's license suspension practices and cautioning that litigation may "open[] the door to bad precedent that can be cited by legislators who oppose reform"); *see, e.g.*, Fowler v. Benson, 924 F.3d 247, 252, 256–58, 260–62 (6th Cir. 2019) (upholding Michigan's driver's license suspension scheme on the grounds that state law did not establish a property interest for indigent drivers in exemptions from license suspensions, preventing a due process challenge, and that the scheme's alleged wealth classification passed rational basis review, preventing an equal protection challenge).

84 Atuahene, *supra* note 4, at 34 (discussing how claims that Detroit property tax assessments were illegal cast light on structural injustices and catalyzed activism from a broad base).

III
ADVOCACY AGAINST FEES AND FINES: BEYOND ILLEGALITY

In certain ways, the stategraft frame, with its focus on illegal state conduct, captures the emphasis of much of the last decade's advocacy against fees and fines. Before the Ferguson uprisings in 2014, the issue of fees-and-fines debt was not high on the national policy agenda.[85] When residents of Ferguson turned to the streets after the murder of Michael Brown and protested a police department and court system that targeted them for low-level tickets to raise money, they brought the issue of fees and fines into the spotlight.[86] The subsequent Department of Justice report solidified fees and fines as a core civil rights issue with its findings about racially discriminatory "revenue-driven policing."[87] The DOJ followed up on the Ferguson report

---

85 *See* Fernandes et al., *supra* note 19, at 398 (stating that the death of Michael Brown and subsequent uprisings were a "watershed moment" that brought national attention to unequal practices in municipal court systems and law enforcement). In some jurisdictions, however, defense attorneys, advocates, and academics had previously drawn attention to the system. *See, e.g.*, ALAN ROSENTHAL & MARSHA WEISSMAN, CTR. CMTY. ALTS., SENTENCING FOR DOLLARS: THE FINANCIAL CONSEQUENCES OF A CRIMINAL CONVICTION (2007), https://communityalternatives.org/wp-content/uploads/2020/04/sentencing-for-dollars-financial-consequences-of-criminal-conviction.pdf [https://perma.cc/W9WH-93V4] (discussing the impacts of fines and fees in New York State and offering policy recommendations to address negative consequences); KATHERINE BECKETT, ALEXES HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUST. COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE (2008), http://faculty.washington.edu/kbeckett/Legal%20Financial%20Obligations.pdf [https://perma.cc/T554-6L8D] (reviewing how Washington State assesses fines and fees and the consequences of those fines and fees on defendants, including their reentry rates); R.I. FAMILY LIFE CTR., COURT DEBT AND RELATED INCARCERATION IN RHODE ISLAND (2007), http://www.realcostofprisons.org/materials/Court_Debt_and_Related_Incarceration_RI.pdf [https://perma.cc/Q9DQ-SFV6] (analyzing data on Rhode Island court debt, discussing interviews with individuals incarcerated for court debt, and recommending reforms for Rhode Island). In 2010, two national reports (one by the authors and one by the ACLU) and an academic article in a major journal all articulated fees and fines as a national problem. BANNON ET AL., *supra* note 26; AM. C.L. UNION, *supra* note 35; Harris, Evans & Beckett, *supra* note 12. These writings were perhaps not coincidentally published shortly after the 2008 financial crisis, during which states experienced significant budgetary pressures. *See* Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS INST. (Dec. 31, 2012) https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession [https://perma.cc/DG8Q-RLPN] (discussing how the 2008 recession led to state and local government revenues plunging, and subsequent responses).

86 FERGUSON REPORT, *supra* note 15, at 5, 27 (detailing the large-scale public protests in Ferguson following the death of Michael Brown). A local nonprofit, Arch City Defenders, had documented the problems of revenue-driven racist policing in Ferguson around the same time. Press Release, ArchCity Defenders, ArchCity Defenders: Leading the Charge to Make St. Louis a Better, More Fair Place to Live and Work (Mar. 6, 2015), https://www.archcitydefenders.org/archcity-defenders-leading-the-charge-to-make-st-louis-a-better-more-fair-place-to-live-and-work [https://perma.cc/25B9-B6BR]; *see also* ARCHCITY DEFS. , MUNCIPAL COURTS WHITE PAPER (2014), https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf [https://perma.cc/9FXL-RWGM].

87 FERGUSON REPORT, *supra* note 15, at 5–6.

with a "Dear Colleague" letter to encourage state courts to take action to assess the nature of this problem in their jurisdictions and enact reforms.[88] The 2016 Dear Colleague Letter outlined principles states should follow to ensure that their fees-and-fines practices complied with *Bearden* and other due process protections when jailing people for non-payment.[89] The letter also raised concerns about arrest warrants and driver's license suspensions as tools to compel payment.[90]

The 2016 Dear Colleague Letter promoted, for the most part, a framework for a robust implementation of existing constitutional law. It did not, however, speak directly to how states should address the underlying logic of the system found in Ferguson—namely, one that was designed to raise money from Black residents. This *Bearden*-centered framework influenced advocates to target what were understood as the worst aspects of the system.[91] Advocates made significant progress by highlighting illegal conduct and documenting widespread harms that had not previously been understood outside the affected communities.[92] As a result, there is now a more widespread skepticism of states' efforts to raise and collect revenues through incarceration and other punitive measures.[93]

In *A Theory of Stategraft*, Professor Atuahene describes how the illegal corruption of stategraft forms the tip of the predation iceberg, and how uncovering such practices opens the door to resistance against other dangers "cloaked by legality."[94] Litigation and other advocacy efforts focused on

---

88 DOJ 2016 DEAR COLLEAGUE LETTER, *supra* note 40, at 1. The 2016 Dear Colleague letter was subsequently revoked during the Trump administration by Attorney General Jeff Sessions. *See* Rebecca Beyer, *DOJ Rescinds Guidance on Excessive Court Fines and Fees*, AM. BAR ASS'N J., Apr. 2018, at 9, https://www.abajournal.com/magazine/article/doj_rescinds_guidance_excessive_court_fines_fees [https://perma.cc/L2RB-4KNL] The DOJ recently reissued an updated and expanded "Dear Colleague" letter. *See supra* notes 51–53 and accompanying text. Under the Biden Administration, the DOJ has also taken positions in litigation consistent with the letters. *See* Statement of Interest at 1, *Coleman v. Brookside*, No. 2:22-cv-00423-RDP, 2022 WL 16540076 (N.D. Ala. Oct. 28, 2022), https://www.justice.gov/crt/case-document/file/1522606/download [https://perma.cc/X8KE-YWNP] ("Courts, prosecutors, and police should be driven by justice—not revenue. Accordingly, the Due Process Clause of the Fourteenth Amendment bars courts, prosecutors, and police from deciding cases or enforcing laws where their decision-making may be distorted by substantial personal or institutional financial interests.").

89 DOJ 2016 DEAR COLLEAGUE LETTER, *supra* note 40, at 2.

90 *Id.*

91 A recent article described the advocacy after Ferguson and the 2016 Dear Colleague Letter undertaken by civil society and state actors as "target[ing] the most detrimental assessment and collections procedures that have been enacted." Fernandes et al., *supra* note 19, at 402.

92 *See id.* at 401–03 (describing "[n]ational [m]omentum for [r]eform" and "evolving acknowledgment of these sanctions as disproportionately assessed and burdensome").

93 *See, e.g.*, *id.* at 403 (describing the American Bar Association's adoption of guidelines calling for "limiting assessed fines and fees and eliminating incarceration . . . for failure to pay").

94 Atuahene, *supra* note 4, at 26.

unconstitutional practices have done this for the fees-and-fines movement by showcasing the most obvious and outrageous harms stemming from the imposition of financial sanctions.[95] In doing so, advocates have opened the door to a more fundamental critique of the use of the criminal legal system as a revenue generator for the state, even when policies are not illegal. But at this juncture, a focus on illegality may no longer serve the same purpose. Litigation efforts to declare unconstitutional certain fee collection practices, such as driver's license revocations and even incarceration for repeated failures to pay, face legal headwinds.[96] So too do efforts to attack the impartiality of revenue collection by local courts and law enforcement agencies that are highly dependent on fees-and-fines revenue.[97]

Put simply, many dimensions of injustice in the fees-and-fines arena are not well-elucidated by *Bearden*'s focus on determining ability to pay prior to incarceration or by a legal definition of conflict of interest that is limited to instances where judges or other system actors have direct financial stakes in particular fees. Research on the causes and impact of fees-and-fines systems has provided a deeper understanding of the racialized political economy of this revenue source,[98] and both researchers and advocates are making efforts to better connect the intersection of public finance and fees and fines to argue against racist, structurally regressive budgeting.[99] This broader notion of predation—which Joshua Page and Joe Soss describe as "relations and practices that (i) are based on a subordinated group's oppression and marginalization and (ii) leverage the group's vulnerabilities and needs to pursue projects of expropriation, extreme exploitation, and/or dispossession"—may resonate more with the lived experiences of those in overpoliced communities and encourage policy reforms that target fees and fines as a system.[100] As community members reported in one study, they saw themselves as the victims of an organized "fleec[ing]" by law enforcement, who saw them as "nothing but a check" and used their neighborhoods to

---

95 *See supra* Part I (discussing litigation and advocacy efforts).

96 *See* Hirsch & Jones, *supra* note 81, at 883–84 (describing how, in a number of states, litigation efforts achieved limited results or altogether failed to achieve reform). At least one court has read *Bearden* to permit the incarceration of indigent persons for their "willful" failures to pay based on "considering all of the relevant circumstances and concluding alternatives to a jail sentence were inadequate" for promoting rehabilitation and deterrence. *See* State v. McCalley, 972 N.W.2d 672, 678–79 (Iowa 2022).

97 *See, e.g.*, Brucker v. City of Doraville, 38 F.4th 876, 888 (11th Cir. 2022) (holding that even a rate of eleven to twenty-five percent of police budget from fees and fines "is still a far cry from the kind of bounty system that raises core due process concerns").

98 Pacewicz & Robinson, *supra* note 9, at 997–99 (developing a theoretical lens that highlights the racialization of municipal opportunities like attracting businesses to "create windfalls of sales and other commercial taxes").

99 *See, e.g.*, SANDERS & LEACHMAN, *supra* note 6 (arguing that state and local governments should eliminate fees and peg fines to income as antiracist revenue policy).

100 Page & Soss, *supra* note 11, at 291.

"collect a dime for the city and the government."[101]

As the fees-and-fines movement has developed, it has increasingly focused on these broader structural, political economy questions. For example, advocates have campaigned to eliminate fees altogether. Successful campaigns in California have centered racial justice and demanded the elimination of dozens of fees, squarely challenging the system of regressive, predatory, fee-based government funding. In 2020, California campaigners won the elimination of twenty-three fees and the forgiveness of unpaid debt from those fees,[102] and advocates since have worked furiously to win retroactive relief for people with outstanding debt.[103] Activists behind the current student loan abolition campaign are similarly calling on states to eliminate criminal justice debt.[104] Most recently, in October 2022, a coalition of national groups announced a campaign to eliminate justice system fees and discharge fee debt nationwide.[105]

A broader frame may also more effectively illuminate another defining feature of the fees-and-fines regime: its use as a tool of social control and political exclusion. Court debt prolongs individuals' involvement with the criminal legal system—often for decades, in ways that are unjust yet not illegal—thus perpetuating the social marginalization of persons with convictions.[106] In addition, fees and fines remain potent devices for political exclusion, as a recent example from Florida demonstrates. Notwithstanding massive popular support in a referendum to permit the reenfranchisement of persons with felony convictions, the legislature was able to use fees-and-

---

101 Gwen Prowse, Vesla M. Weaver & Tracey L. Meares, *The State from Below: Distorted Responsiveness in Policed Communities*, 56 URB. AFFS. REV. 1423, 1447 (2020).

102 Cortney Sanders, *California Criminal Fee Repeal a Big Step for Racial Justice, Equitable Policy*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (Oct. 14, 2020, 10:00 AM), https://www.cbpp.org/blog/california-criminal-fee-repeal-a-big-step-for-racial-justice-equitable-policy [https://perma.cc/9765-78W5].

103 *See, e.g.*, *Juvenile Fee Abolition in California*, BERKELEY L.: POL'Y ADVOC. CLINIC, https://www.law.berkeley.edu/experiential/clinics/policy-advocacy-clinic/juvenile-fee-collection-in-california [https://perma.cc/QD99-S2X6] (noting that, in response to years of organizing, research, and advocacy, California abolished new juvenile fees in 2018 and finally declared all outstanding debts from juvenile fees uncollectible and discharged in 2021).

104 *See, e.g.*, Astra Taylor, *Millions of Americans Owe Court Fees or Other 'Carceral Debt'. This Must End*, GUARDIAN (Nov. 6, 2021), https://www.theguardian.com/commentisfree/2021/nov/06/millions-of-americans-owe-court-fees-or-other-carceral-debt-this-must-end [https://perma.cc/HQ4X-ZUCB] (describing efforts to extinguish probation debt and calling for the abolition of all such debt).

105 Press Release, End Justice Fees, National Campaign to Eliminate Justice System Fees Launches Today (Oct. 6, 2022), https://endjusticefees.org/news/press-release-national-campaign-to-eliminate-justice-system-fees-launches-today [https://perma.cc/552Z-BLZW].

106 *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1093–94 (2015) (describing how the threat of failure-to-pay warrants may discourage individuals from having contact with health care, financial, educational, and other institutions).

fines debt to exclude many persons with convictions from the voting rolls.[107] When these dynamics are accounted for, the picture broadens beyond filling budget holes and claims of austerity.

CONCLUSION

As Professor Atuahene states, using legal argumentation (such as stategraft) against "complex social problems can downplay other essential aspects of the injustice."[108] These words of caution may apply with particular force in the fees-and-fines context. Stategraft captures an important aspect of the injustice within fees-and-fines systems. But as the movement to address these injustices matures, a broader framework is likely to have greater utility as both a mobilization tool and a foundation to encourage comprehensive policy reform. This framework is all the more needed given that the rightward tilt of the federal courts has made arguments for expansive readings of illegality more difficult to assert.

---

107 *See* Comment, Jones v. Governor of Florida, 134 HARV. L. REV. 2291, 2291–92 (2021) (describing how, after Florida voters passed a ballot initiative—with nearly sixty-five percent of the vote—to amend the state constitution to permit most people with felony convictions to vote, the state legislature passed a statute "conditioning reenfranchisement on the payment of hundreds, sometimes thousands, of dollars in court fees" and "effectively barr[ed] from voting the vast majority of the 1.4 million people whom the constitutional amendment sought to reenfranchise"); *see also* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 71 (2019) (concluding that "twenty-eight jurisdictions require either full or partial payment of economic sanctions to regain eligibility to vote").

108 Atuahene, *supra* note 4, at 33.