

A Fine Scheme: How Court-Imposed Fees and Fines Unjustly Burden Vulnerable Communities

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The discussion of the use of fines and fees in our state criminal justice systems is an exceedingly important topic with surprising agreement on the political left and right. My testimony will focus on the issue from a conservative or libertarian perspective, as it is not discussed as much in the national dialogue on this issue.

To begin, the power to punish is the greatest domestic power a government wields. Scholars and judges have debated the purpose of this power for centuries, settling on four fundamental justifications: incapacitation, retribution, rehabilitation, and deterrence. One function that is notably excluded from this list is raising revenue. Revenue raising has never been considered one of the legitimate purposes of the criminal justice system. However, for a variety of reasons, we have reached a point where in many places this is exactly what is happening.

Courts may impose fines and fees, which are found in state statutes and municipal codes. The terms fines and fees are often discussed interchangeably, but their purposes and implications differ. *Fines* serve as both a deterrence and punishment for an individual upon conviction (e.g., court fines associated with a misdemeanor or felony charge) whereas *fees* are generally levied to support operational expenses in the criminal justice system (e.g., court clerk fees). The Eighth Amendment to the Constitution prohibits the federal government from imposing “excessive fines,” a prohibition that the Supreme Court incorporated against the states in a February 2019 decision.

It is not illegitimate, in some circumstances, to expect a convicted offender to bear the cost of at least a portion of their own punishment in the criminal justice system. But when an enormous portion of a local government's budget comes from criminal justice fees and fines, we can reasonably wonder whether the quest for revenue has displaced those four legitimate purposes of the criminal justice system mentioned above.

It is not uncommon for 10 to 20 percent of many cities' municipal budgets to come from criminal justice fees and fines. Chicago, the third largest city in the United States, derived 15 percent of its budget in 2014 from criminal justice fees and fines.

Conservatives and libertarians often worry that a conflict of interest has developed in our criminal justice government institutions. Too often, our police officers, courts, and community supervision officers are put in positions to raise revenue for their respective jurisdictions through the execution of their day-to-day functions in the criminal justice system. This is something we should all be concerned about. Conservative or libertarian points-of-view tend to be skeptical of big government. In its worst cases, the issue we're discussing today is a telltale practice of big government.

When law enforcement officers must serve warrants for a failure to pay fees and fines, they are less available to respond to 911 emergency calls. When courts schedule appearances for failure to pay fees and fines, court proceedings for more serious offenses can be postponed or rushed to judgment. When criminal justice fees and fines begin to ebb away at relationships between law enforcement officers and community members, we run the risk of converting our police force into tax agents. We should not be putting our law enforcement officers and community supervision officers into such a position. This diverts from their primary mission as public safety officers and erodes community trust.

States have been taking a leading role to reform the use of fines and fees in the criminal justice system. Various states have recently considered legislation and others have enacted laws to reform their fines and fees. Between February and April 2021, several states including Florida, Indiana, Arizona, New Mexico, and Oregon considered legislation that would eliminate fines, fees, and court costs for juveniles in the criminal justice system. In June 2021, Nevada enacted a law to end the practice of suspending an individual's driver's license or prohibiting an individual from applying for a driver's license because of an unpaid fine or fee. Also in June 2021, Colorado enacted a law to eliminate certain monetary amounts a juvenile or a juvenile's parent or legal guardian in the criminal justice system is required to pay, like fees, for applying for court-appointed counsel.

A few years ago, the American Legislative Exchange Council passed model legislation, urging states to prioritize victims' restitution in fees and fines as research has found no direct correlation between the payment of state criminal fines and lower recidivism rates. This model legislation focusing on restitution for victims has been modified and passed in several states.

A permutation of the use of fines and fees in our criminal justice system involves the use of civil asset forfeiture with seized assets utilized in equitable sharing programs. When federal and state law enforcement combine forces in an investigation or a state law enforcement agency requests that the federal law enforcement agency adopt a seizure, the forfeiture investigation becomes a federal matter. Equitable sharing allows federal law enforcement to share the forfeited assets with their state and local law enforcement partners. Restrictions under Department of Justice policy require that the shared funds must be used for a law enforcement purpose only.

Obviously, there are cases where civil forfeiture has been abused by both state and federal law enforcement agencies. However, there are areas where civil forfeiture can be useful. In cases involving romance scams, online lottery scams or business email compromise scams where a money mule is used to facilitate the transfer of funds from a domestic account to a foreign account, criminal forfeiture is usually not a good vehicle because the originator of the fraud cannot be identified, or the fraudster is outside the jurisdiction of the state or the United States.

Over the past decade, more than half of all states have passed some form of asset forfeiture reform, mostly in response to media investigations and reports by civil liberties groups that found the practice frequently ensnared innocent owners. Four states have abolished civil forfeiture completely while another twelve have allowed civil forfeiture to proceed through civil

courts only after prosecutors obtain a criminal conviction. Many of the states that have reformed their civil forfeiture statutes have included restrictions on how forfeited assets may be used. The carrot and stick approach of equitable sharing has undermined state efforts to reform their civil forfeiture laws by allowing state and local law enforcement to circumvent their own state civil forfeiture laws unless, like Maine, the participation in equitable sharing is prohibited outright.

While not necessarily a grant program, equitable sharing takes on certain aspects of a federal grant program in that it allows federal law enforcement agencies to share forfeited property owned by the federal government with state law enforcement agencies. This asset sharing policy scheme can produce perverse incentives for federal and local law enforcement agencies to seize assets. Some states that have enacted reforms to civil forfeiture are requiring forfeited assets to go into specific funds like those set aside for education, so as to ameliorate the motive of supplementing state law enforcement budgets and sticking to the purported purpose of forfeiture: deterring crime and taking away criminals' profit motive.

Well beyond the scope of equitable sharing, federal grant programs have increased significantly over the past several decades. There were an estimated 1,386 federal aid programs in 2018—triple the number of programs in existence in the 1980s. Noticeably, in the 1960s, President Lyndon Johnson expanded the federal aid system and created hundreds of new programs for housing, urban neighborhoods, and education. The number of federal aid programs quadrupled from 132 in 1960 to 530 in 1970. Using federal taxpayer dollars to influence state and local activities is a dubious use of taxpayer money and contradicts the Founding Fathers' framework established in the Constitution. States are the laboratories of democracy and are better equipped to make decisions regarding fines and fees implemented in their state statutes and municipal codes than the federal government.

A 2010 study by economists at George Mason University found that for every dollar given to the states through a federal grant program, there was an eventual increase in state and local taxes or fees of 33-to-42 cents per dollar. The initial grant incited and paid for the expansion of a government service. But once the initial grant ran its course, the service had become inculcated in the city's or county's service portfolio, increasing the felt need to perpetuate the service beyond the life of the original grant.

In conclusion, these three general recommendations could help to curb the overuse of fines and fees in our criminal justice system by states and local jurisdictions. First, jurisdictions generally should limit fees and fines to an amount adequate for satisfying retributive interests and for restoring victims. To go much beyond that, law enforcement and the courts become little more than mechanisms for raising revenue via criminal justice fees and fines. Second, jurisdictions should provide for alternative mechanisms when people cannot pay fees and fines. Community service is a simple example, though there are several larger states like Arizona, New York, North Carolina that do not allow for such a provision. Jurisdictions could also offer workable payment plans. And third, a large part of the national conversation of criminal justice reform surrounds the reduction in incarceration rates in the U.S. In the 1980s, when prison censuses began to climb notably, it became very expensive, very quickly. We started looking for ways to pay for it, often turning to criminal justice fees and fines as the solution. As we see the nation's overreliance on incarceration begin to wane, we may also see a reversal on some of the

needs and incentives for overusing fines and fees. While overuse of fines and fees has several undesired effects on our justice system, it is advisable for the U.S. Department of Justice to function as a data gatherer and policy repository, rather than a national policy engineer through the grantmaking process.