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A TICKET TO JAIL: DO MINOR TRAFFIC VIOLATIONS RESULT IN JAIL TIME FOR POOR ARKANSANS?

*Jessie Wallace Burchfield**

“Do not exploit the poor because they are poor and do not crush the needy in court”¹

I. INTRODUCTION

The 2015 report of the United States Department of Justice’s Civil Rights Division investigation of the Ferguson, Missouri, Police Department² brought national attention to the problem of fines and fees for relatively minor infractions that lead to incarceration for those who cannot afford to pay. The report discovered frequent instances of minor offenses generating crippling debt or resulting in jail time.³ Many offenders lost their driver’s licenses, and some lost their employment and even their housing.⁴

One particularly shocking example of injustice for the poor is that of Angel.⁵ Angel’s woes began in 2007, when she parked her car illegally *once*, receiving two citations and a \$151 fine, plus fees.⁶ Over the next several years, Angel experienced financial difficulties and periods of homelessness; between 2007 and 2010, she was charged with seven failure to appear (FTA)

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1. *Proverbs 22:22* (New Int’l Version).

2. See generally U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 7 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

3. *Id.* at 4. The report also brought to light evidence of racial bias in enforcement resulting in disproportionate harm to African Americans. *Id.* at 62. Much of the research in this area implicates racial bias and disparate impact on communities of color, an injustice that cannot be ignored. However, no racially or ethnically identifying data was collected for this study, so those implications are outside the scope of the present article.

4. *Id.* at 4.

5. Angel is not her real name—the Ferguson report identifies her simply as “an African-American woman.” *Id.*

6. *Id.*

offenses for missing court dates or fine payments on her parking tickets.⁷ “For each [FTA], the court issued an arrest warrant and imposed new fines and fees.”⁸ “From 2007 to 2014, [Angel] was arrested twice, spent six days in jail, and paid \$550 to the court”—all for events stemming from parking illegally *one time*.⁹ Court records show that she tried to make two partial payments of \$25 and \$50, but the court returned them, refusing anything less than full payment.¹⁰ At the time of the report, Angel was making regular payments on the fine.¹¹ As of December 2014, over seven years after her offense, despite having already paid \$550 on what began as a \$151 fine, she still owed \$541.¹²

Scholars and advocates have identified predicaments like Angel’s not only in Ferguson, but around the country. Elsewhere in Missouri, police arrested and handcuffed another woman in front of her four-year-old grandson for a warrant issued on outstanding traffic tickets.¹³ In Colorado, a man spent ten days in jail because he could not pay a ticket for an illegal left turn.¹⁴ In Georgia, a woman received a sentence of three months of probation (and was charged \$105 in fees plus a \$27 fee for the Georgia Crime Victims Emergency Fund) because she could not pay the \$135 fine for failing to come to a complete stop at a stop sign.¹⁵ Police detained her briefly until her fiancé made a partial payment (after pawning her engagement ring

7. *Id.*

8. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., *supra* note 2, at 4.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson Over ‘Debtors Prisons’*, NPR: MORNING EDITION (Feb. 8, 2015), <https://www.npr.org/sections/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons>. The woman in question, Tonya DeBerry, joined a lawsuit against Ferguson, expressing her outrage at being jailed for “[j]ust traffic tickets. No criminal act. Nothing.” *Id.*

14. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR: ALL THINGS CONSIDERED (May 19, 2014), www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor (describing the case of Jared Thornburg). Thornburg was unable to pay his ticket after losing his job due to injury. *Id.* The fines increased from \$165 to \$306. *Id.* He found a new job, but before he started work, he was arrested and incarcerated for ten days for the nonpayment. *Id.* The cost of his incarceration was \$700, more than twice what he then owed and more than three times the original fine. Russell Simmons, *How We Fund Our Criminal Justice System*, HUFFINGTON POST BLOG (July 12, 2016), http://www.huffingtonpost.com/russell-simmons/how-we-fund-our-criminal_b_10949090.html.

15. Abby Shafroth & Larry Schwartzol, *Confronting Criminal Justice Debt: The Urgent Need for Comprehensive Reform*, NAT’L CONSUMER L. CTR. & CRIM. JUST. POL’Y PROGRAM, HARV. 3 (2016).

to be able to do so).¹⁶ In Alabama, police arrested a grandmother in her home because of her inability to complete payment of fines and fees on multiple tickets; she spent thirty-one days in jail.¹⁷ A young Arkansas mother served multiple jail sentences totaling almost two years for non-payment of fines and fees related to a ticket for failure to wear a seat belt, and another for using a false name.¹⁸ In Michigan, a woman, having on one occasion forgotten her driver's license at home, was sent to jail five different times because she could not pay fines for that offense and others including driving with loud music and driving with expired tags.¹⁹ In another Michigan case, a thirty-two-year-old drug rehab patient died after seventeen days in jail without access to his withdrawal medication—his offense: unpaid traffic tickets.²⁰ In an especially tragic case, a Pennsylvania woman died while serving

16. *Id.*; see also Carrie Teegardin, *Ticket Torment: Georgia Probation Systems Ensnare Those Too Poor to Pay Traffic Fines*, ATL. J. CONST. (Nov. 22, 2014), <http://www.myajc.com/news/crime--law/ticket-torment/X8g1muJFCr10Tuf1JRwBkM/>. This is a continuing issue. See Andrea Young, *How Georgia's Probation System Squeezes the Poor and Feeds Mass Incarceration*, ACLU (Nov. 13, 2018), <https://www.aclu.org/blog/criminal-law-reform/how-georgias-probation-system-squeezes-poor-and-feeds-mass-incarceration> (describing how “in Georgia, a traffic offense, such as a speeding ticket or driving with a suspended license, can result in fees and fines of up to \$1,000.”).

17. See Amended Complaint at 3, *Cleveland v. City of Montgomery*, 300 F.R.D. 578 (M.D. Ala. 2014).

18. Myesha Braden et al., *Too Poor To Pay*, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW 4 (2019), <https://lawyerscommittee.org/executive-summary/>. This executive summary dedicates the full report to the young woman and other Arkansans who have faced a similar plight. *Id.* Samantha Booten struggled with addiction, and it eventually took her life. *Id.* She spent the last four years of her life in and out of jail in various counties as process-based charges related to her two original tickets stacked up. *Id.* She had active cases in at least four counties when she died. *Id.*

19. *In For a Penny: The Rise Of America's New Debtor's Prisons*, AM. CIVIL LIBERTIES UNION 29–30 (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [hereinafter *In for a Penny*]. The woman had actually attempted to do community service because she could not pay her fines and fees. *Id.* at 29. The day before her payment was due, the probation officer informed her that her community service hours would not count because the facility where she had served was not a nonprofit. *Id.*

20. Sarah Cwiek, *In Macomb County Man's Jail Death, a Horrifying Intersection of Big Issues*, MICH. RADIO (Sept. 24, 2015), <https://www.michiganradio.org/post/macomb-county-mans-jail-death-horrifying-intersection-big-issues>; David Shortell, *Michigan Jail Death Leads to FBI, ACLU Moves*, CNN (Oct. 21, 2015), <https://www.cnn.com/2015/10/21/us/michigan-jail-death-david-stojcevski/index.html>. David Stojcevski was sentenced to thirty days in jail when he was unable to pay \$772 in overdue traffic fines. *Id.* The ACLU of Michigan called for an FBI investigation into the actions of the guards and medical staff, but also issued a statement about the illegality of “pay or stay” sentencing. Darrell Dawsey, *Death in a Debtors' Prison*, ACLU OF MICH. (Oct. 21, 2015), https://www.aclumich.org/en/news/death-debtors-prison_

two days in jail because she could not pay the fines associated with her children's truancy.²¹

According to the U.S. Bureau of Justice Statistics, the most common reason for an individual to encounter the police is as a driver during a traffic stop.²² When those stops lead to a ticket, the driver encounters the justice system, typically in a municipal or district court.²³ Those court experiences should not result in a two-tiered system of justice dependent upon ability to pay.²⁴ Data reported to the National Center for State Courts indicates that, in Arkansas, traffic cases make up roughly half of trial court caseloads statewide,²⁵ fair disposition of these cases is a crucial component of access to justice for all Arkansans.

How often do minor infractions set off a trajectory resulting in ever-increasing debt, jail time, or both for those who cannot pay their fines immediately? This article seeks to examine the phenomenon in Arkansas. Part II of this article discusses recent scholarship and advocacy about fines and fees in the context of debtors' prisons and recent fines-related litigation in Arkansas. Part III discusses the legal framework in Arkansas for imposing and enforcing fines and fees. Part IV analyzes selected data from three central Arkansas counties, Garland, Hot Spring, and Pulaski, as a sample in an

21. Maryclaire Dale, *Woman Sentenced to 2 Days for Truancy Fines Dies in Jail; Judge Says It Was His Only Option*, STARTRIBUNE (June 11, 2014), <http://www.startribune.com/nation/262737551.html>. Professor Neil Sobol likened this tragedy to those in the early 1800s that sparked reform and led to laws abolishing debtors' prisons. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 488–489 (2016). The decedent, Eileen DiNino, was identified as suffering from extremely high blood pressure on admission to the facility, and, despite two calls for medical assistance during the night, she died of a heart attack sometime during the first 24 hours in jail. Complaint at 1, *Tarkoski v. County of Berks*, No. 5:15-cv-2000 (E.D. Pa. April 16, 2015).

22. ELIZABETH DAVIS ET AL., U.S. DEP'T OF JUSTICE, SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 1 (2018).

23. See THOMAS HARVEY ET AL., ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 15 (2014), <https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> (“For most individuals, the only substantive interaction they have with the Missouri justice system . . . is through the municipal courts . . .”); ARK. DISTRICT JUDGES COUNCIL, <http://arkansasdjcc.org/index.html> (last visited Apr. 27, 2019) (“Arkansas District Courts . . . have county-wide jurisdiction over traffic cases . . .”).

24. Sobol, *supra* note 21, at 492; see also *In for a Penny*, *supra* note 19, at 81.

25. *CPS Data Viewer*, NAT'L CTR. FOR STATE COURTS, http://popup.ncsc.org/CSP/CSP_Intro.aspx (last visited Dec. 29, 2019) (use top menu tab to specify Traffic Violations and left menus to specify Arkansas and the specific years). In 2013 and 2014, traffic cases (559,689 and 516,113, respectively) made up 49% of all caseloads statewide. *Id.* Traffic as a percentage of all cases was not available for 2015, but the raw number of traffic cases (547,678) was comparable. *Id.* No data was available for 2016 and 2017. See *id.*

attempt to determine the frequency of this phenomenon in Arkansas.²⁶ In Part V, the article recommends potential solutions to prevent the poor from suffering life-altering negative consequences for minor infractions.

II. RESEARCH SHOWS THAT CRIMINAL JUSTICE FINES AND FEES CAN HAVE RUINOUS CONSEQUENCES FOR THOSE WHO CANNOT AFFORD TO PAY THEM

Criminal justice debt, often referred to by scholars and advocates as “Legal Financial Obligations” (LFOs), generally encompasses fines, court costs, and fees; court-ordered restitution; and various add-on fees.²⁷ Fines are monetary penalties upon conviction of given offenses.²⁸ Fees are charges for using the justice system.²⁹ Surcharges are amounts added to fines, fees, and court costs for designated purposes or to benefit the general fund.³⁰ Court costs are amounts assessed against litigants and can sometimes include fees and surcharges.³¹ Between 2010 and 2017, every state except Alaska, North Dakota, and the District of Columbia increased fines and fees.³² Bankruptcy relief is not available for LFOs.³³ When defendants can-

26. The data examined is limited to cases involving traffic offenses and moving violations and includes the charged offense, sentence/fine, any warrants generated, and current disposition (as of June 2017) for cases from 2013 through June of 2017.

27. Arthur W. Pepin, *The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations*, CONF. OF STATE COURT ADMINISTRATORS 1, n. 2 (2016), <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx> (common fees include probation and supervision fees, charges for drug and alcohol testing, interest charges on outstanding LFOs, payment plan charges, jail costs, charges for access to a public defender, warrant fees, and costs for attending court-ordered classes); see also ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 3 (Lee Clark et al. eds., 2016).

28. HARRIS, *supra* note 27 at 26; see also Carl Reynolds & Jeff Hall, *Courts Are Not Revenue Centers*, CONF. OF ST. CT. ADMINS.2 (2012), <https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf>.

29. See HARRIS, *supra* note 27, at 26; see also Reynolds & Hall, *supra* note 28, at 1.

30. See Reynolds & Hall, *supra* note 28, at 2. The general fund is the primary fund for financing a government entity's operations. See NAT'L ASS'N OF ST. BUDGET OFFICERS, 2018 STATE EXPENDITURE REPORT 7 (2018), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-e943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/2018_State_Expenditure_Report_S.pdf.

31. See Reynolds & Hall, *supra* note 28, at 2. It is somewhat confusing to say in one sentence “[s]urcharges [are] added to . . . court costs” and in the next say “[c]ourt costs include . . . surcharges.” *Id.* The designations in assessment can vary among jurisdictions. *Id.* at 1. Some jurisdictions allow charging back the costs of court and prosecution time, jury and witness payments, warrants, and lab costs. HARRIS, *supra* note 27, at 27. Many jurisdictions also charge defendants for using a public defender. *Id.* at 42. Surcharges are often levied for probation management and installment payment plans. *Id.*

32. J. Lisa Foster, *Injustice Under Law: Perpetuating and Criminalizing Poverty Through the Courts*, 33 GA. ST. U. L. REV. 695, 703 (2017). Judge Foster was a co-author of

not pay their LFOs, they are often jailed, resulting in a modern-day version of debtors' prison.³⁴

The resurgence of modern-day debtors' prisons has fueled studies and sparked litigation around the country. One scholar likened the plight of poor offenders paying fines in the present day criminal justice debt system to the punishment of Sisyphus, a laborious task with no end.³⁵ Others have noted, "[i]ndividuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape."³⁶ Advocates allege that debtors' prisons are creating a two-tiered justice system in various localities in the United States.³⁷

the Gupta and Foster Letter, *infra* note 36, and is currently co-director of the Fines and Fees Justice Center. See *Team*, FINES & FEES JUSTICE CTR., <https://finesandfeesjusticecenter.org/>.

33. HARRIS, *supra* note 27, at 3.

34. PEPIN, *supra* note 27, at 1.

35. HARRIS, *supra* note 27, at 160. Sisyphus was the mythical king of Ephyra who was sentenced by Zeus to roll an enormous boulder up a hill only to have it roll down again each time he neared the top, dooming him to repeat the labor for eternity. *Sisyphus*, ENCYCLOPEDIA BRITANNICA ACADEMIC, <https://academic.eb.com/levels/collegiate/article/Sisyphus/68010>.

36. Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, & Lisa Foster, Dir., Office for Access to Justice, to colleagues (Mar. 14, 2016), <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf> [hereinafter Gupta & Foster Letter] (citing COUNCIL OF ECON. ADVISERS ISSUE BRIEF, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf). This guidance document was retracted by the Justice Department in 2017. See Press Release, Dep't of Justice Off. of Pub. Aff., Attorney General Jeff Sessions Rescinds 25 Guidance Documents (Dec. 21, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>; see also NUSRAT CHOUDHURY, AM. CIVIL LIBERTIES UNION, WRITTEN STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS 11–12 (2016).

37. CHOUDHURY, *supra* note 36, at 2; see also *In for a Penny*, *supra* note 19, at 10 ("Although courts attempt to collect LFOs from indigent and affluent defendants alike, those who can afford to pay their legal debts avoid jail, complete their sentences, and can move on with their lives.") This 2010 report details the ACLU investigation of the assessment and collection of LFOs in Georgia, Louisiana, Michigan, Ohio, and Washington. *Id.* at 5. Advocates continue to fight the rising specter of debtors' prisons around the country. See *id.* The ACLU filed a class action lawsuit against Lexington County, South Carolina in 2017 alleging, "[i]mpoverished people are routinely arrested and incarcerated for their inability to pay fines and fees imposed by the County's magistrate courts in traffic and misdemeanor criminal cases." Class Action Complaint at 1, *Brown v. Lexington County*, 3:17-cv-01426-MBS (D.S.C. June 1, 2017). The judge ordered mediation and the case is still open.

A. For Those Who Cannot Pay Their Fines, a Minor Offense Can Snowball into Devastating Debt or Lead to Incarceration

Unfortunately, individuals who interact with the courts often incur significant, even devastating debts.³⁸ Former California Superior Court Judge Lisa Foster noted, “if you can afford to immediately pay fines and fees for minor traffic offenses and municipal code violations, . . . your experience of the justice system . . . will be qualitatively different than the experience of someone who is poor.”³⁹ Indigent defendants charged with minor offenses, even mere traffic violations, may find themselves burdened with crushing fines, surcharges, and other fees if they are not able to make immediate payment in full.⁴⁰ Inability to pay those debts can lead to incarceration.⁴¹ The Missouri grandmother who was jailed for her outstanding tickets,⁴² and dependent on food stamps and disability, described the disparity in treatment: “[i]f you have the money, you would never go through that type of situation. If you don’t have the money, it’s jail, jail.”⁴³ While this outcome may seem unlikely, it is unfortunately common, as noted in a 2016 dissent by Justice Sonia Sotomayor, “[w]hen a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant.”⁴⁴ In jurisdictions

38. Shafroth & Schwartzol, *supra* note 15, at 1.

39. Foster, *supra* note 32, at 695; *see also* Jocelyn Rosnick & Mike Brickner, *The Ohio Model for Combatting Debtors’ Prisons*, 21 MICH. J. RACE & L. 375, 378 (2016) (explaining that individuals with resources who encounter the criminal justice system simply pay their fines and go on with their lives; however, indigent defendants may actually pay more fines and fees than those with means after charges for payment plans and other fees are added to their initial debt).

40. Shafroth & Schwartzol, *supra* note 15, at 1–2.

41. *Id.* at 1; *see also* HARVEY ET AL., *supra* note 23, at 29; KAREN DOLAN & JODI CARR, *THE POOR GET PRISON 6* (2015) (“A broken taillight, an unpaid parking ticket, a minor drug offense, sitting on a sidewalk, or sleeping in a park can all result in jail time.”).

42. *See* Shapiro, *supra*, note 13.

43. Shapiro, *supra* note 13.

44. *Utah v. Strieff*, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting). After Strieff exited a suspected drug house, an officer stopped him and asked for identification, which he ran and discovered an outstanding arrest warrant for a traffic violation. *Id.* at 2060. The officer arrested Strieff on the warrant and then searched his car, discovering drug paraphernalia and methamphetamine. *Id.* Strieff was charged with unlawful possession and moved to suppress the evidence because the initial stop was unconstitutional. *Id.* The trial court denied his motion to suppress and the Utah Court of Appeals affirmed, but the Utah Supreme Court held that the evidence was inadmissible. *Id.* The Supreme Court of the United States granted certiorari and ruled that the evidence was admissible under the attenuation doctrine—the valid arrest warrant interrupting the connection between the unlawful detention and the discovery of the evidence. *Id.* at 2059. Justice Sotomayor pointed out that Justice Department investigations around the country reveal alarming numbers of outstanding warrants for minor infractions; these warrants allow the police to stop citizens without reasonable suspicion, arrest them on the outstanding warrant, and conduct what would otherwise be illegal searches. *Id.* at 2068.

around the country, poor people have been and still are being jailed simply because they cannot pay their fines.⁴⁵ As one scholar lamented, “Ferguson is almost everywhere.”⁴⁶

B. Previous Arkansas-Specific Research Has Identified That Poverty Feeds into a Cycle of Fines, Warrants, and Arrests

A 2016–2017 study of misdemeanor warrants in the city of Conway, Arkansas, revealed that many of the misdemeanants who received FTA and/or FTC warrants had traffic-related offenses.⁴⁷ Many of the misdemeanants had traffic offenses in multiple counties, resulting in multiple warrants and additional fines and fees.⁴⁸

Failure to appear and failure to comply warrants typically result in driver’s license suspension.⁴⁹ In 2018, approximately 32,222 people statewide had their licenses suspended.⁵⁰ In a rural state like Arkansas, with limited access to public transportation, a license suspension can be devastating, leaving residents with no way to get to work, school, medical appointments, etc., unless they risk further fines and fees—and possible jail time—by driving without a valid license.⁵¹ Research has also shown that when

45. HARRIS, *supra* note 27, at 51; *see also* PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 4 (2017); *In for a Penny*, *supra* note 19, at 6; CRIM. JUST. POL’Y PROGRAM, HARV., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 1 (2016).

46. EDELMAN, *supra* note 45, at 4; *see also* U.S. DEPT. OF JUSTICE, OFF. OF JUSTICE PROGRAMS, RESOURCE GUIDE: REFORMING THE ASSESSMENT AND ENFORCEMENT OF FINES AND FEES 2 (2016) (“Ferguson is not unique; similar problems exist throughout the country.”). The effect of LFOs on individuals, their families, and our communities can be devastating. *See also* Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors’ Prisons*, 34 YALE L. & POL’Y REV. 93, 99 (2015) (“[T]he practice of jailing low-income debtors who cannot afford to pay criminal fines and costs is both a regional and nationwide problem that affects low-income communities well beyond Ferguson.”); U.N. Hum. Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, ¶ 47, U.N. Doc. A/HRC/38/33/Add. 1 (May 4, 2018) (“In many cities and counties, the criminal justice system is effectively a system for keeping the poor in poverty while generating revenue . . .”).

47. Hannah Bahn et al., *Courting Solutions: Reducing the Outstanding Warrants Burdening Conway’s Citizens and Court* 43 (2017) (unpublished practicum project paper, University of Arkansas Clinton School of Public Service) (on file with the author).

48. *Id.*

49. *Id.*

50. Michael R. Wickline, *Bill to Limit License Suspensions Gains*, ARK. DEMOCRAT-GAZETTE (March 19, 2019), <https://www.arkansasonline.com/news/2019/mar/29/bill-limit-license-suspensions-gains/>.

51. BRADEN ET AL., *supra* note 18, at 2. Driving on a suspended license is a misdemeanor, with a minimum 2-day jail sentence and up to a \$500 fine. ARK. CODE ANN. § 27-16-303 (Supp. 2017). For a description of the ramifications of expired/suspended driver’s licenses in Texas before reform, *see* AM. CIVIL LIBERTIES UNION, NO EXIT TEXAS: MODERN-DAY

someone's license is suspended due to an inability to pay fines or fees, that person faces increased barriers to employment and education, which can disrupt families and undermine community stability, harming everyone.⁵² City and court officials and employees interviewed in the Conway study expressed the view that poverty in the misdemeanor population is a significant problem, contributing to a cycle of fines, warrants, and arrests.⁵³ One respondent pointed out that the everyday stresses of living in poverty, such as worrying about "feeding my kids . . . making rent," can make it easy to forget about a ticket or just decide not to deal with it.⁵⁴ Another stated, "[m]ost of the time, it's just strictly poverty. People just don't have the money to pay probation, to pay the courts, fines, whatever."⁵⁵

C. Arkansas Litigation

Practices that unfairly penalize the poor and result in debtors' prisons for those who are unable to pay have been a source of recent litigation in Arkansas. The Arkansas ACLU and the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) filed a class action lawsuit in 2016 against the City of Sherwood, Pulaski County, and District Judge Milas Hale, III over alleged unconstitutional practices in the "Hot Check"

DEBTORS' PRISONS AND THE POVERTY TRAP 2–4 (2016) (describing how an unpaid traffic ticket for a minor offense could prevent an individual from renewing his or her license and registration, likely causing cancellation of auto insurance—the expired registration could then lead to other traffic stops where the driver would receive additional tickets for the expired tags, expired license, and lapse in insurance.) The report documented it was common for low-income individuals to quickly accumulate multiple traffic tickets totaling more than \$1000. *Id.* at 4.

52. AM. BAR ASS'N, TEN GUIDELINES ON COURT FINES AND FEES 4 (2018) (citing ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 5 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>). Long-term joblessness is linked to a breakdown in family relationships, more reliance on public assistance, and higher crime. AUSTIN NICHOLS ET AL., CONSEQUENCES OF LONG-TERM UNEMPLOYMENT 11–12 (2013). The persistently unemployed do not invest in housing or other things that benefit the community as a whole, and they may be tempted to engage in criminal behavior to get money. *Id.* at 12.

53. Bahn et al., *supra* note 47, at 31.

54. *Id.* The struggle to pay for basic necessities often impedes payment of LFOs. A young Michigan woman articulated these same barriers when requesting an extension of time to pay from a judge; though she had started a job, she was behind on rent and needed to provide food and other necessities for her two children. *In for a Penny*, *supra* note 19, at 30. The young mother went on to say, "[i]t doesn't make sense to jail people when they can't pay because they definitely can't pay while they're in jail." *Id.*

55. Bahn et al., *supra* note 47, at 31.

court.⁵⁶ In a separate action, the Lawyers' Committee filed a class action lawsuit against White County District Judge Mark Derrick in August 2018, alleging creation of a modern-day debtors' prison in White County.⁵⁷ Judge Derrick requires a minimum monthly payment of \$100 towards any court-imposed debt.⁵⁸ One missed payment can subject debtors to an additional fine of \$450–\$670 and the possibility of arrest and incarceration.⁵⁹ The class action suit named a White County judge, but investigators working with the Lawyers' Committee performed court-watching activities in eight other Arkansas counties.⁶⁰ The Lawyers' Committee also interviewed judges, other government officials, social service organizations, and individuals who were charged or incarcerated for inability to pay fines.⁶¹ One of their major findings was “[p]rolific use of arrest warrants and driver’s license suspensions as methods of enforcing payment of fines and fees traps poor Arkansans in a vicious cycle of poverty and incarceration.”⁶²

III. CURRENT ARKANSAS LAW ALLOWS JUDGES TO JAIL OFFENDERS WHO FAIL TO PAY THEIR FINES, REGARDLESS OF THE UNDERLYING OFFENSE

Arkansas Code Annotated sections 16-13-701 to 712 govern the imposition and enforcement of fines. The statutes dictate that when a court imposes a fine, the court should inform the defendant that payment is due immediately and inquire about payment arrangements.⁶³ The court may allow the defendant a short time frame, until the end of business on the following day, to tender payment (“Option 1”).⁶⁴ The court may also offer the defendant the opportunity to set up an installment plan for paying the fine (“Option 2”).⁶⁵ Under Option 1, if the defendant fails to appear and pay, the court will issue an arrest order⁶⁶ and may impose other sanctions⁶⁷ such as entering a

56. Complaint – Class Action, *Dade v. City of Sherwood*, No. 4:16-cv-00609-JM (E.D. Ark. 2016). The case was settled in November 2017. Stipulated Settlement Agreement at 2, *Dade*, No. 4:16-cv-00609-JM.

57. Complaint – Class Action Demand for Jury Trial at 1, *Mahoney v. Derrick*, No. 60CV-18-5616, 2018 WL 3768088 (Cir. Ct. Pulaski Cty. Ark. Aug. 9, 2018).

58. BRADEN ET AL., *supra* note 18, at 8.

59. *Id.*

60. *Id.* at 3.

61. *Id.*

62. *Id.*

63. ARK. CODE ANN. § 16-13-702(a)(2) (Repl. 2010). Some interpret this as requiring an ability to pay determination, but that interpretation is not being applied in all courts. See BRADEN ET AL., *supra* note 18, at 3–4.

64. ARK. CODE ANN. § 16-13-702(a)(3).

65. *Id.* § 16-13-704(a)(1) (Supp. 2017).

66. *Id.* § 16-13-702(a)(4)(A)(i).

67. *Id.* § 16-13-702(a)(4)(B).

judgment to impose a lien against real property⁶⁸ or revoking the debtor defendant's driver's license⁶⁹ or motor vehicle registration.⁷⁰ Under Option 2, the defendant is given a certain date by which to complete payment or in the event of default to appear and explain the failure to pay.⁷¹ Debtors on an installment plan are required to pay two separate installment fees of five dollars per month for the duration of the plan.⁷² If the debtor misses a monthly payment, the monthly fee still accrues, adding to the total debt.⁷³ Debtors paying on an installment plan are also subject to the sanctions listed above.⁷⁴ Under either option, debtors face the prospect of jail because of their inability to pay.

A. Federal Law and Arkansas Law Prohibit Debtors' Prisons

The United States Supreme Court has opined that if a fine or fee has been determined as the appropriate penalty for an offense, the state may not imprison a person merely because he or she cannot pay the fine or fee.⁷⁵ In that case, Danny Bearden pled guilty to burglary and theft by receiving; the court sentenced him to probation, and payment of restitution and a fine.⁷⁶ The trial court revoked his probation after he lost his job and could not pay the balance of his fines.⁷⁷ The Court held that it was unfair to automatically revoke his probation without considering his efforts and ability to pay and

68. *Id.* § 16-13-707(a)–(c) (Repl. 2010); *see also id.* § 5-4-204(b) (Repl. 2013).

69. *Id.* § 16-13-708(a)–(b) (Repl. 2010). Arkansas Code Annotated section 16-17-131 grants district court judges authority to suspend the driver's license of any person who, having been served with notice fails to appear. To reinstate his or her license, the individual must appear, satisfy the requirements of the court, and then pay a reinstatement fee to the Department of Finance and Administration ("Department"). *Id.* Under Arkansas Code Annotated section 27-16-808(c)(1)(A)–(B), the Department is mandated to set the fee at \$100 multiplied by each separate order for suspension.

70. ARK. CODE ANN. § 16-13-708(a), (c).

71. *Id.* § 16-13-704(a)(2)(A) (Supp. 2017).

72. *Id.* § 16-13-704(b)(1)(A); § 16-13-704(b)(3)(E).

73. *Id.* § 16-13-704(b)(1)(C).

74. *See supra* notes 59–63 and accompanying text.

75. *Bearden v. Georgia*, 461 U.S. 660, 667–668 (1983) (citing the rule of *Williams v. Illinois*, 399 U.S. 235 (1970) and *Tate v. Short*, 401 U.S. 395 (1971)). *Williams* held that it was impermissible to imprison an offender beyond the maximum sentence allowable for his offense merely because he owed fines that he could not pay. *Williams*, 399 U.S. at 241. In *Tate*, the court held that "[i]t is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it." *Tate*, 401 U.S. at 395. The holding in *Bearden* has been a central argument for those seeking to end modern day debtors' prisons. *See ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 9* (2012); *In for a Penny, supra* note 19, at 5; Gupta & Foster Letter, *supra* note 36, at 4.

76. *Bearden*, 461 U.S. at 662.

77. *Id.* at 663.

whether there were acceptable alternative punishments.⁷⁸ *Bearden* established that offenders have a constitutional right to a judicial inquiry into their ability to pay.⁷⁹

The Arkansas Constitution expressly prohibits debtors' prisons: "[n]o person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud."⁸⁰ One could argue that those who cannot pay their LFOs are imprisoned for failing to obey a court order (to pay the amount owed) rather than inability to pay.⁸¹ However, the Arkansas Supreme Court has held that imprisonment for failing to comply with an order to pay a sum to the court, without first finding that the party was able to pay the ordered sum, is imprisonment for debt in violation of the Arkansas Constitution.⁸² The court recently reaffirmed this fundamental concept.⁸³

B. Judges Can Jail Debtors Who "Willfully" Do Not Pay

Bearden established the right to an ability-to-pay determination, but the Court expressly affirmed precedent empowering judges to imprison offenders for willful nonpayment: "nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs."⁸⁴ The Court made it clear that there was not "any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so."⁸⁵

78. *Id.* at 673.

79. *Id.*

80. ARK. CONST. art. II, § 16.

81. See also Marsh & Gerrick, *supra* note 46 at 116–19 (discussing the concepts of fairness and personal responsibility in the context of individuals who cannot pay their fines).

82. *Godwin v. Godwin*, 268 Ark. 364, 368, 596 S.W.2d 695, 697 (1980) (citing ARK. CONST. art II, § 16 and *Leonard v. State*, 170 Ark. 41, 278 S.W. 654 (1926)). In *Godwin*, the Chancery Court had required the husband in a divorce action to post a \$4,000 performance bond before leaving the courtroom. *Id.* at 366, 596 S.W.2d at 696. The Arkansas Supreme Court held that the court below erred because *Godwin* had not been given prior notice that he might have to post a bond, nor was he given the right to a hearing on posting the bond. *Id.* at 368, 596 S.W.2d at 697.

83. *Stehle v. Zimmerebner*, 2016 Ark. 290, 497 S.W.3d 188 (2016). *Stehle* was found in civil contempt in circuit court for failure to "make proper efforts" to pay her child support arrearages and ordered to spend every weekend in the Faulkner County Jail until the court determined that she was making such "proper efforts." *Id.* at 3, 497 S.W.3d at 190. *Stehle* and her husband had previously testified that they had no money in savings, she had been unable to work full time while in school and doing an unpaid internship, the husband had lost his job, they were two months behind on their mortgage, and they had had to spend money on substantial automobile repairs. *Id.* at 3–4, 497 S.W.3d at 190–91. The Arkansas Supreme Court held that the circuit court record did not show findings that *Stehle* had the ability to pay and remanded for the circuit court to make that "critical determination." *Id.* at 7, 497 S.W.3d at 192.

84. *Bearden*, 461 U.S. at 668 (quoting *Williams v. Illinois*, 399 U.S. 235, 242 (1970)).

85. *Id.* (quoting *Tate v. Short*, 401 U.S. 395, 400 (1971)).

The Court went on to clearly state that imprisonment as a sanction to enforce collection of a fine or other LFO is justifiable *when the offender has the means to pay*,⁸⁶ noting that failure to make bona fide efforts to find employment or borrow money can be considered evidence of “insufficient concern for paying the debt”⁸⁷

Arkansas judges have the authority to imprison debtors who default on their fines.⁸⁸ The jail sentence imposed may not exceed the shorter of the following: one day for each forty dollars owed on the fine, thirty days if the fine was for a misdemeanor, or one year if the fine was for a felony.⁸⁹ Judges may credit forty dollars a day against the fines owed, but the fine reduction is not automatic.⁹⁰ However, if the court determines that the default was not attributable to a purposeful refusal to obey the court or a failure to make a good faith effort to obtain the funds to pay, the judge has the discretion to give the debtor additional time to pay, to reduce the amount of the monthly installment payments, or to partially or completely revoke the fine or fine balance.⁹¹

C. Judges Are Not Clearly Required to Make an Initial Determination of Ability to Pay

If a defendant claims an inability to pay, the judge must inquire into that defendant’s ability to pay any fine(s) imposed.⁹² However, though the language of the section governing installment payments⁹³ implies a determination of ability to pay (“If the court concludes that the defendant has the ability to pay the fine . . .”),⁹⁴ there is not a clear requirement to assess the defendant’s ability to pay before imposing a fine, and there is no detailed guidance in the statute on how to make a determination of ability to pay.⁹⁵

86. *Id.*

87. *Id.*

88. ARK. CODE ANN. § 16-13-703(a)–(c) (Supp. 2017).

89. *Id.* § 16-13-703(c)(2)(A).

90. *Id.* § 16-13-703(c)(2)(B).

91. *Id.* § 16-13-703(d).

92. *Id.* § 16-13-702(a)(5)(A) (Repl. 2010).

93. *Id.* § 16-13-704 (Supp. 2017).

94. ARK. CODE ANN. § 16-13-704(a)(1).

95. *See generally id.* § 16-13-702(a)(5)(A) (“*If the defendant claims an inability to pay the fine, the court shall inquire into the defendant’s ability to pay and shall make a determination of the defendant’s financial ability to pay the fine.*”) (emphasis added); *id.* § 16-13-704(d) (“‘Ability to pay’ means that the resources of the defendant, including all available income and resources, are sufficient to pay the fine and provide the defendant and his or her dependents with a reasonable subsistence compatible with health and decency.”); *see also* BRADEN ET AL., *supra* note 18, at 4 (“Many judges proceed directly to the penalties . . . without conducting the ability to pay determination . . . or conducting only cursory inquiries . . . such as whether defendants possess smart phones or have tattoos.”).

Researchers for the Lawyers' Committee reported that various Arkansas courts disagree about the scope of the requirement, with some requiring an affirmative finding of fact that an individual willfully refused to pay before sentencing and others requiring that the defendant raise the issue of inability to pay.⁹⁶ Investigators reported that many courts do not conduct the determinations nor consider any evidence of inability to pay that is introduced.⁹⁷

IV. ARKANSAS DATA SAMPLE

This study focuses on “minor” traffic offenses. For these infractions, individuals who can pay their fines do not have to go to court or think about the situation again after they pay, except maybe to bemoan higher insurance premiums.⁹⁸ More serious charges such as driving under the influence, reckless driving, fraudulent registration, and unlawful use of a vehicle were excluded from the data. Violations relating to commercial vehicles and boating were also excluded.⁹⁹ Because the recent Arkansas-specific research and litigation discussed in Part II has identified driver's license suspensions as a

96. BRADEN ET AL., *supra* note 18, at 12.

97. *Id.* See Marsh & Gerrick, *supra* note 46, at 102, for examples from other jurisdictions of failure to inquire about ability to pay or subjective determinations of ability to pay. See also Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR MORNING EDITION (May 21, 2014), <https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> (describing judges who will find an ability to pay based on subjective factors such as defendants having tattoos, wearing expensive clothes, smoking, or having a cell phone).

98. For those who can pay, Arkansas law allows them to waive appearance, plead guilty or *nolo contendere* by a signed statement, and pay the fine and any costs. ARK. CODE ANN. § 16-17-136 (Supp. 2017); see also HARVEY ET AL., *supra* note 23, at 3.

99. There are some caveats about the data:

- (1) Some older data came from a previous case management system; court staff have concerns about the data quality after the conversion. E-mail from Diane Robinson, Director, Arkansas Administrative Office of the Courts Office of Research and Justice Statistics, to author (Oct. 15, 2017, 3:12 P.M. CST) (on file with author).
- (2) Though the data requested was limited to traffic offenses and in cases with multiple charges the punishment for each charge should have been listed separately, there may have been keying errors when the data was entered so that the entire sentence was attached to a minor charge. *Id.* To mitigate this issue, unless otherwise noted, the data has been filtered to those cases with a Charge Number of 1. Charges in each case are numbered from most serious (1) to least. A Charge Number of 1 would indicate that the traffic offense was the most serious charge. E-mail from Joe Beard, Research Analyst, Arkansas Administrative Office of the Courts Office of Research and Justice Statistics, to author (June 26, 2019, 9:07 A.M. CST) (on file with author).
- (3) Subsequent penalties and interest for non-payment are not captured in the data.
- (4) A limited number of circuit court cases were included in the data.

major problem impacting poor people with LFOs, data on fines, fees, and jail time for driving on a suspended license is also examined.

A. District Courts and Demographics of Selected Counties

There are 230 district courts and departments in Arkansas, and generally, these courts have county-wide jurisdiction of traffic cases.¹⁰⁰ Garland County has one district court with three departments: two in Hot Springs and one in Mountain Pine.¹⁰¹ For the time period analyzed in this article, Hot Spring County had one district court with four departments: one in Malvern, one in Rockport, one in Friendship, and one in Donaldson.¹⁰² For the relevant time period, Pulaski County had five district courts—Jacksonville, Little Rock, North Little Rock, Maumelle, and Pulaski County—with eleven departments served by ten judges. Jacksonville District Court had one department and one judge; Little Rock District Court had three departments, with one judge for each department; North Little Rock District Court had two departments, with one judge for each department; Maumelle District Court had one department and one judge; and Pulaski County District Court had four departments, Pulaski County, Sherwood, Wrightsville, and Cammack Village, served by three judges.¹⁰³ District courts in all three counties participate in the online payment plan system for fines and fees.¹⁰⁴

Garland County has a population of approximately 99,154, a median household income of \$41,672, and a 15.9% poverty rate.¹⁰⁵ Hot Spring County has a population of approximately 33,701, a median household income of \$40,626, and a 16.8% poverty rate.¹⁰⁶ Pulaski County has a popula-

100. ARK. DISTRICT JUDGES COUNCIL, *supra* note 22. These courts also have jurisdiction over misdemeanor cases, preliminary felony cases, and civil cases in matters of less than \$5000. *Id.* Minor civil matters are also resolved in small claims divisions of these courts. *Id.*

101. ARK. CODE ANN. § 16-17-912 (a)(1) (Supp. 2017).

102. *Id.* § 16-17-945 (a)(1) (repealed 2017). Hot Spring County and Grant County now comprise the Thirty-Third district in the Arkansas State District Court System. One district judge serves three departments: one in Sheridan, one in Malvern, and one in Rockport. *Id.* § 16-17-1110 (26)(A)–(E) (Supp. 2017).

103. *Id.* § 16-17-921 (superseded by Ark. Act 723 of 2017 as codified at ARK. CODE ANN. § 16-17-1110 (24) (A)–(B) (Supp. 2017)). Before the 2017 amendment, most of these district courts had jurisdiction tied to their locality; now each court has districtwide jurisdiction.

104. See *Courts That Accept Online Payment Plans in the State of Arkansas*, ARK. ONLINE CT. PAYMENTS, <https://www.arcourts.gov/sites/default/files/epay-contact-payment-plan.html> (last visited June 24, 2019); *eTraffic*, ARK. JUDICIARY, <https://www.arcourts.gov/administration/acap/etraffic> (last visited June 25, 2019).

105. *QuickFacts Hot Spring County, Arkansas; Garland County, Arkansas; Pulaski County, Arkansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/hotspringcountyarkansas,garlandcountyarkansas,pulaskicountyarkansas,ar/pst045218> (last visited Apr. 27, 2019) [hereinafter *QuickFacts*].

106. *Id.*

tion of approximately 392,680, a median household income of \$48,850 and a 15% poverty rate.¹⁰⁷ The total Arkansas population is 3,013,825, median household income is \$43,813, and the overall poverty rate is 16.4%.¹⁰⁸

B. Fines, Fees, and Warrants in Selected Counties

Fines and fees generate substantial revenue. As illustrated in Table 2, for traffic offenses in cases from January 2013 through June 2017, courts charged offenders in Garland, Hot Spring, and Pulaski Counties a total of \$1,949,401, \$1,266,995, and \$8,781,049 in fines, respectively.

*Table 1. Total Fines.*¹⁰⁹

County	# Fines	Total Fines
Garland	25,234	\$1,949,401
Hot Spring	18,237	\$1,266,995
Pulaski	70,973	\$8,781,049

Table 2 shows total fine adjustments made by the court in each of the three counties, and Table 3 shows the total remaining balances as of June 2017.

Table 2. Fine Adjustments.

County	# Adjustments	Total Adjustments
Garland	2259	\$203,235
Hot Spring	1959	\$161,663
Pulaski	19,846	\$1,037,716

107. *Id.*

108. *Id.*

109. See Access queries and Excel tables generated from Ark. Admin. Office of the Courts, Office of Research and Justice Statistics, to author (on file with the author) [hereinafter Access Queries & Excel Tables] (tables generated from the data requested from the Arkansas Administrative Office of the Courts, Office of Research and Justice Statistics.).

Table 3. Fine Balances.

County	# Balances	Total Balances Remaining
Garland	4944	\$539,305
Hot Spring	1674	\$247,645
Pulaski	13,144	\$2,358,445

Table 4 shows the percentages of adjustments made and remaining balances for each county. Judges in Pulaski County adjusted fines at more than three times the rate of judges in Garland County and at more than twice the rate of judges in Hot Spring County; however, the percentage balance remaining differs by only 1% between Garland and Pulaski and 7% between Hot Spring and Pulaski. The average fine amount in Garland was \$83.48, the average fine amount in Hot Spring was \$69.47, and the average fine amount in Pulaski was \$132.71, perhaps explaining the higher percentage of remaining balances in Pulaski.

Table 4. Percentages of Adjustments and Balances.

County	Fines Adjusted	Balances Remaining
Garland	9%	28%
Hot Spring	11%	20%
Pulaski	30%	27%

For purposes of comparison to the three counties studied, Table 5 details total fines assessed for selected minor infractions¹¹⁰ for all counties with data available for the studied time period.¹¹¹ Observations are outlined below.

Garland County and Craighead County are comparable: Craighead County has a 6% larger population, a 10% higher median income, and a 1% lower poverty rate. Craighead County, though larger, assessed 95% less in fines than Garland County; this is a dramatic difference and warrants further inquiry. Of the reporting counties, the next most similar to Garland County

110. ARK. CODE ANN. § 27-14-304 (Repl. 2014) (invalid plates); *Id.* § 27-14-306 (Repl. 2014) (invalid use of plates); *id.* § 27-14-314(a)(2)(A) (Repl. 2014) (no registration, first offense); *id.* § 27-14-601 (Supp. 2017) (failure to register); *id.* § 27-14-701 (Supp. 2017) (expired registration); *id.* § 27-36-215 (Repl. 2014) (tail lights on drawn vehicles); *id.* § 27-36-216 (Repl. 2014) (brake lights); *id.* § 27-14-217 (Repl. 2014) (additional equipment); *id.* § 27-51-201 (Supp. 2017) (driving 1–15 miles per hour over the speed limit).

111. Excel data on spreadsheets from Ark. Admin. Office of the Courts, to author (June 19, 2019) (on file with author) [hereinafter Excel Data]. Not all counties use Contexte, the case management system used by the AOC. *Id.*

in terms of population is White County.¹¹² White County has a 20% smaller population, a 6% higher median income, and a slightly lower (within one percentage point) poverty rate. White County assessed 25% less in fines than Garland County, a percentage somewhat comparable to the difference in population.

Hot Spring County and Independence County are similar demographically: Independence County has a 12% larger population, a 2% lower median income, and a slightly lower poverty rate (within one percentage point). Independence County assessed 14% more in fines than Hot Spring County, a percentage comparable to the difference in population.

Pulaski County is 214% more populous than Faulkner County, the next largest reporting county in terms of population. However, other demographics are similar. Faulkner County has a 3% higher median income and a 1.6% lower poverty rate. Pulaski County assessed 254% more in total fines than Faulkner County.

Table 5. Total Fines Assessed for Selected Minor Infractions.

County	Total Assessed	County	Total Assessed
Clark	\$318,782	Montgomery	\$52,446
Craighead	\$19,885	Perry	\$630
Crawford	\$691,309	Poinsett	\$127
Crittenden	\$56,791	Polk	\$64,931
Faulkner	\$1,064,927	Pulaski	\$3,773,962
Garland	\$396,671	Stone	\$105
Hot Spring	\$294,657	Van Buren	\$222,516
Independence	\$336,787	White	\$298,045
Lonoke	\$57,916	Grand Total	\$7,650,485

Table 6 details the warrants by type for each of the three studied counties. In every county, the majority of the warrants issued were for FTA, followed by Failure to Pay (FTP), Failure to Comply (FTC), and Arrest.¹¹³ This

112. White County might not be the best choice for comparison. *See supra* Part II.C for a discussion of the class action suit alleging creation of a modern-day debtors' prison in White County.

113. FTA warrants are issued pursuant to Arkansas Code Annotated section 5-54-120; classification is dependent on the underlying charge. FTP and FTC are issued under the Contempt statute, Arkansas Code Annotated section 16-10-108(a)(3). Conviction of Contempt is a Class C Misdemeanor. ARK. CODE ANN. § 16-10-108(b)(1) (Supp. 2017).

pattern held true when examining warrants for the selected minor infractions,¹¹⁴ illustrated in Table 7.

Table 6. Warrants By Type for All Traffic Offenses.

County	Arrest Warrant	FTA Warrant	FTC Warrant	FTP Warrant	All Warrants
Garland	16	6188	646	1815	8665
Hot Spring	81	3823	30	1988	5922
Pulaski	91	8689	847	4948	14,594
Totals	188	18,700	1523	8751	29,181

Table 7. Warrants By Type for Minor Infractions.

County	Arrest Warrant	FTA Warrant	FTC Warrant	FTP Warrant	All Warrants
Garland	1	1075	115	272	1463
Hot Spring	14	552	3	275	844
Pulaski	6	5490	248	2220	7964
Totals	21	7117	366	2767	10,271

Table 8 details the percentage of warrants issued for these selected minor infractions out of all warrants issued. For these selected infractions, the percentage was less than 20% for all warrant types in Garland and Hot Spring Counties. In Pulaski County, 45% of FTP warrants and 63% of FTA warrants were for these minor infractions. At first blush, these figures might suggest that Pulaski County judges are much more likely to issue warrants for minor infractions than judges in the other two counties. However, as seen in Table 9, minor infractions constitute over half of the traffic cases in Pulaski County, while they represent less than a quarter of the traffic case-load in Garland and Hot Spring.

Table 8. Percentage of Warrants Issued for Minor Infractions.

County	Arrest Warrant	FTA Warrant	FTC Warrant	FTP Warrant	All Warrants
Garland	6%	17%	17%	15%	17%
Hot Spring	17%	14%	10%	14%	14%
Pulaski	7%	63%	29%	45%	55%
Totals	11%	38%	24%	31%	35%

114. See statutes cited *supra* note 110.

Table 9. Minor Infractions as a Percentage of All Cases.

County	All Traffic Cases	Minor Infraction Cases	Minor Infractions Percentage
Garland	47,712	10,830	23%
Hot Spring	17,135	3910	23%
Pulaski	75,043	42,368	56%
Totals	139,890	57,108	41%

Table 10 illustrates the percentage of warrants issued in all traffic cases. When compared with the data in Table 8, the data reveals that in Garland County the percentage of warrants issued for all cases is roughly the same as the percentage for minor infractions. In Hot Spring County, the percentage of warrants issued for all cases is more than double that of the percentage of warrants for minor infractions. The reverse is true for Pulaski County: the percentage of warrants for minor infractions is more than double the percentage of warrants issued for all cases. Again, this is likely due to the high percentage of minor infractions cases relative to the total traffic caseload in Pulaski County.

Table 10. Warrants Issued as a Percentage of All Cases.

County	All Traffic Cases	All Warrants Issued	Warrants Issued Percentage
Garland	47,712	8665	18%
Hot Spring	17,135	5922	35%
Pulaski	75,043	14,594	19%
Totals	139,890	29,181	21%

The Conway study noted that many of the misdemeanants interviewed had warrants for traffic offenses in multiple counties.¹¹⁵ The same held true for offenders in this study. There were 326 individuals with warrants in both Garland and Hot Spring Counties, 119 with warrants in both Garland and Pulaski Counties, and 86 with warrants in both Hot Spring and Pulaski Counties.¹¹⁶

An additional ten individuals had warrants in all three counties.¹¹⁷ This is not surprising, given that many Arkansans must commute for work or

115. Bahn et al., *supra* note 47, at 43.

116. See Excel Data, *supra* note 111.

117. *Id.*

school,¹¹⁸ and the working poor may be traveling to multiple locations for part time work or odd jobs. Having outstanding warrants in multiple counties can confuse matters for those who do not know how to navigate the court system¹¹⁹ and compound their debt. For instance, if judges from multiple counties suspend an individual's license because of FTA, FTP, or FTC, before the license can be reinstated, he or she will have to pay a \$100 fee to the Department of Motor Vehicles for each order in addition to any fines and court costs.¹²⁰

The data examined for these three counties did not reveal a pattern of jailing individuals for the selected minor infractions because they were unable to pay. For the selected infractions, there were 645 cases with a balance in Garland County, 244 cases with a balance in Hot Spring County, and 2,718 cases with a balance owed in Pulaski County. For the selected infractions, the data revealed no sentences of jail time in Hot Spring County and only one sentence of jail time in Pulaski County, for an individual with multiple other cases and charges.¹²¹ Garland County judges imposed 22 jail sentences on 19 individuals, ranging from 4 to 100 days. As seen in Table 11, all but one of those individuals had other charges, some of which carried mandatory jail time—driving on a suspended license for instance. All but seven of the individuals also had at least one FTA or FTC warrant.

118. See, e.g., JONATHAN LUPTON & LYNN BELL, METROPLAN, METRO TRENDS: DEMOGRAPHIC REVIEW AND OUTLOOK 3 (2017), <http://metroplan.org/sites/default/files/media/publications/DemographicReview2017.pdf> (describing how for thirty years the majority of workers in outlying counties have commuted to Pulaski County for work).

119. Bahn et al., *supra* note 47, at 31.

120. ARK. CODE ANN. § 27-16-808 (Supp. 2017); see also Act of Apr. 5, 2017, 2017 Ark. Laws 915 (made provision for graduates of certain specialty court programs, such as drug court, Helping Offenders Prosper Effectively (HOPE) Court, or veterans court, owing multiple reinstatement fees to pay only one reinstatement fee if all other court costs, fines, and fees related to the suspension have been paid. The effective date of that legislation was September 1, 2017 through January 15, 2019).

121. See Access Queries & Excel Tables, *supra* note 109. In addition to an invalid license plate (the selected minor charge captured), the individual also had charges in the same case for driving with an invalid license and driving with no liability insurance coverage. *Id.*

Table 11. Garland Jail Time Other Offenses.

Charge	Individual																				
	ARK. CODE ANN. §27-	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
14-304			√			√		√						√	√	√	√	√		√	
14-306				√√							√										
14-701							√														
14-713																√					
14-723									√												
16-303		√	√	√√√√			√√	√		√	√	√	√√		√√√√					√	
16-601				√																	
16-602								√													
19-304		√																		√	
20-104(a)								√													
20-104(b)(2)											√										
20-106							√√				√										
22-104		3rd	√	√√√√	2nd	√√	3rd	√	√	√	√			√	√	√			√	√	
36-209							√														
36-211																					
36-215										√											
37-702				√	√		√									√					
50-302(7)																√					
50-308(b)(1)(B)				1st																	
51-104		√																			
51-201		√	√			√			√			√	√							√	√
51-304				√																	
52-103														√							

C. Data on LFOs and Jail Time for Driving on Suspended License

During the relevant time period, a total of 30,200 charges were filed for driving on a suspended license¹²² in the three selected counties. That number almost equals the population of Hot Spring County.¹²³ There are many reasons an individual’s license might be suspended.¹²⁴ The cause most relevant to this study is suspension for FTA or FTP fines on a traffic ticket or FTC

122. ARK. CODE ANN. § 27-16-303 (Supp. 2017).

123. *Quickfacts*, *supra* note 105. Hot Spring County has a population of approximately 33,701. *Id.*

124. Failure to pay child support, Arkansas Code Annotated section 9-14-239, and habitual violation of traffic laws, Arkansas Code Annotated section 27-16-907, are two well-known examples.

with court-ordered community service.¹²⁵ The data examined for this study does not provide a complete picture because it does not show the total number of license suspensions,¹²⁶ just the total number of charges brought for driving with a suspended license—that subset of people who were caught driving on their suspended license. Research suggests that as many as 75% of those people whose licenses are suspended keep driving.¹²⁷

This data does not reveal the underlying cause of the suspension. However, if any of these license suspensions were a consequence of FTA or FTP fines or FTC with court-ordered community service after being charged with one of the selected minor infractions, those suspensions could be an example of a minor traffic ticket turning into a ticket to jail. It is a misdemeanor to drive while your license is cancelled, suspended, or revoked.¹²⁸ Convic-

125. ARK. CODE ANN. § 16-13-708(a)–(b) (Repl. 2010) (circuit courts); *id.* § 16-17-131 (Repl. 2010) (authorizing district court judges to suspend licenses for failure to appear); *see also supra* notes 47–49 and accompanying text (discussing the prevalence of failure to appear and failure to comply warrants for traffic-related offenses and how these lead to license suspensions); Memorandum from Little Rock Dist. Court Judge Vic Fleming to his staff (Jan. 26, 2018) (on file with author). In this memorandum, Judge Fleming uses a hypothetical scenario in a fictitious court to illustrate each of these offenses leading to a license suspension: “Dannie” receives a traffic citation that includes information regarding a court date and time to appear. *Id.* When she does not communicate with the court and does not appear on her court date, she is subsequently charged with FTA and the judge orders her license suspended. *Id.* One week after the issuance of the warrant and the order to suspend her license, Dannie appears with counsel and enters a plea bargain, under which she will make installment payments, the FTA will be dismissed, and her license will be reinstated. *Id.* The judge approves and enters an order. *Id.* Dannie makes one scheduled payment, but then does not pay for two months. *Id.* On the first day of the third month, the court issues a warrant for FTP and requests the Office of Driver Services (ODS) to suspend Dannie’s license. *Id.* Two weeks later, Dannie returns with her lawyer and enters into another plea bargain—she is unable to pay but she agrees to do five hours of community service per week for a \$10 per hour credit towards her fines. *Id.* The court enters the order for community service and orders her license reinstated. *Id.* Dannie performs only three hours of community service on one day, so after a month, the agency reports her to the court. *Id.* The court issues a warrant for FTC and directs ODS to suspend her license. *Id.* Dannie returns to court with her lawyer and another plea bargain is struck. *Id.* The court dismisses the contempt charge, orders Dannie’s license reinstated with no fee, and sentences her to “time served.” *Id.* In this hypothetical, the defendant was represented, and the prosecutor and judge were agreeable to the plea bargains. *Id.* For many poor defendants, things might not work out so well. *See also* Victor A. Fleming, *DisAPPEARING Act: Arkansas’s Circularly-Defined Default*, 42 *UA Little Rock L. Rev* 405 (2020) (included in this issue and focusing on some of the same statutes and issues discussed herein).

126. *See generally* Access Queries & Excel Tables, *supra* note 109; *but see* Wickline, *supra* note 50 (noting that in 2018 approximately 32,222 statewide had their licenses suspended).

127. EDELMAN, *supra* note 45, at 15 (citing Joseph Shapiro, *How Driver’s License Suspensions Unfairly Target the Poor*, NPR MORNING ED. (Jan. 5, 2015), <https://www.npr.org/2015/01/05/372691918/how-drivers-license-suspensions-unfairly-target-the-poor>).

128. ARK. CODE ANN. § 27-16-303(a)(1) (Supp. 2017).

tion under this statute carries a mandatory jail sentence of two days to six months and may also result in a fine of up to \$500.¹²⁹ Table 12 illustrates the number of cases for driving while suspended, showing sentences for jail time and assessed fine totals. Table 13 details the percentages of cases resulting in jail time and/or fines. Hot Spring County had the highest average fine and also had the highest percentage of cases resulting in fines.

Table 12. Driving on Suspended License.

County	# Cases	# Jail Sentences ¹³⁰	# Fines	Total Fines	Average Fine
Garland	7129	1275	3984	\$810,361	\$203
Hot Spring	2550	4	1789	\$536,900	\$300
Pulaski	20,521	332	11,520	\$3,105,562	\$270
Totals	30,200	1611	17,293	\$4,452,823	\$257

Table 13. Driving Suspended Percentages Jail Sentences and Fines.

County	# of Cases	% Resulting in Jail Sentences ¹³¹	% Resulting in Fines
Garland	7129	18%	55%
Hot Spring	2550	Less than 1%	70%
Pulaski	20,521	2%	56%
Totals	30,200	5%	57%

129. *Id.* § 27-16-303(a)(2). On top of that, upon conviction under this section, the ODS extends the time of the suspension by the length of the original suspension. *Id.* § 27-16-303(b)(1).

130. See Excel Data, *supra* note 111. The numbers shown for Hot Spring and Pulaski are almost certainly lower than the actual numbers, but problems with the data require erring on the side of under-reporting rather than potentially inflating. Sentence types included “Alcohol Safety Education,” “Community Service,” “Driver’s License Suspended,” “Fine,” “Probation,” “Probation-Supervised,” “Probation-Unsupervised,” “Sentence,” “Suspended Imposition of Sentence,” and “Imposed Conversion” (signifies data imported from prior case management system) See *supra* note 99 at (1). No sentence was counted as a “jail sentence” unless it was labeled “Jail Time Local Facility” or “Department of Corrections.” Pulaski had 4155 labeled merely “Sentence” and 3064 labeled “Imposed Conversion.” Hot Spring had 974 “Sentence.” *Id.*

131. See Excel Data, *supra* note 111. Note especially the caveat about categories counted as a “jail sentence.” If we add in the 974 Hot Spring County cases from the category “Sentence,” the percentage jumps to 38%. If we add in the 4155 Pulaski cases from the category “Sentence,” the percentage jumps to 22%. Adding in that category for those two counties would bring the percentage of cases from all three counties that resulted in jail time up to 22%.

V. CONCLUSION AND RECOMMENDATIONS

The data examined did not reveal a pattern of imprisoning individuals solely for inability to pay their fines on the selected minor traffic offenses in the three counties studied. However, it is probable that many of the warrants subsequently issued for FTA, FTP, or FTC on those minor infractions¹³² resulted in some defendants being jailed. In addition, this small sample is not dispositive; further investigation is needed.

Driving on a suspended license is one way that some of the minor traffic offenses can lead to jail in certain circumstances. For example, an offender is unable to pay and has his or her license suspended as a result of failure to pay, then is subsequently convicted of driving on a suspended license. Technically, a defendant in this situation is not jailed for his inability to pay, but for the violation of driving on a suspended license. However, had the defendant been able to pay the fine on the original minor offense, his license would never have been suspended. This scenario is illustrative of the “[p]rolific use of arrest warrants and driver’s license suspensions”¹³³ leading to a “vicious cycle of poverty and incarceration.”¹³⁴

The recent litigation and other studies examined indicate that Arkansas needs to make improvements to the overall system of imposing and enforcing fines, fees, and court costs. Legislatures and courts around the country have begun reforming their laws and procedures, and various stakeholders have proposed best practices. The following is a list of suggested reforms for Arkansas to help ensure that no defendant serves jail time solely due to an inability to pay. While this article focuses on the consequences of fines, fees, and costs generated by minor infractions, the recommendations apply to LFOs generally.

132. See *supra* Table 8. Thirty-five percent of all warrants issued in traffic cases were for the selected minor infractions. *Id.*

133. BRADEN ET AL., *supra* note 18, at 8.

134. *Id.*

A. The Legislature Should Clarify the Statutory Language to Make It In-disputable That Ability-to-Pay Determinations Are Required Before Fines Are Imposed and That Judges Have Authority to Waive Fines, Fees, and Costs

The legislature should remove any ambiguity in the statutes governing imposition of fines, fees, and costs, including:

- (1) Expressly requiring an on-the-record ability to pay determination before the imposition of any fines or fees.¹³⁵
- (2) Setting out clear guidelines for determining when a defendant would be unable to pay without “undue hardship.”¹³⁶
- (3) Clearly empowering judges to reduce or waive fines, fees, and costs at the time of sentencing, if the judge finds the defendant is unable to pay.¹³⁷

135. Presently the statutes dictate that *following* the imposition of a fine, the court should inquire about the defendant’s payment arrangements. ARK. CODE ANN. § 16-13-702(a)(2) (Repl. 2010) (emphasis added). As discussed in *supra* note 53, some Arkansas judges interpret this to require an ability to pay determination and others do not. In addition, *if* the defendant claims an inability to pay, the court shall inquire into the defendant’s ability to pay and make a determination. *Id.* § 16-13-702(a)(5)(A). This appears to place the onus on the defendant, who may not realize he or she can raise the issue. *See* AM. BAR ASS’N, *supra* note 52, at 3 (“An individual’s ability to pay should be considered at each stage of proceedings, including at the time fines are imposed and before any sanctions for nonpayment”)

136. *See* COLO. REV. STAT. ANN. § 18-1.3-702 (4)(a)–(h) (2002). A defendant or defendant’s family would suffer “undue hardship” if paying an LFO deprived them of money needed for food, shelter, clothing, necessary medical expenses, or child support. *Id.* Factors the court *shall* consider: homelessness; present employment, income, and expenses; defendant’s outstanding debts and liabilities; whether the defendant receives public assistance; real or personal property of the defendant available to convert without undue hardship; whether the defendant resides in public housing; whether the defendant’s family income is less than 200% of the federal poverty line, and any other circumstances that could impair the defendant’s ability to pay. *Id.* (emphasis added).

137. If a defendant defaults in payment of a fine or installment, and the court determines that the default was not due to “purposeful refusal to obey the sentence of the court” or “failure on his or her part to make a good faith effort to obtain the funds required for payment,” the court can allow additional time for payment, reduce the amount of each installment, or revoke the fine or any unpaid portion of the fine. ARK. CODE ANN. § 16-13-703(c)(1) (Supp. 2017); *id.* § 16-13-703(d). Judges should have all these options at the time a sentence is imposed. Also, the statute addresses only fines and gives no express authority for reduction of fees and costs. *See* AM. BAR ASS’N, *supra* note 52, at 1 (“GUIDELINE 1: Limits to Fees . . . No law or rule should limit or prohibit a judge’s ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause a substantial hardship.”). For purposes of the guideline, “fees” encompasses surcharges, assessments, court costs and user fees. *Id.* at 1–2; *see also id.* at 3 (“GUIDELINE 2: Limits to Fines . . . No law or rule should limit or prohibit a judge’s ability to waive or reduce

Reforming the statutes governing fines and fees may prove difficult. In the 2019 session, Representative Jay Richardson proposed a bill eliminating the fees for installment payments on court-ordered fines.¹³⁸ He withdrew the bill one week later, and it was referred to the Joint Interim Committee for study.¹³⁹

B. The Legislature Should Change the Law So That Driver's License Suspensions Are Not a Sanction for FTA or FTP

Due to the previously discussed harms to the poor caused by driver's license suspensions for nonpayment of fines, the law governing suspensions should be reformed. State Senator Alan Clark proposed legislation to repeal ARK. CODE ANN. § 16-13-708, governing suspension for failure to pay, and amend section 16-17-131, governing suspension for failure to appear, in the most recent general assembly.¹⁴⁰ A report from the Department of Finance and Administration estimated that the proposed legislation would cost the state approximately \$32,200 in lost revenue.¹⁴¹ The bill did not pass, but the Senate Judiciary Committee has recommended it for interim study.¹⁴²

In the absence of this needed reform, if judges suspend or revoke a license for FTA, FTP, or FTC, they should exercise their authority under ARK. CODE ANN. §27-16-915 to issue a restricted driving permit so that the defendant can still drive to work, school, court dates, etc.¹⁴³

any fine, and a full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship.”).

138. H.B. 1749, 92nd Gen. Assembl., Reg. Sess. (Ark. 2019).

139. *Bill Status History HB1749 – To Repeal the Installment Fee For an Installment Payment Towards a Court-Ordered Fine*, ARK. STATE LEGIS, <http://www.arkleg.state.ar.us/assembly/2019/2019R/Pages/BillInformation.aspx?measureno=HB1749> (last visited Oct. 6, 2019).

140. S.B. 623, 92nd Gen. Assembl., Reg. Sess. (Ark. 2019).

141. DEP'T. OF FINANCE & ADMIN., LEGISLATIVE IMPACT STATEMENT BILL: SB623 1 (2019). That figure is based on the approximately 32,200 individuals who had their licenses suspended in 2018 each paying the state \$100 for their license to be reinstated. *Id.*

142. *Bill Status History SB623 – To Remove a Driver's License Suspension or Revocation as an Available Penalty For an Offense Not Related to Driving a Motor Vehicle*, ARK. STATE LEGIS., <http://www.arkleg.state.ar.us/assembly/2019/2019R/Pages/BillInformation.aspx?measureno=SB623> (last visited Sept. 14, 2019).

143. *See also* CAROLINE HOLLINGSWORTH & LINDSEY BAILEY, ASS'N OF ARK. COUNTIES, FINE COLLECTION SEMINAR & GUIDEBOOK 14 (3rd ed. 2019).

C. All Judges Should Use the Bench Card Developed by the National Task Force on Fines, Fees, and Bail Practices¹⁴⁴

The National Task Force on Fines, Fees, and Bail Practices (Task Force) is a joint endeavor of the Conference of Chief Justices and the Conference of State Court Administrators. The work of the Task Force was sponsored by the State Justice Institute and the Bureau of Justice Assistance, with coordination from the National Center for State Courts.¹⁴⁵ The Bench Card provides information about what constitutes notice of a hearing to determine ability to pay,¹⁴⁶ defines a meaningful opportunity for the defendant to be heard,¹⁴⁷ lists factors the court should consider when determining the willfulness of any nonpayment,¹⁴⁸ and recommends findings on the record.¹⁴⁹

144. See generally NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACS., LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES (2017), https://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx (last visited Sept. 14, 2019). The American Bar Association referenced this step-by-step guide as a resource for courts to consult so that they apply "a clear and consistent standard to determine an individual's ability to pay . . ." AM. BAR ASS'N, *supra* note 52, at 11. The Michigan Supreme Court incorporated many of these guidelines into their court rules. JULIA NORTON, MICH. SUPREME COURT, ABILITY TO PAY COURT RULE AMENDMENTS (2016), <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/TCS-2016-25.pdf#search=%22ability%20to%20pay%22>. Ohio was a leader in reforms of this type. See Sobol, *supra* note 21, at 527–30 (discussing Ohio's swift actions to provide judges with bench cards and to train judges and court staff).

145. NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACS., *supra* note 144, at 2.

146. *Id.* at 1.

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the person's ability to pay at the hearing;
- d. That the person should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;
- f. Right to counsel[]; and
- g. That a person unable to pay can request payment alternatives, including, but not limited to, community service and/or a reduction of the amount owed.

147. *Id.* ("The person must have an opportunity to explain: (a.) [w]hether the amount charged as due is incorrect; and (b.) [t]he reason(s) for any nonpayment (e.g., inability to pay).").

148. *Id.*

Factors the Court Should Consider to Determine Willfulness:

- a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG);
- b. Receipt of needs-based, means-tested public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability

Alternative sanctions recommended by the Task Force include reduction of the total amount due, extension of time to pay, a reasonable payment plan, credit for community service, credit for completion of a relevant, court-approved program, or waiver or suspension of the amount due.¹⁵⁰ The Arkansas Administrative Office of the Courts has conducted several trainings for judges on fines, fees, and court costs, and it has distributed the bench card to the judges.¹⁵¹

benefits (Such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);

- c. Financial resources, assets, financial obligations, and dependents;
- d. Whether the person is homeless, incarcerated, or resides in a mental health facility;
- e. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support;
- f. The person's efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges.
- g. Other LFOs owed to the court or other courts;
- h. Whether LFO payment would result in manifest hardship to the person or his/her dependents; and
- i. Any other special circumstances that may bear on the person's ability to pay.

149. *Id.* at 2.

The court should find, on the record, that the person was provided prior adequate notice of:

- a. Hearing date/time;
- b. Failure to pay an LFO is at issue;
- c. The right to counsel[];
- d. The defense of inability to pay;
- e. The opportunity to bring any documents or other evidence of inability to pay; and
- f. The opportunity to request an alternative sanction to payment or incarceration.

After the ability to pay hearing, the court should also find on the record that the person was given a meaningful opportunity to explain the failure to pay.

If the Court determines that incarceration must be imposed, the Court should make findings about:

- a. The financial resources relied upon to conclude that nonpayment was willful; or
- b. If the defendant/respondent was not at fault for nonpayment, why alternate measures are not adequate, in the particular case, to meet the state's interest in punishment and deterrence.

150. *Id.* (These alternatives are available in Arkansas.) ARK. CODE ANN. § 16-13-703(d) authorizes judges to extend the time for payment, reduce the amount of installment payments, or revoke a fine in whole or in part if the default in payment was not due to "purposeful refusal to obey the sentence" or "failure . . . to make a good faith effort to obtain the funds required for payment." ARK. CODE ANN. §§ 5-4-801 to 805 define and set out procedures for sentencing eligible offenders to community service.

151. E-mail from Ben Barham, Judicial Branch Educ. Dir., Ark. Admin. Office of the Courts, to author (Sept. 16, 2019, 1:52 P.M. CST) (on file with author).

D. Courts Should Implement Technology to Increase Efficiency and Accessibility

The students who conducted the Conway study recommended implementation of an online case resolution system, Matterhorn, to allow citizens to interact with the district court remotely.¹⁵² Matterhorn provides a platform-based online ability-to-pay assessment software, the Matterhorn ATP Assessment Tool.¹⁵³ Defendants can access the platform at any time to enter their identifying information, review their outstanding LFOs, and answer a series of questions to provide a complete picture of their financial state to the court.¹⁵⁴ The tool requests detailed information about income, assets, and expenses; it also prompts the defendant to explain any special circumstances the court should consider.¹⁵⁵ A distilled version of the data is automatically available to the judge, who can see summary information assessing the defendant's resources against various poverty measures as well as any information about special circumstances.¹⁵⁶

Currently, the district courts in Faulkner and Van Buren Counties, and the Guy, Mayflower, Sherwood, and Vilonia district courts are using Matterhorn.¹⁵⁷ If the platform is successful in those courts in terms of better access for defendants and quicker, fairer resolution of cases, it or a similar technology should be widely adopted by other district courts.¹⁵⁸ Ideally, every court would use the same assessment tool, and that tool would include all the relevant factors necessary to determine ability to pay, promoting uniformity in outcomes. If all courts adopted the same platform technology and defendants were able to search by their driver's license number, adding global search functionality would alleviate the problem of defendants who cannot keep up with charges or warrants in multiple counties.

A relatively simple technology—text messaging defendants to remind them of their court date—is showing promising results around the country.

152. Hannah Bahn et al., *Recommendations: Courting Solutions in the City of Conway 3* (2017) (unpublished practicum project final report, University of Arkansas Clinton School of Public Service) (on file with the author) [hereinafter *Recommendations*].

153. Meghan M. O'Neil & J.J. Prescott, *Targeting Poverty in the Courts: Improving the Measurement of Ability to Pay*, 82 L. & CONTEMP. PROBS. 199, 212 (2019).

154. *Id.*

155. *Id.* at 213.

156. *Id.*

157. See MATTERHORN, <https://www.courtinnovations.com> (last visited Nov. 16, 2019).

158. Mobile apps are another promising technology. In 2018, Craighead County District Court announced development of an app for iPhone and Android devices that would allow defendants to access court information and to pay fines, fees, and costs remotely, stating plans to develop push notification functionality to remind defendants of their court dates. *Craighead Co District Court Develops New App*, KAIT8 (Feb. 14, 2018), <https://www.kait8.com/story/37499768/craighead-co-district-court-develops-new-app/>.

A recent New York City study found that sending a reminder text message led to a 26% reduction in FTAs.¹⁵⁹ A public defender in Richmond, Virginia, says text message reminders really help her clients, who are often poor and have chaotic lives, making it easy to forget their court dates.¹⁶⁰ Courts and public defenders in more than a dozen states are now using text message reminders.¹⁶¹ With the ubiquity of cell phones even among the poor, text message reminders could be a very effective strategy for helping defendants remember their court dates and avoid FTAs.¹⁶²

E. Community Service Options Should Be Expanded

Community service as an alternative to a monetary fine is desirable when the program is robust and well-designed,¹⁶³ but is an ineffective solution if the defendant cannot perform the sentenced hours within the time limit. Poor defendants often encounter difficulty meeting their community service obligations because, if employed, they cannot afford to miss work, because they do not have reliable transportation to the service site, or because they have children and cannot arrange childcare.¹⁶⁴

In Arkansas, Alternative Service and Community Service is governed by ARK. CODE ANN. § 5-4-801 et seq. and Arkansas Administrative Code 159.00.1-8.8. Community Service is imposed by court order and is generally ordered in lieu of a jail sentence.¹⁶⁵ Alternative Service is a voluntary program allowing individuals to satisfy fines and costs assessed by the court in lieu of making payments.¹⁶⁶ For Alternative Service, participants receive a

159. Jason Tashea, *Text Messages are a Cheap and Effective Way to Reduce Pre-Trial Detention*, ABA J. (July 17, 2018), http://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail.

160. Denise Lavoie, *C U in Court: Text Messages Now Remind Defendants to Show Up*, AP NEWS (May 4, 2019), <https://www.apnews.com/579ae4efd6ef4a1ab4b620e105c4d38d>.

161. *Id.*

162. In *Recommendations*, *supra* note 152, at 4, Bahn et al. advocate implementation of a live-caller reminder system. However, text message reminders are likely more effective—they can be automated, and the defendant will be able to refer back to the text message for relevant information such as date, time, location and any special instructions.

163. See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 17 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>. The authors cite a program in Cambria County, Pennsylvania, as an example of a well-designed program: persons who owe fines and court costs that they are unable to pay are allowed to work at preauthorized sites such as the Salvation Army or YMCA. *Id.* They may also seek approval to volunteer at alternate sites such as day-care centers or local churches. *Id.*

164. HARRIS, *supra* note 27, at 50–51; see also BANNON ET AL., *supra* note 163, at 15.

165. See, *Community/Alternative Service Program*, HOT SPRING COUNTY DIST. CT., <https://malverndistrictcourt.godaddysites.com/community-%2Falt-service> (last visited Sept. 13, 2019) [hereinafter HOT SPRINGS COUNTY DISTRICT CT.].

166. *Id.*

credit of \$9 per hour in Hot Spring County¹⁶⁷ and \$65 per 8-hour day in Garland County.¹⁶⁸ For both community service and alternative service, the work is performed for nonprofit or government agencies only; the court assigns the worksite, giving participants no choice of location.¹⁶⁹ Participants who do not maintain the assigned work schedules and follow the program rules and procedures may lose the right to participate in the program and receive a warrant for FTC.¹⁷⁰

Due to the difficulties that poor defendants may face in completing their community and alternative service obligations, judges and program administrators should exercise flexibility and creativity. Judges should discuss with defendants their ability to complete service hours, including how to overcome any impediments.¹⁷¹ Examples are assigning a work site that is on a bus line¹⁷² or within reasonable walking distance for a defendant or allowing a longer time period to fulfill the obligation for defendants who are not able to miss too much work. While most government agencies and many nonprofits can only supervise community and alternative service during regular business hours Monday through Friday, selected nonprofits could be encouraged to schedule periodic weekend events.¹⁷³ Participants should also be allowed to earn service credit by volunteering during times of crisis.¹⁷⁴

167. *Id.*

168. *Community/Alternative Service Program*, CITY OF HOT SPRINGS, <https://www.cityhs.net/146/Community-Alternative-Service-Program> (last visited Sept. 13, 2019) [hereinafter CITY OF HOT SPRINGS]. The regulation from Arkansas Department of Community Correction states that each hour be credited at minimum wage, so the website may be out of date. ARK. ADMIN. CODE. § 159.00.1-8.8 (2019).

169. See HOT SPRINGS COUNTY DIST. CT., *supra* note 165; CITY OF HOT SPRINGS, *supra* note 168.

170. HOT SPRINGS COUNTY DIST. CT., *supra* note 165.

171. ALICIA BANNON ET AL., *supra* note 163, at 32-33; see also AM. BAR ASS'N, *supra* note 52, at 6 (“Any non-monetary alternatives should be reasonable and proportional in light of the individual’s financial, mental, and physical capacity, any impact on the individual’s dependents, and any other limitations, such as access to transportation, school, and responsibilities for caregiving and employment.”).

172. Unfortunately, public transportation is not widely available in Arkansas, so this recommendation would only help in certain areas.

173. Habitat for Humanity, for instance, regularly offers Saturday opportunities. *Volunteer Opportunities*, HABITAT FOR HUMANITY OF CENT. ARK., <https://www.habitatcentralark.org/volunteer> (last visited Sept. 14, 2019). Tree Streets of Little Rock also regularly works on Saturdays. TREE STREETS LITTLE ROCK, <https://treestreetsof.com/> (last visited Sept. 14, 2019). These are just two examples of placements that would also give participants a sense of tangibly bettering their community. There are certainly many others.

174. See Jeanette Anderton & Marissa Hicks, *Faulkner County Judge Declares an Emergency*, LOG CABIN DEMOCRAT (May 24, 2019), <https://www.thecabin.net/news/20190524/faulkner-county-judge-declares-emergency> (discussing District Judges Chris Carnahan and David Reynolds offering double service time credit to probationers and others who owed community service in exchange for filling sandbags prior to anticipated flooding in Faulkner County).

The recommendations outlined above are just a starting point. Legislators, judges, and other stakeholders need to work together to identify laws and practices that harm the poor *simply because they are poor* and implement safeguards to eliminate the specter of modern-day debtors' prisons for poor Arkansans in the justice system.