

Creditor Courts

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One of the largest institutional creditors in the United States is perhaps the most unexpected: the criminal court system. Each year, creditor courts collect more than \$15 billion in revenues from criminal defendants. These fees are the lifeblood of the modern criminal legal system.

In this Article, we shed new light on the legal and economic framework under which myriad stakeholders operate in creditor courts. By analyzing new survey data from clerks of court and 102 contracts with debt collection agencies in Florida, we provide general insights into how creditor courts distort incentives and teem with conflicts of interest. These inefficiencies regularly disrupt the financial stability of the judiciary as well as the lives of the largely indigent criminal defendants who remain indebted to this system.

As we show, legislators, clerks of court, and the judiciary writ large subject criminal defendants to unconstrained coercion through the use of so-called “user fees.” Leveraging campaign finance data and publicly available litigation material, we also find suggestive evidence of possible quid pro quo rewards between collection agencies assigned to collect debt on behalf of courts and the clerks of court tasked with administering them. We argue that state constitutional reforms that eliminate creditor courts and mandate courts be funded from general state revenues are the only meaningful ways to permanently redress the social costs generated by criminal monetary sanctions.

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I. INTRODUCTION

A growing corpus of research illustrates the broad reach of America's criminal legal system. Nearly 40% of children born between 1999–2005 had a parent or guardian who faced criminal charges; for Black children, this statistic

is nearly two-thirds (62%).¹ Among other things, contact with criminal courts lowers wages,² increases recidivism via forfeiture of government benefits,³ and results in the loss of civil liberties.⁴

Entanglements with the criminal legal system also expose defendants to significant financial consequences. Nearly all criminal defendants pay monetary sanctions tied to their convictions, collectively known as legal financial obligations (LFOs).⁵ LFOs include a wide range of devices including restitution, fines, and increasingly, “user fees,” that courts charge defendants for access to the criminal court system.⁶ According to the Brookings Institution’s Hamilton Project, state and local governments collect more than \$15 billion in such revenues annually.⁷

Creditor courts are a growing phenomenon. The type and quantity of user fees continue to increase;⁸ they manifest themselves in a variety of forms such

¹ Keith Finlay, Michael Mueller-Smith & Brittany Street, *Measuring Intergenerational Exposure to the U.S. Justice System: Evidence from Longitudinal Links Between Survey and Administrative Data* 25–26 (June 9, 2022) (unpublished manuscript), https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2022/06/CJARS_KidExposure_20220609.pdf [<https://perma.cc/LTX6-B7TW>].

² See Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191, 192 (2018).

³ Cody Tuttle, *Snapping Back: Food Stamp Bans and Criminal Recidivism*, 11 AM. ECON. J.: ECON. POL’Y 301, 301–02 (2019).

⁴ Neel U. Sukhatme, Alexander Billy & Gaurav Bagwe, *Felony Financial Disenfranchisement*, 76 VAND. L. REV. 143, 156 (2023).

⁵ See *infra* Part II.

⁶ NAT’L TASK FORCE ON FINES, FEES & BAIL PRACS., *PRINCIPLES ON FINES, FEES AND BAIL PRACTICES* 3 (Feb. 2021), https://www.ncsc.org/_data/assets/pdf_file/0021/61590/Principles-on-Fines-Fees-and-Bail-Practices-Rev.-Feb-2021.pdf [<https://perma.cc/V9LB-TG44>]. The National Task Force on Fines, Fees, and Bail Practices describes LFOs as “all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.” NAT’L TASK FORCE ON FINES, FEES & BAIL PRACS., *LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS* 1 (Mar. 2021), https://www.ncsc.org/_data/assets/pdf_file/0026/17396/benchcard-reformatted-3-13-19.pdf [<https://perma.cc/7LR4-2URU>].

⁷ PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, HAMILTON PROJECT, *NINE FACTS ABOUT MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM* 1 (Mar. 2019), https://www.brookings.edu/wp-content/uploads/2019/03/BailFacts_20190314.pdf [<https://perma.cc/EN6S-W3G6>].

⁸ See *infra* Part II.

as public defender fees,⁹ driver's license reinstatement fees,¹⁰ and parole costs and electronic monitoring fees.¹¹ Failure to pay these criminal debts often results in additional punishment beyond that directly related to sentencing. Delinquent LFOs lead to disenfranchisement, terminated driver's licenses, and even incarceration.¹² In practice, LFOs extend defendants' exposure to criminal courts and heighten the costs of contact.¹³

⁹ According to the National Legal Aid & Defender Association, forty-two states and the District of Columbia authorize the collection of fees related to court appointed attorneys. MAREA BEEMAN, KELLIANNE ELLIOTT, ROSALIE JOY, ELIZABETH ALLEN & MICHAEL MROZINSKI, NAT'L LEGAL AID & DEF. ASS'N, AT WHAT COST? FINDINGS FROM AN EXAMINATION INTO THE IMPOSITION OF PUBLIC DEFENSE SYSTEM FEES 1 (July 2022), https://www.nlada.org/sites/default/files/NLADA_At_What_Cost.pdf [<https://perma.cc/D6WF-G8SV>]; see, e.g., TEX. GOV'T CODE ANN. § 26.050 (2023); see also Shannon Najmabadi, *He Thought He Had a Free Court-Appointed Lawyer. Then He Got a Bill for \$10,000*, TEX. TRIB. (Nov. 14, 2017), <https://www.texastribune.org/2017/11/14/texas-court-appointed-lawyers-arent-always-free/> [<https://perma.cc/R98J-C3ZU>].

¹⁰ ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 24 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [<https://perma.cc/QW5X-9DLV>].

¹¹ See TAMMY GAMERMAN ET AL., OFF. OF THE N.Y.C. COMPTROLLER SCOTT M. STRINGER, FEES, FINES AND FAIRNESS: HOW MONETARY CHARGES DRIVE INEQUITY IN NEW YORK CITY'S CRIMINAL JUSTICE SYSTEM 5 (Sept. 2019), <https://comptroller.nyc.gov/wp-content/uploads/documents/Fees-and-Fines-in-the-Criminal-Justice-System.pdf> [<https://perma.cc/RZB2-HDB8>] ("For instance, parolees are expected to pay a supervision fee of \$30 per month upon release, but the private company authorized to collect those fees charges 'convenience fees ranging for \$2 to \$3 for every electronic transfer.'"); FINES & FEES JUST. CTR. & REFORM ALL., 50 STATE SURVEY: PROBATION & PAROLE FEES 10 (May 2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/05/Probation-and-Parole-Fees-Survey-Final-2022-.pdf> [<https://perma.cc/SM3S-MHS2>]; FINES & FEES JUST. CTR., ELECTRONIC MONITORING FEES: A 50-STATE SURVEY OF THE COSTS ASSESSED TO PEOPLE ON E-SUPERVISION 1 (Sept. 2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/09/FFJC-Electronic-Monitoring-Fees-Survey-2022.pdf> [<https://perma.cc/RR9F-WDCS>]; Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1485 (2016).

¹² See, e.g., ALA. CODE § 15-22-36.1(a)(3) (2023) (disenfranchisement); ARK. CODE ANN. § 16-13-708(a)(1) (West 2023) (suspension of driver's license); N.H. REV. STAT. ANN. § 263:56-a (2023) (suspension of driver's license); WIS. STAT. ANN. § 973.07 (West 2023) (incarceration).

¹³ In a randomized control trial that cleared defendants' misdemeanor debts in Oklahoma, members of the control group were subjected to new warrants, additional LFOs, as well as garnishments within a year of the initial sentence. See Devah Pager, Rebecca Goldstein, Helen Ho & Bruce Western, *Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment*, 87 AM. SOCIO. REV. 529, 543-44 (2022). Despite these tactics, courts collected less than 5% of outstanding debt. *Id.* at 546. The research indicates that "fines and fees criminalize poverty by prolonging criminal court involvement for those unable to pay." *Id.*

In this Article, we contribute to this discussion by drawing attention to the understudied stakeholders who collect and benefit from monetary sanctions in the creditor court system. These actors include legislators and clerks of court, whose interactions form a complex economic network that we sketch.¹⁴ By focusing on these relationships, we show that stakeholders compete over revenue sourced from largely indigent defendants. Legislators' growing appetite for such revenue directly deprives courts of already scarce funding. To their detriment, defendants lack tools to halt additional encroachments.¹⁵ This vulnerable position encourages legislators—with the approval of court officials—to adopt larger penalties both in scope and size. However, such expansions do not sufficiently cover the costs of providing court services. Thus, the process repeats itself *ad infinitum*.

This economic framework is complicated by the introduction of third-party firms that bid for contracts to track outstanding debt. These agencies, employed to acquire hard-to-collect debt, earn surcharges on LFOs, or a portion of these fees.¹⁶ We show correlative evidence that debt collection firms make arguably inappropriate campaign donations to sponsor the election of clerks of court who contract with these agencies. This finding dovetails with contextual evidence of putative illegal conduct outlined in a series of criminal investigations across the country.

Our analysis illustrates that the creditor court system is dominated by conflicts of interest among stakeholders. Such conflicts often stem from a fundamental problem: fees are detached from the costs they are supposed to cover. Further, the misaligned incentives foment the potential for inappropriate campaign finance donations. Perhaps most problematic, fees encourage stakeholders to coerce marginalized defendants to fund their activities, thereby lengthening exposure to criminal courts and magnifying the associated deleterious consequences.¹⁷ To make matters worse, the judiciary still regularly

¹⁴ See *infra* Part IV.A.

¹⁵ See *infra* Part III.D.

¹⁶ See *infra* Part IV.B.

¹⁷ See, e.g., Ryan E. Kessler, Do Fines Cause Financial Distress? Evidence from Chicago 2 (June 2, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3592985> [<https://perma.cc/37ED-E5DL>]; Carl Lieberman, Elizabeth Luh & Michael Mueller-Smith, *Criminal Court Fees, Earnings, and Expenditures: A Multi-State RD Analysis of Survey and Administrative Data* 1 (Ctr. for Econ. Stud., Working Paper, No. 23-06, 2023), <https://www2.census.gov/library/working-papers/2023/adrm/ces/CES-WP-23-06.pdf> [<https://perma.cc/G3AH-MWPZ>]. Lieberman's, Luh's, and Mueller-Smith's study did not find robust, systematically negative effects of fines or fees. *Id.* at 16. Their regression discontinuity design (RDD) focuses on one-time changes to the fee system. *Id.* at 9. Florida—one of the states they study—implemented a \$65 conviction fee on May 21, 2004. *Id.* at 5. Using a secular RDD, they *do* find statistically significant decreases in the likelihood of W-2 submission as well as increases in felony and drug convictions in Florida. *Id.* at 16–17. However, these effects are not identified in the four other states examined. See *id.* It is noteworthy that Florida also implemented additional fines and fees on July 1, 2004 that affect

finds itself on the verge of insolvency despite its ability to charge such fees.¹⁸ Together, these findings explain why fee-based court systems fail to sufficiently finance themselves while also causing sizable negative consequences.

Past critics of LFO-based systems have typically focused on singular actors (i.e., defendants);¹⁹ accordingly, their recommended legal reforms have been limited to the perspective of those actors. For example, graduated fees based on ability-to-pay have become a popular policy prescription.²⁰ Proponents argue income-based LFOs would restrain excessive penalties.²¹ Similarly, others have proffered debt-forgiveness programs.²² Though well-intentioned, these measures are merely palliative. They do not correct the underlying systemic design flaw: the distorted incentives and conflicts of interest inherent to a fee-based judiciary. Instead, removing fees from the courts would make the administration of justice more financially sound and aligned with the interests of constituents. As we show, broader state constitutional reforms might be necessary to eliminate creditor courts and redress the ills of fee-based judiciaries.

Part II of this Article provides an overview of different categories of legal-financial obligations. Our approach focuses primarily on fees used to fund judicial systems. As such, we describe the rise of the creditor court system in Florida, which parallels broader nationwide trends. Part III then details why fee-based judiciaries fail in practice. In particular, we spotlight problems of temporal mismatch (revenues received at different times than when expenses

some but not all cases; this potentially confounds the design. *See* FLA. STAT. ANN. § 28.241(6) (West 2023).

¹⁸ *See, e.g.*, REVENUE STABILIZATION WORKGROUP, STABILIZING REVENUES FOR THE STATE COURTS SYSTEM AND CLERKS OF COURT 3 (Nov. 2011), <https://www.flcourts.gov/content/download/218240/file/RevenueStabilizationReport.pdf> [<https://perma.cc/5QTV-2NPZ>].

¹⁹ Compare Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 110 (2017) (considering how a narrow focus on defendants obscures the motivations of other relevant actors), with Tia Lee Kerkhof, Note, *Small Fines and Fees, Large Impacts: Ability-to-Pay Hearings*, 95 S. CAL. L. REV. 447, 481 (2021) (focusing on defendants and suggesting a limited “ability to pay” determination to reduce the hardship created by LFOs), and Michael F. Crowley, Matthew J. Menendez & Lauren-Brooke Eisen, *If We Only Knew the Cost: Scratching the Surface on How Much it Costs to Assess and Collect Court Imposed Criminal Fees and Fines*, 4 UCLA CRIM. JUST. L. REV. 165, 176 (2020) (noting the need for more data to assess the impact of LFOs on public employees).

²⁰ *See infra* Part II.C.

²¹ *See, e.g.*, Colgan, *supra* note 19, at 54–55; Meghan M. O’Neil & J.J. Prescott, *Targeting Poverty in the Courts: Improving the Measurement of Ability to Pay*, 82 L. & CONTEMP. PROBS. 199, 200 (2019); Dana A. Waterman, Note, *A Defendant’s Ability to Pay: The Key to Unlocking the Door of Restitution Debt*, 106 IOWA L. REV. 455, 458 (2020).

²² MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 11–12 (Nov. 2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final4.pdf [<https://perma.cc/3WTB-F43B>].

are accrued), fee proliferation, and fee diversion. Part III also applies arguments from theoretical political economics—particularly work on the importance of exit and voice in political systems—to explain why creditor court systems are prone to such inefficiencies and distortions.

Part IV then confronts a separate but compounding problem: how attempts to collect debt create a web of new entanglements. Once again using data from Florida, we sketch a system rife with potential conflicts of interest. We begin by presenting empirical results from a novel survey of clerks of court, who describe a system that strains to collect sufficient revenue from indigent defendants to fund its operations. Though creditor courts have attempted to ease these issues by contracting with third-party debt collection agencies, the contractual relationships between the parties appear to do little to stave off financial concerns. Rather, these contracts often put these agencies' interests at odds with the courts they are supposed to serve. Likewise, they further alienate defendants from whom they attempt to collect. We illustrate both facts using detailed data on 102 contracts between counties/clerks and collection agencies.

Part IV also offers a possible explanation to why this state of affairs persists: collection agencies and their representatives contribute significantly to clerks' personal and political interests. Although we make no causal findings, evidence drawn from litigation as well as campaign finance data we collected suggest distorted interests may arise from these contractual relationships.

Part V then analyzes a series of proposed methods of addressing the problems plaguing fee-based judiciaries. It concludes that these methods might provide temporary relief but are unlikely to change the inefficiencies and conflicts of interest inherent in fee-based systems. Ultimately, we conclude that state constitutional reform to eliminate creditor courts is likely the only meaningful way to surmount the challenges we outline in the prior sections.

II. THE RISE OF CRIMINAL COURT DEBT

We begin with an overview of fees and the broader category of monetary sanctions to which they belong, legal-financial obligations (LFOs). We then highlight the system in Florida, which serves as a case study for our analysis.

A. *Types of Legal-Financial Obligations (LFOs)*

Despite increased scholarly focus,²³ monetary sanctions receive substantially less attention than other obligations imposed by the criminal legal

²³ See, e.g., Pager, Goldstein, Ho & Western, *supra* note 13, at 530; Keith Finlay, Matthew Gross, Elizabeth Luh & Michael Mueller-Smith, The Impact of Financial Sanctions in the U.S. Justice System: Regression Discontinuity Evidence from Michigan's Driver Responsibility Program 1 (Nov. 10, 2021) (unpublished manuscript), https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2021/11/CJARS_

system.²⁴ Broadly speaking, such sanctions comprise three main devices: fines, restitution, and fees.

Fines—One of the oldest sanctions,²⁵ fines function primarily as a means of punishment.²⁶ They can serve as a complement to and substitute for other penalties, most notably imprisonment.²⁷ Fines typically reflect an individual's criminal history, the severity of the violation, or personalized details.²⁸ Generally, they tend to fall within a prespecified statutory range.²⁹

Apart from their penological objectives, fines also generate revenue for local or state governments.³⁰ Collections can be directed to either general or targeted sources.³¹ This pecuniary feature has been subject to criticism for centuries; beleaguered citizens have accused governments of extortion or using these devices for ulterior motives.³²

FinSanc_MI_DRF_20211110.pdf [https://perma.cc/G3H4-8KXC]; Joni Hirsch & Priya Sarathy Jones, *Driver's License Suspension for Unpaid Fines and Fees: The Movement for Reform*, 54 U. MICH. J.L. REFORM 875, 877 (2021).

²⁴ Though an imperfect measure, a Google N-Gram analysis using hits from 2019 reveals that the term incarceration is at least seventy-eight times more prevalent than LFO, legal financial obligation, and criminal debt combined. *Google Books Ngram Viewer*, GOOGLE, <https://books.google.com/ngrams/> [https://perma.cc/6KVG-TUU6] (search in search bar for “incarceration, LFO, legal financial obligation, criminal debt”).

²⁵ Fines levied upon thieves and those guilty of domestic abuse can be found in the Code of Hammurabi and the Torah, respectively. *See, e.g.*, ROBERT FRANCIS HARPER, CODE OF HAMMURABI KING OF BABYLON ABOUT 2250 B.C. 12–13 (1904); *Deuteronomy* 22:19.

²⁶ ANNE TEIGEN, NAT'L CONF. OF STATE LEGISLATURES, ASSESSING FINES AND FEES IN THE CRIMINAL JUSTICE SYSTEM 1 (Jan. 2020), https://documents.ncsl.org/wwwncsl/Criminal-Justice/Fines-and-Fees_v02.pdf [https://perma.cc/9T7E-KJAS].

²⁷ TERANCE D. MIETHE & HONG LU, PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE 88–90 (2005).

²⁸ Elizabeth Heckmann, *A Modern Poll Tax: Using the Twenty-Fourth Amendment to Challenge Legal Financial Obligations as a Condition to Re-Enfranchisement*, 100 CALIF. L. REV. 1417, 1420 (2022).

²⁹ *See, e.g.*, KY. REV. STAT. ANN. § 534.030 (West 2023) (fines for felonies); N.H. REV. STAT. ANN. § 651:2(IV) (2023) (general felonies and misdemeanors).

³⁰ Vittorio Nastasi, *Local Governments Collected \$9 Billion in Fines and Fees in 2020*, REASON FOUND. (Jan. 31, 2023), <https://reason.org/data-visualization/local-governments-collected-9-billion-in-fines-and-fees-in-2020/> [https://perma.cc/AKD8-NY5A].

³¹ R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 DUQ. L. REV. 751, 753 (2011).

³² Several English monarchs exploited fines to circumvent taxes or silence critics. *Timbs v. Indiana*, 139 S. Ct. 682, 693–94 (2019) (Thomas, J., concurring). Restrictions on fines in the common law system can be found in the Magna Carta, as well as the English Bill of Rights of 1689. *Id.* at 688 (majority opinion) (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)) (requiring that fines “be proportioned to the wrong” and “not be so large as to deprive [an offender] of his livelihood”); *id.* at 693 (Thomas, J., concurring) (“A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like

Restitution—Unlike fines, the goal of restitution is to compensate those harmed by crime.³³ It enables victims to seek restoration along many dimensions, including repayment for property damage, medical expenses, or lost income.³⁴ By and large, restitution “seeks to make victims whole.”³⁵ Unlike its counterparts, restitution is much less controversial. That is not to say that assessing and tracking restitution is without its own challenges.

For instance, in some jurisdictions, restitution is paid directly to the state, which in turn forwards the money to victims.³⁶ In other jurisdictions, however, former defendants pay restitution amounts directly to victims.³⁷ The lack of a central authority to keep track of restitution payments creates challenges both in collecting restitution payment and in keeping track of amounts that have been paid.³⁸ Accordingly, there is often a lack of good data on the effectiveness of restitution in achieving its stated objectives.

Fees—At least in theory, fees offset the administrative costs of the judiciary and connected actors.³⁹ For instance, fees are often imposed to recoup costs associated with court-appointed attorneys, investigations and prosecutions, the administration of the courts, and incarceration.⁴⁰ Related to fees are other types of obligations including *court costs* and *assessments*.⁴¹ These, too, reimburse the state for administrative costs.⁴²

Terminology varies by jurisdiction. Assessments may refer to surcharges in addition to other monetary sanctions.⁴³ In other locales, assessments are synonymous with court costs or fees.⁴⁴ However, the instrumental role of

manner, a merchant saving his trade, and a villein saving his tillage.” (quoting Magna Carta, ch. 20, in A.E. DICK HOWARD, *MAGNA CARTA: TEXT & COMMENTARY* 42 (rev. ed. 1998))).

³³ Ruback & Clark, *supra* note 31, at 756.

³⁴ Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 ANN. REV. CRIMINOLOGY 471, 473 (2018).

³⁵ See Heckmann, *supra* note 28, at 1438.

³⁶ See Martin, Sykes, Shannon, Edwards & Harris, *supra* note 34, at 473.

³⁷ See *id.*

³⁸ Jessica Gonzales-Bricker, *The Importance of Making Data-Driven Restitution Decisions*, COUNCIL OF STATE GOVS. JUST. CTR. (Apr. 28, 2022), <https://csgjusticecenter.org/2022/04/28/the-importance-of-making-data-driven-restitution-decisions/> [<https://perma.cc/3ACZ-YZZK>].

³⁹ MENENDEZ, CROWLEY, EISEN & ATCHISON, *supra* note 22, at 6.

⁴⁰ Martin, Sykes, Shannon, Edwards & Harris, *supra* note 34, at 473.

⁴¹ FINES & FEES JUST. CTR., ASSESSMENTS & SURCHARGES: A 50-STATE SURVEY OF SUPPLEMENTAL FEES 1 (Dec. 2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/12/Assessments-Surcharges-2.pdf> [<https://perma.cc/GRZ6-CTT5>].

⁴² *Id.*

⁴³ Martin, Sykes, Shannon, Edwards & Harris, *supra* note 34, at 473.

⁴⁴ Ruback & Clark, *supra* note 31, at 761.

assessments is identical to that of fees and court costs. In fact, clerks often interchangeably refer to the three categories.⁴⁵

Our gaze is fixed on this third bucket of LFOs. For simplicity we refer to fees, court costs, and assessments collectively as fees. We turn to how fees are increasingly being used as funding mechanisms for the judiciary, becoming the lifeblood of the creditor court system.

B. Fees as Funding Mechanisms

Fees date back to at least the 19th century in the United States.⁴⁶ Their legacy—much like that of many elements of the modern judicial system—has roots in systemic oppression. In the Reconstruction Era, several Southern states implemented a “convict leasing system.”⁴⁷ Under the system, state and local penal authorities “leased” Black inmates to private companies.⁴⁸ In turn, these entities took responsibility to supervise, house, and care for institutionalized individuals.⁴⁹ In exchange, these companies received revenue directly tied to inmate labor.⁵⁰ This system, therefore, offset the costs of administering criminal court services via products of inmate labor.⁵¹ Generally, these operations sought to minimize costs of supporting inmates while exploiting them in grueling conditions, a system reminiscent of chattel slavery.⁵² State and local officials welcomed the opportunity to ease anemic postbellum budget deficits without

⁴⁵ FINES & FEES JUST. CTR., *supra* note 41, at 1.

⁴⁶ Michigan granted authorities the ability to charge inmates for expenses of medical costs as early as 1846. FINES & FEES JUST. CTR., END FEES, DISCHARGE DEBT, FAIRLY FUND GOVERNMENT 4 (Jan. 2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/01/FFJC-Policy-Guidance-Fee-Elimination-1.13.22.pdf> [<https://perma.cc/4JR8-86CU>].

⁴⁷ Courtney Howell, Student Article, *Convict Leasing: Justifications, Critiques, and the Case for Reparations*, 5 VA. TECH. UNDERGRAD. HIST. REV. 57, 59 (2016), <https://storage.googleapis.com/jnl-vt-j-tvtuhr-files/journals/1/articles/40/submission/proof/40-1-72-1-10-20171116.pdf> [<https://perma.cc/EHF6-GH7Y>].

⁴⁸ *Id.* at 58.

⁴⁹ *Id.* at 59 (noting white prisoners were more likely to be housed in jails and prisons while Black inmates were more likely to be leased as laborers); Christopher Muller, *Freedom and Convict Leasing in the Postbellum South*, 124 AM. J. SOCIO. 367, 367–68 (2018); Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1758 (2010); Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865–1890*, 30 SOC. PROBS. 555, 556 (1983).

⁵⁰ See Harris, Evans & Beckett, *supra* note 49, at 1758.

⁵¹ Bryan L. Adamson, *Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System*, 15 NW. J.L. & SOC. POL’Y 305, 317 (2020).

⁵² Timothy Black & Lacey Caporale, *The New Debt Peonage in the Era of Mass Incarceration*, 4 CULTURAL ENCOUNTERS, CONFLICTS & RESOLS. 1, 2, 17–18 (2020), <https://engagedscholarship.csuohio.edu/cccr/vol4/iss1/4> [<https://perma.cc/GGJ7-ZMCT>]; Muller, *supra* note 49, at 368; Howell, *supra* note 47, at 58.

raising taxes.⁵³ Their interest in preserving the leasing system was often personal; fees collected paid salaries of many authorities, including judges and sheriffs.⁵⁴

Modern manifestations of cost offsetting LFOs bear some relation to their predecessors. Like the convict leasing system, modern fees were primarily borne out of fiscal concerns. During the 1980s, the federal government consolidated its “revenue sharing” programs that benefited criminal courts and law enforcement agencies into fewer broad grants.⁵⁵ This effectively increased competition for a smaller pool of money and required local governments to identify new funding sources.⁵⁶

This shift reflected the poor financial situation of the federal government at the time as much as a new zeitgeist.⁵⁷ Specifically, anti-tax sentiment, as reflected by the Taxpayers’ Revolt, grew in popularity.⁵⁸ To avoid provoking angry taxpayers, state and local governments looked for funding vehicles aside from taxes.⁵⁹ Expansion of non-tax revenue portfolios, including fines, fees, and forfeiture, was a tantalizing prospect.⁶⁰ Unsurprisingly, courts and law enforcement, too, felt the pressure to finance their own operations.⁶¹ To alleviate their financial distress, officials turned to revenue-generating streams in lieu of taxes.⁶² They often did so wielding the “threat of arrest.”⁶³

Much like its earlier incarnation, the modern criminal fee system continues to disproportionately fall upon minorities, especially Black individuals. Some

⁵³ Howell, *supra* note 47, at 60.

⁵⁴ Black & Caporale, *supra* note 52, at 2; Harris, Evans & Beckett, *supra* note 49, at 1758.

⁵⁵ Evan A. Davis, *Restart Federal Revenue Sharing to Address COVID-19*, HILL (May 19, 2020), <https://thehill.com/opinion/finance/497762-restart-federal-revenue-sharing-to-address-covid-19/> [<https://perma.cc/2NGN-WLTE>].

⁵⁶ *Id.* (noting that the consolidation of revenue sharing was meant to increase competition); Lindsey Gruson, *End of Federal Revenue Sharing Creating Financial Crises in Many Cities*, N.Y. TIMES, Jan. 31, 1987, at 7 (noting that the end of federal revenue sharing forced municipalities to increase taxes and fees).

⁵⁷ Davis, *supra* note 55.

⁵⁸ GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* 189, 196 (1980). The Taxpayers Revolt appears to have begun via Proposition 13, a referendum in 1978 in California to limit taxes on real estate. *Id.*

⁵⁹ MICHAEL MAKOWSKY, HAMILTON PROJECT, *A PROPOSAL TO END REGRESSIVE TAXATION THROUGH LAW ENFORCEMENT* 5 (Mar. 2019), https://www.hamiltonproject.org/assets/files/Makowsky_PP_20190314.pdf [<https://perma.cc/28WB-CLSP>].

⁶⁰ *Id.*

⁶¹ *Id.* at 9.

⁶² *Id.*

⁶³ C.R. DIV., U.S. DEP’T OF JUST., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 55 (Mar. 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/E7NW-SE9B>].

law enforcement—incentivized by the financial benefits of LFOs—discriminately target such groups.⁶⁴ This produces disparate impacts, which most notably include a greater probability of future incarceration, even if policies are explicitly race neutral.⁶⁵ Thus, downstream consequences of the carceral state, such as disenfranchisement, tend to fall most heavily upon Black individuals and other marginalized groups.⁶⁶

Today, the criminal fee system has evolved into a constellation of revenue flows. Many of these automatically trigger upon arrest.⁶⁷ For example, some jurisdictions charge a “docket fee” to have a criminal case presented before a judge.⁶⁸ Other jurisdictions charge indigent defendants a fee to appoint a lawyer and recoup the cost of that attorney’s time.⁶⁹ Courts often charge defendants costs of investigation and prosecuting the case against them.⁷⁰ Fees are tied to a host of things, including diversion programs aimed at avoiding prosecution,⁷¹ electronic monitoring,⁷² phone calls made as well as room and board used while incarcerated,⁷³ expungement of records,⁷⁴ and even storage of prisoners’ personal money.⁷⁵ Though many states enforce these fees upon adjudication of

⁶⁴ *Id.* at 2.

⁶⁵ Evan K. Rose, *Who Gets a Second Chance? Effectiveness and Equity in Supervision of Criminal Offenders*, 136 Q.J. ECON. 1199, 1248–50 (2021).

⁶⁶ Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 311–12 (2017).

⁶⁷ See FINES & FEES JUST. CTR., *supra* note 41, at 1.

⁶⁸ See, e.g., KAN. STAT. ANN. § 28-172a (West 2023).

⁶⁹ BEEMAN, ELLIOTT, JOY, ALLEN & MROZINSKI, *supra* note 9, at 1. Eighteen states statutorily impose upfront application fees, while forty-two states and the District of Columbia impose recoupment fees. *Id.* at 5. Seventeen states do both. *Id.*

⁷⁰ Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 142–43 (2014).

⁷¹ See, e.g., IND. CODE § 33-37-4-1 (2023).

⁷² FINES & FEES JUST. CTR. & REFORM ALL., *supra* note 11, at 1.

⁷³ Brittany Friedman, *Unveiling the Necrocapitalist Dimensions of the Shadow Carceral State: On Pay-to-Stay to Recoup the Cost of Incarceration*, 37 J. CONTEMP. CRIM. JUST. 66, 72 (2021); *States Unfairly Burdening Incarcerated People with “Pay-to-Stay” Fees*, RUTGERS (Nov. 20, 2020), <https://www.rutgers.edu/news/states-unfairly-burdening-incarcerated-people-pay-stay-fees> [<https://perma.cc/PNZ3-DU34>]; *New Report Uncovers the Cost of Phone Calls in Over 2,000 Locally-Run Jails Across the U.S.*, PRISON POL’Y INITIATIVE (Feb. 11, 2019), <https://www.prisonpolicy.org/blog/2019/02/11/phone-justice-report/> [<https://perma.cc/8AAV-8CJZ>].

⁷⁴ See generally Cassie Chambers Armstrong, *The Price of Fundamental Rights: Criminal Convictions, Expungement Fees, and Constitutional Concerns*, 74 RUTGERS U. L. REV. 1167 (2022); Maura Ewing, *Want to Clear Your Record? It’ll Cost You \$450*, MARSHALL PROJECT (May 31, 2016), <https://www.themarshallproject.org/2016/05/31/want-to-clear-your-record-it-ll-cost-you-450> [<https://perma.cc/EDP6-HFN9>].

⁷⁵ Stephen Raher & Tiana Herring, *Show Me the Money: Tracking the Companies that Have a Lock on Sending Funds to Incarcerated People*, PRISON POL’Y INITIATIVE (Nov. 9, 2021), <https://www.prisonpolicy.org/blog/2021/11/09/moneytransfers/> [<https://perma.cc/P9QX-PTYJ>]; Stephen Raher, *The Multi-Million Dollar Market of Sending Money to an Incarcerated Loved One*, PRISON POL’Y INITIATIVE (Jan. 18, 2017),

guilt, high levels of guilty pleas essentially make that all but a formality.⁷⁶ Failure to settle criminal debt may trigger additional penalties including driver's license suspensions,⁷⁷ wage garnishment (from both the defendant and their family members),⁷⁸ and incarceration.⁷⁹

C. Case Study: Fees in Florida

Because the use of criminal court fees has accelerated dramatically over the past fifty years,⁸⁰ this funding apparatus merits detailed attention. To do so, we home in on Florida, which serves as a useful case study of the wider trends associated with the adoption and implementation of a fee-based judiciary system and creditor courts.

Florida's fee-based criminal court system has its origins in the 1960s and 1970s, when voters approved a revised constitution and articles to replace its previous 1885 constitution.⁸¹ Article V of the 1972 revision consolidated sixteen different types of trial courts into a unified system composed of twenty circuits and sixty-seven county-level courts.⁸² Each county-level court would now be managed by an elected clerk of court,⁸³ a position that is present in many

<https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/> [https://perma.cc/6HSC-Y2TV].

⁷⁶ MAKOWSKY, *supra* note 59, at 7 (first citing BANNON, NAGRECHA & DILLER, *supra* note 10; then citing REBEKAH DILLER, BRENNAN CTR. FOR JUST. THE HIDDEN COSTS OF FLORIDA'S CRIMINAL JUSTICE FEES (2010)).

⁷⁷ Brandon L. Garrett, Karima Modjadidi & William Crozier, *Undeliverable: Suspended Driver's Licenses and the Problem of Notice*, 4 UCLA CRIM. JUST. L. REV. 185, 193 (2020) (analyzing North Carolina law); EMIL DINDIAL, EMILY GREYTAK, & KANA TATEISHI, AM. C.L. UNION, RECKLESS LAWMAKING: HOW DEBT-BASED DRIVER'S LICENSE SUSPENSION LAWS IMPOSE HARM AND WASTE RESOURCES 10 (2021), https://www.aclu.org/wpcontent/uploads/publications/reckless_lawmaking_aclu_final_4.19.21.pdf [https://perma.cc/63U8-REJ5].

⁷⁸ Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 513, 523 (2011).

⁷⁹ Vicki Turetsky & Maureen R. Waller, *Piling on Debt: The Intersections Between Child Support Arrears and Legal Financial Obligations*, 4 UCLA CRIM. JUST. L. REV. 117, 132 (2020); BANNON, NAGRECHA & DILLER, *supra* note 10, at 21–23.

⁸⁰ KARIN D. MARTIN, SANDRA SUSAN SMITH & WENDY STILL, SHACKLED TO DEBT: CRIMINAL JUSTICE FINANCIAL OBLIGATIONS AND THE BARRIERS TO RE-ENTRY THEY CREATE 2–3, 5 (Jan. 2017), <https://www.ojp.gov/pdffiles1/nij/249976.pdf> [https://perma.cc/KK4K-D9KX] (“On the state level, 4 percent of persons convicted of felonies who were sentenced to prison in 1986 were also fined; by 2004, that figure was seven times higher.”).

⁸¹ Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What It Has Become*, 18 FLA. COASTAL L. REV. 5, 7, 19 (2016).

⁸² *History of Court Processes, Programs, and Initiatives*, FLA. CTS., <https://www.flcourts.gov/Publications-Statistics/Publications/Short-History/Delivering-Justice> [https://perma.cc/RK22-JGQE].

⁸³ FLA. CONST. art. V, § 16; *id.* art. VIII, § 1. For a list of duties performed by the Clerk of Court, see *Role of the Clerk and Comptroller*, FLA. CT. CLERKS & COMPTROLLERS,

jurisdictions across the United States.⁸⁴ These roles became much sought-after given their relatively high salaries.⁸⁵ Article V also restructured the financial model of the judiciary.⁸⁶

Namely, Florida's 1972 revision to its state constitution adjusted how judges were compensated.⁸⁷ Under the previous constitutional framework, LFO revenue could account for a portion of judges' and judicial staff's salaries.⁸⁸ The newly revised Article V required that judicial salaries be paid directly by the state.⁸⁹ LFO revenue would continue to be collected via clerks of court.⁹⁰ Fines and fees were to be paid into a trust fund or remitted to the local or state government as general revenue.⁹¹ Judiciary funding, including that of clerks,

<https://www.flclerks.com/page/RoleoftheClerk> [<https://perma.cc/YG8Q-T3CR>]. For more discussion on the duties and powers of Florida clerks of court, see *infra* notes 161–165.

⁸⁴ The role of clerk of court was specifically enumerated in the federal Judiciary Act of 1789. *Federal Judiciary Act (1789)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/federal-judiciary-act> [<https://perma.cc/35HT-VXNS>] (May 10, 2022). At the state level, clerks are expected to fulfill similar duties and are often assisted by court administrators, who handle the day-to-day operations of the court. See, e.g., Steve Henley & Jo Haynes Suhr, *View from the Wheelhouse: The Role of Court Administration in the Management, Independence, and Accountability of the Courts*, 78 FLA. BAR J. 26, 26 (2004). The method of selection for clerks of court depends on the jurisdiction. For example, clerks in Florida are elected, while their counterparts in other jurisdictions are appointed. See, e.g., FLA. CONST. art. VIII, § 1; ALA. RULES OF JUD. ADMIN. r. 27(B) (1977).

⁸⁵ For example, Hillsborough County pays its elected clerk \$170,000. C.T. Bowen, *Tom Lee to Run for Hillsborough Court Clerk*, TAMPA BAY TIMES (June 5, 2020), <https://www.tampabay.com/news/hillsborough/2020/06/05/tom-lee-to-run-for-hillsborough-court-clerk/> [<https://perma.cc/Q5WD-RX69>].

⁸⁶ *History of Court Processes, Programs, and Initiatives*, *supra* note 82.

⁸⁷ Talbot "Sandy" D'Alemberte, *Judicial Reform—Now or Never*, 46 FLA. BAR J. 68, 69 (1972).

⁸⁸ REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 36.

⁸⁹ D'Alemberte, *supra* note 87, at 68 ("Too often, municipal courts are as intent on producing revenue as dispensing justice. We felt we could no longer condone this cash register justice."); *id.* at 71 ("I strongly believe we must upgrade all our courts so that the entire judicial system is not dragged down by a judge who thinks it is as important to produce revenue as it is to dispense justice.").

⁹⁰ FLA. CLERKS OF CT. OPERATIONS CORP., CLERK COLLECTION BEST PRACTICES 1 (Dec. 2015), <https://flccoc.org/wp-content/uploads/2019/08/Best-Practices-Collections-12-10-15.pdf> [<https://perma.cc/YQ38-8AZR>].

⁹¹ S.J. RES. 52-D, art. V, § 20(c)(8) (Fla. 1972) ("All fines and forfeitures arising from offenses tried in the county court shall be collected, and accounted for by the clerk of the court, and deposited in a special trust account. All fines and forfeitures received from violations of ordinances or misdemeanors committed within a county or municipal ordinances committed within a municipality within the territorial jurisdiction of the county court shall be paid monthly to the county or municipality respectively. If any costs are assessed and collected in connection with offenses tried in county court, all court costs shall be paid into the general revenue fund of the state of Florida and such other funds as prescribed by general law.").

came entirely from county revenue.⁹² Altogether, these changes represented an attempt to reduce the perception that judges were dispensing “cash register justice.”⁹³

This reform was not well-received by all stakeholders, however. The judiciary and clerks found themselves competing for revenue against other publicly funded programs within the county.⁹⁴ Restrictions on use of revenue, mandated spending on other programs, and uncertain indigent defense costs undermined their solvency.⁹⁵ Funding sources, too, tapered.⁹⁶ The bulk of revenue came from property taxes, whose receipts represented up to two-thirds of county revenue; however, these taxes were lowered and capped in the 1990s.⁹⁷

Much of the consternation revolved around a desire to provide adequate, uniform services.⁹⁸ Because courts relied upon county-level revenue, population levels directly influenced the amount of financial support received.⁹⁹ Operationally, this produced geographic disparities in the services rendered by courts.¹⁰⁰ For example, many clerks struggled to fulfill their long list of non-judicial responsibilities essential to administration of court services.¹⁰¹ These include docket preparation, official correspondence composition, permit issuance, and record preservation.¹⁰² Given the breadth of these activities, clerks’ offices necessarily turn to a number of junior clerks.¹⁰³ However, clerks in less populous locales could not hire staff that would guarantee the same quality or scope of service as their peers in more urban areas.¹⁰⁴

⁹² Alan Carlson, Kate Harrison & John K. Hudzik, *Adequate, Stable, Equitable and Responsible Trial Court Funding: Reframing the State vs. Local Debate* 74 (Sept. 2008) (unpublished manuscript), <http://www.ncjrs.gov/pdffiles1/nij/grants/223973.pdf> [<https://perma.cc/2JX3-VL7G>].

⁹³ D’Alemberte, *supra* note 87, at 68.

⁹⁴ *History of Court Processes, Programs, and Initiatives*, *supra* note 82.

⁹⁵ Carlson, Harrison & Hudzik, *supra* note 92, at 58.

⁹⁶ John J. Copelan, Jr. & Edward G. Labrador, *Broken Promises: The Failure to Adequately Fund a Uniform State Court System*, 71 FLA. BAR J. 30, 30 (1997).

⁹⁷ Carlson, Harrison & Hudzik, *supra* note 92, at 58.

⁹⁸ Copelan, Jr. & Labrador, *supra* note 96, at 34–35.

⁹⁹ *Id.*

¹⁰⁰ *History of Court Processes, Programs, and Initiatives*, *supra* note 82.

¹⁰¹ See Henley & Suhr, *supra* note 84, at 29.

¹⁰² *Court, Municipal, and License Clerks*, O-NET ONLINE, <https://www.onetonline.org/link/summary/43-4031.00?redir=43-4031.01> [<https://perma.cc/6N9Q-YZNV>] (providing the Department of Labor’s description of clerk of courts).

¹⁰³ Survey results on file with the author. These junior clerks vary in number by jurisdiction even today. For instance, clerk’s offices employ as few as five people in rural Lafayette County or as many as 700 individuals in urban Broward County. *Id.*; *Overview of the Clerk’s Office*, BROWARD CNTY. CLERK OF CTS., <https://www.browardclerk.org/AboutUs/AboutTheOffice#OverviewOfOffice> [<https://perma.cc/4ZNY-ML9C>].

¹⁰⁴ See *History of Court Processes, Programs, and Initiatives*, *supra* note 82.

These mounting problems facing Florida counties drew the attention of the state in the 1990s.¹⁰⁵ These interests culminated in the second Constitutional Revision Commission (CRC), which convened in 1997.¹⁰⁶ The primary goal of the second CRC was to divert funding of the judicial system away from counties and toward the state and criminal court litigants.¹⁰⁷ Under the CRC's proposal,

¹⁰⁵ Copelan, Jr. & Labrador, *supra* note 96, at 30.

¹⁰⁶ In 1968, the State of Florida amended its Constitution to create a Constitution Review Commission, which comprises 37 members that meet once every twenty years to examine the Florida Constitution and propose potential changes. *Constitution Revision Commission*, FLA. CHAMBER OF COM., <https://www.flchamber.com/political/constitutional-amendments/constitution-revision-commission/> [https://perma.cc/2TAP-YEFV]. CRC members are appointed by the Governor (15 appointments), Senate President (9), House Speaker (9), Chief Justice (3) and Attorney General (1). *Id.* Ten years after the amendment, the first CRC convened in 1977–78, and the second CRC, which proposed the amendments discussed above, convened in 1997. *Florida Constitution Revision Commission*, BALLOTPEDIA, https://ballotpedia.org/Florida_Constitution_Revision_Commission [https://perma.cc/A5BF-6FST]. In 2017, the third CRC convened. *Id.*

¹⁰⁷ *Nine Proposed Revisions for the 1998 Ballot: Revision 7*, FLA. CONST. REVISION COMM'N [hereinafter 1998 CRC Revision 7], <http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/ballot.html#rev7> [https://perma.cc/D3YQ-ZS3N]: Art. V, § 14, Funding—

(a) All justices and judges shall be compensated only by state salaries fixed by general law. Funding for the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel, except as otherwise provided in subsection (c), shall be provided from state revenues appropriated by general law.

(b) All funding for the offices of the clerks of the circuit and county courts performing court-related functions, except as otherwise provided in this subsection and subsection (c), shall be provided by adequate and appropriate filing fees for judicial proceedings and service charges and costs for performing court-related functions as required by general law. Selected salaries, costs, and expenses of the state courts system may be funded from appropriate filing fees for judicial proceedings and service charges and costs for performing court-related functions, as provided by general law. Where the requirements of either the United States Constitution or the Constitution of the State of Florida preclude the imposition of filing fees for judicial proceedings and service charges and costs for performing court-related functions sufficient to fund the court-related functions of the offices of the clerks of the circuit and county courts, the state shall provide, as determined by the legislature, adequate and appropriate supplemental funding from state revenues appropriated by general law.

(c) No county or municipality, except as provided in this subsection, shall be required to provide any funding for the state courts system, state attorneys' offices, public defenders' offices, court-appointed counsel, or the offices of the clerks of the circuit and county courts performing court-related functions. Counties shall be required to fund the cost of communications services, existing radio systems, existing multi-agency criminal justice information systems, and the construction or lease, maintenance, utilities, and security of facilities for the trial courts, public

individual counties remained responsible for local requirements, building upkeep, communications, and security.¹⁰⁸ But now, the state would bear the burden of funding state attorneys' and public defenders' offices.¹⁰⁹ Perhaps most importantly, clerks would become dependent upon filing fees, service charges, and court-imposed costs charged to individuals in the judiciary system.¹¹⁰

Florida voters approved the CRC's recommendations in 1998,¹¹¹ which went into effect starting in 2004.¹¹² The purpose of this 6-year moratorium was to give the Florida legislature time to draft and pass "implementation bills" that increased civil and criminal fees, costs, and surcharges.¹¹³

Initially, lawmakers seemed cognizant of the inherent inequality of requiring individuals to pay for access to the courts; they implemented a fee waiver for indigent individuals in 2000.¹¹⁴ But awareness was fleeting; three

defenders' offices, state attorneys' offices, and the offices of the clerks of the circuit and county courts performing court-related functions. Counties shall also pay reasonable and necessary salaries, costs, and expenses of the state courts system to meet local requirements as determined by general law.

Id. § 14.

¹⁰⁸ *Id.* § 14(c).

¹⁰⁹ *Id.* § 14(a); see GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, WHO PAYS FOR JUSTICE? PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE 14 (Apr. 2014), https://www.rand.org/pubs/research_reports/RR486.html [<https://perma.cc/PK9Z-X2HA>] ("In Florida, the current framework for financing the state courts was established by a state constitutional amendment in 1998, which explicitly made the state broadly responsible for funding most aspects of the state court system, with enumerated exceptions to define county funding responsibilities, including with regard to facility (i.e., trial courthouse) costs, maintenance, and court security. Whereas budget and spending for the state-funded aspects of the Florida court system are closely monitored and managed by the state court administrator, county-level funding and court costs are reportedly not directly tracked by state authorities.").

¹¹⁰ See 1998 CRC Revision 7, *supra* note 107, § 14(b).

¹¹¹ *Florida Constitution Revision Commission*, *supra* note 106.

¹¹² 1998 CRC Revision 7, *supra* note 107, art. XII, § 22; see also Act of June 7, 2000, ch. 2000-237, § 2, 2000 Fla. Laws 2299, 2301 (Comm. Substitute S.B. 1212); Act of June 25, 2003, ch. 2003-402, 2003 Fla. Laws 3647-48, 3654 (H.R. 113A); Act of May 28, 2004, ch. 2004-265, 2004 Fla. Laws 946, 1024 (Comm. Substitute S. 2962).

¹¹³ See, e.g., 2004 Fla. Laws 1006 (increased maximum service charge for reinstatement of driver's license after a period of revocation from \$37.50 to \$47.50); *Id.* at 1008 (local government may impose up to \$15 court funding surcharge on non-criminal for traffic violations); *Id.* at 1019-20 (additional \$101 court fee in cases involving certain crimes against minors); Act of May 15, 2002, ch. 2002-263, § 11, 2002 Fla. Laws 1929 (expanded application of \$135 court cost to apply to those charged with "boating under the influence").

¹¹⁴ 2000 Fla. Laws 2301; see also FLA. STAT. ANN. CONST. art. V, § 14 (West. 2023), Commentary, Statement of Intent: Alan C. Sundberg and Jon L. Mills ("It is further the intent of the proposers that the legislature, when developing the schedule of reasonable and adequate filing fees, service charges and costs, review the court-related operations of the offices of the clerks of the circuit in county courts and make an independent determination

years later, lawmakers eliminated the waiver and removed judicial discretion to impose costs.¹¹⁵ Bills subsequently adopted substantially increased civil filing fees; tripled court costs for traffic violations; denied courts the ability to reduce an LFO based on ability to pay; and lowered the indigency income limit for appointment of a public defender from 250% to 200% of federal poverty guidelines.¹¹⁶ Another implementation bill adopted in 2004 created new fees and costs that affect individuals in both civil and criminal courts.¹¹⁷ To wit, the state legislature approved an assessment linked to income-driven payment plans.¹¹⁸ These payment plans, which loosely reflect one's ability to pay, include a sign-up fee.¹¹⁹

The financing model underwent additional changes in response to Great Recession-induced shortfalls.¹²⁰ Specifically, the Florida Legislature increased systemic reliance on fees when it created the State Courts Revenue Trust Fund (SCRTF) in 2009.¹²¹ The SCRTF was intended to help finance state court systems and county clerks' offices.¹²² This fund drew heavily on filing fees for certain civil court filing fees, particularly fees for mortgage foreclosure

as to what should be the reasonable cost to perform the court-related operations of the clerks' offices. The drafters of subsection (b) recognize that there currently exists significant disparities among what the various clerks' offices spend to perform the same functions.").

¹¹⁵ 2003 Fla. Laws 3650; *see also* Fla. H.R., Staff Analysis of H.R. 113A, at 7 (2003), https://www.flsenate.gov/Session/Bill/2003A/113A/Analyses/2003a0113HAP_h0113A.ap.pdf [<https://perma.cc/9CFK-H5F3>] ("The bill generally requires fees, service charges, and costs to be imposed as a matter of law, rather than by court order, and eliminates waivers of these fees, service charges, and costs. Requires the clerk of court to enroll those seeking to defer payment of charges because of indigency into a payment program to recover unpaid costs in full.").

¹¹⁶ 2003 Fla. Laws 3648–50 (describing that indigency status triggers a fee for a public defender borne by the defendant).

¹¹⁷ 2004 Fla. Laws 946; *see also* FLA. S., STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT: S.B. 2962, at 25 (2004), https://www.flsenate.gov/Session/Bill/2004/2962/Analyses/20042962SAP_2004s2962.ap.pdf [<https://perma.cc/RP4P-LMA4>] ("Court system users will be negatively impacted by numerous provisions of this bill that raise clerk of the court service charges . . .").

¹¹⁸ FLA. STAT. §§ 28.24(27)(b)–(c) (2023).

¹¹⁹ "Ability to pay" is currently defined in Florida law as: "A monthly payment amount . . . is presumed to correspond to the person's ability to pay if the amount does not exceed . . . 2 percent of the person's annual net income . . . divided by 12" or \$25.00, whichever is greater. *Id.* § 28.246(4)(b). For an in-depth review of Florida's payment plans, see generally FINES & FEES JUST. CTR., PAYMENT PLANS AS A COMPLIANCE TOOL: BEST PRACTICES FOR FLORIDA COURTS (Aug. 2019), <https://finesandfeesjusticecenter.org/articles/payment-plans-as-a-compliance-tool-best-practices-for-florida-courts/> [<https://perma.cc/HP8W-R4J3>].

¹²⁰ Rebekah Diller, *Court Fees as Revenue?*, BRENNAN CTR. FOR JUST. (July 30, 2008), <https://www.brennancenter.org/our-work/analysis-opinion/court-fees-revenue> [<https://perma.cc/REL8-UQS6>].

¹²¹ *History of Court Processes, Programs, and Initiatives*, *supra* note 82.

¹²² *Id.*; Act of Jan. 27, 2009, ch. 2009-6, 2009 Fla. Laws 147.

filings.¹²³ Money received in SCRTF would be sent back to the state.¹²⁴ The state would then remit funds back to clerks based on the total budget set for clerks in annual general appropriations acts.¹²⁵ As it supported state courts as well as clerks, the adoption of the SCRTF represented a departure from a general revenue model toward a trust fund system in terms of judiciary financing.¹²⁶

Paradoxically, the new system created more cash flow challenges for clerks of court. First, the legislature tended to provide insufficient revenue to fund clerks' appropriated budgets.¹²⁷ Second, because the SCRTF depended heavily on mortgage foreclosure filing fee revenue, clerks collected significantly less revenue once mortgage foreclosures in Florida started to slow down in FY 2009–10 and later, after the worst of the financial crisis of 2008 had passed.¹²⁸

Increasingly reliant on fees, the state also expanded its means of collection and, in effect, the consequences of failing to pay those fees. For example, financial penalties can now be converted to liens.¹²⁹ As such, the state can collect debt upon sale of the property associated with the lien;¹³⁰ liens directly reduce owners' equity in the property and lower sellers' credit scores.¹³¹ While perhaps convenient as a collection device, the effects of a lien on a debtor and their family can be meaningful; for instance, lien-induced credit reductions may erode job prospects.¹³²

In addition to liens, the courts reserve the right to suspend former defendants' driver's licenses if they fail to satisfy court imposed debts.¹³³ The judiciary employs these penalties under the assumption that it will induce payments.¹³⁴ Given that approximately 90% of Floridians travel by vehicle to work, residents would appear to be sensitive to such threats.¹³⁵ Yet for the

¹²³ *History of Court Processes, Programs, and Initiatives*, *supra* note 82.

¹²⁴ REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 12.

¹²⁵ Act of June 18, 2009, ch. 2009-204, 2009 Fla. Laws 2021.

¹²⁶ *History of Court Processes, Programs, and Initiatives*, *supra* note 82.

¹²⁷ REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 4.

¹²⁸ *Id.* at 7.

¹²⁹ *See, e.g.*, § 2, 2009 Fla. Laws 2025.

¹³⁰ JAN BUSH, RADU DODEA & SABRINA HARTLEY, OFF. OF PROGRAM POL'Y ANALYSIS & GOV. ACCOUNTABILITY, COURT FINE AND FEE COLLECTIONS CAN INCREASE 5 (Jan. 2004), <https://oppaga.fl.gov/Documents/Reports/04-07.pdf> [<https://perma.cc/7VDN-CY76>].

¹³¹ *See* Melissa Horton, *What Types of Liens Are Seen as Good and Which Are Bad for My Credit?*, INVESTOPEDIA (Sept. 16, 2021), <https://www.investopedia.com/ask/answers/062515/what-types-liens-are-seen-good-and-which-are-bad-my-credit.asp> [<https://perma.cc/7YRM-5UKT>].

¹³² Dean Corbae & Andrew Glover, *Employer Credit Checks: Poverty Traps Versus Matching Efficiency* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25005, 2018), https://www.nber.org/system/files/working_papers/w25005/w25005.pdf [<https://perma.cc/7LC8-V49C>].

¹³³ Act of Jan. 27, 2009, ch. 2009-6, 2009 Fla. Laws 148.

¹³⁴ BUSH, DODEA & HARTLEY, *supra* note 130, at 3.

¹³⁵ CARSON WHITELEMONS, ASHLEY THOMAS & SARAH COUTURE, FINES AND FEES JUST. CTR., DRIVING ON EMPTY: FLORIDA'S COUNTERPRODUCTIVE AND COSTLY DRIVER'S LICENSE

indigent—who are overrepresented as criminal defendants—financial penalties may be unaffordable.¹³⁶ This effectively punishes the needy, who may be forced to drive with a suspended license to remain employed and provide for their families.¹³⁷ The overlap between indigent and minority communities raises racial equity questions as well.¹³⁸ Many who lose the ability to legally drive continue to do so.¹³⁹ These individuals run the risk of additional LFOs and, eventually, incarceration.¹⁴⁰

Ultimately, the legal arc of judiciary funding in Florida was circuitous. In an attempt to avoid one form of “cash register justice,” officials and voters constructed a new creditor court system that is arguably even more problematic.

III. DISTORTIONS AND INEFFICIENCIES IN FEE-BASED CRIMINAL COURTS

At first glance, a fee-based system for criminal courts might seem sensible; as in other domains, it seems reasonable that those who use goods or services should pay for them.¹⁴¹ Such a system also provides a convenient way for state legislatures to ease budget constraints, by ostensibly offloading court financing costs on to criminal defendants and away from recalcitrant taxpayers.¹⁴²

In reality, however, a series of practical and theoretical considerations undermine this logic. Fee-based systems are unreliable revenue streams, connected neither in time nor in value to the costs they are intended to offset.¹⁴³

SUSPENSION PRACTICES 4 (Oct. 2019), <https://finesandfeesjusticecenter.org/articles/driving-on-empty-florida-drivers-license-suspension-fines-fees/> [<https://perma.cc/82HU-37NH>].

¹³⁶ Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 512 (2018).

¹³⁷ WHITELEMONS, THOMAS & COUTURE, *supra* note 135, at 4.

¹³⁸ *Id.* at 10.

¹³⁹ *Id.* at 8; Lieberman, Luh & Mueller-Smith, *supra* note 17, at 16 (finding that drivers who face LFOs do not adjust their means of travel to work, consistent with the notion that many may continue to drive even if their license is suspended).

¹⁴⁰ BANNON, NAGRECHA & DILLER, *supra* note 10, at 24.

¹⁴¹ The Tax Foundation notes that “user fees are efficient because they act as a pricing mechanism.” *User Fee*, TAX FOUND., <https://taxfoundation.org/tax-basics/user-fee/> [<https://perma.cc/NQ2J-89A3>]. In essence, user fees tie marginal benefits directly to marginal costs. However, this generally applies to privately provided goods, like in the Tax Foundation’s example, toll road fees. *See, e.g.*, HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 718–20 (Jack Repcheck ed., 9th ed. 2014) (demonstrating that while, in general, optimal allocations occur when individuals internalize the full cost of the good, public goods tend to be underprovided when privately financed because individuals can free ride on others’ outlays, which ultimately undermines provision of the public good); *see also* D. ANDREW AUSTIN, CONG. RSCH. SERV., R45463, *ECONOMICS OF FEDERAL USER FEES* 1 (2019), <https://sgp.fas.org/crs/misc/R45463.pdf> [<https://perma.cc/R8JF-92GH>].

¹⁴² Copelan, Jr. & Labrador, *supra* note 96, at 30.

¹⁴³ AUSTIN, *supra* note 141, at 1.

They are often imposed on the individuals least capable of paying them.¹⁴⁴ And they are collected in ways that make them susceptible to diversion—siphoned off by legislatures to be used for other purposes—and proliferation—the creation of new fees that bear little relation to underlying court costs.¹⁴⁵

As we explain, this state of affairs is not surprising if one digs deeper into the relationships between the state legislature, courts, clerks of court, and criminal defendants. While one might view the state as a monopolist who can charge a “price” to defendants for use of its courts, this market analogy is wholly inapposite in the criminal legal context. This is because criminal defendants do not choose to use the criminal legal system; having already committed or been accused of a crime, they have no real opportunity to avoid these fees, nor do they have significant political power to change the system once they leave it. As such, the state faces little “market discipline” in terms of setting fees or ensuring they cover the expenses for which they were ostensibly charged. The result, predictably, is the chaos endemic in fee-based criminal court systems across the country.

A. Uncertain Revenue and Temporal Mismatch

As others have noted, criminal defendants lack resources to sufficiently finance court operations.¹⁴⁶ Those with felony convictions disproportionately come from economically fragile communities.¹⁴⁷ Those initial conditions persist even if opportunities for betterment emerge. For example, young men from such locales often are unable to surmount unbecoming behaviors that correlate with risk of future incarceration.¹⁴⁸

The process from arrest to conviction itself may inhibit long-term financial stability among the less well-off. Consider pre-trial detention. All else equal, prohibitively expensive bail induces guilty pleas among individuals who otherwise would face no punishment.¹⁴⁹ In effect, this depresses income generation and drains families of economic resources.¹⁵⁰ Upon release, many of

¹⁴⁴ Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [<https://perma.cc/X64X-3TEU>].

¹⁴⁵ MENENDEZ, EISEN, ATCHINSON & CROWLEY, *supra* note 22, at 7.

¹⁴⁶ *Id.* at 10.

¹⁴⁷ See Jens Ludwig, Greg J. Duncan & Paul Hirschfield, *Urban Poverty and Juvenile Crime: Evidence from a Randomized Housing-Mobility Experiment*, 116 Q. J. ECON. 655, 676 (2001).

¹⁴⁸ Jeffrey R. Kling, Jens Ludwig & Lawrence F. Katz, *Neighborhood Effects on Crime for Female and Male Youth: Evidence from a Randomized Housing Voucher Experiment*, 120 Q. J. ECON. 87, 116–18 (2005).

¹⁴⁹ Stevenson, *supra* note 136, at 512–13.

¹⁵⁰ WILL DOBBIE & CHRYSAL S. YANG, CATO INST., *THE ECONOMIC COSTS OF PRETRIAL DETENTION* 2 (Jeffrey Miron ed., 2019), <https://www.cato.org/sites/cato.org/files/2022-01/RB283.pdf> [<https://perma.cc/2J8D-RZUW>].

those with convictions experience discrimination in labor markets.¹⁵¹ Even if returning citizens desire to make amends for wrongdoing, they may be unable to do so.¹⁵²

A recent report from the Bureau of Justice Statistics confirms the difficulties that recently released individuals face.¹⁵³ Analyzing the labor market prospects of 51,500 individuals released from federal prison in 2010, 33% found no employment in the 16 quarters (4 years) following their release from prison.¹⁵⁴ Among those who found jobs, they were typically low paying: the quarterly median income started at \$3,500 in the first full quarter following their release (less than what a minimum wage worker would earn in that time) to \$6,000 by the 16th quarter.¹⁵⁵ Collectively, these data give serious reason to doubt that fee-based funding—stemming from a marginalized population with inconsistent, low-paying labor market opportunities—could cover the costs of criminal proceedings.

These observations imply assessing and collecting fees are distinct issues. The reality is that the vast majority of fees that are assessed are never collected. Moreover, with time, debts become increasingly less likely to be collected.

States across the country have recognized that stale debt may not be worth the expense of collection or the hardship it places on the people who owe it. For instance, the Oregon Judicial Department considers court debt older than five years “virtually uncollectable”;¹⁵⁶ Nevada considers debt from traffic infractions uncollectible “if after 10 years it remains impossible or impracticable to collect the delinquent amount”;¹⁵⁷ and in California, counties are authorized to initiate a “discharge from accountability” for court debt too small or too old

¹⁵¹ Agan & Starr, *supra* note 2, at 222. This realization has prompted many to consider the implementation of income-based fees specific to defendants. *See, e.g.,* Adamson, *supra* note 51, at 327; *see also* MENENDEZ, CROWLEY, EISEN & ATCHISON, *supra* note 22, at 47. While popular as a policy recommendation, it is crucial to note other deficiencies have been pointed out. Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517, 546–49 (2020). Kleiman points out that discriminatory policing patterns and administrative inefficiencies detract from the potential upsides to ability-to-pay inquiries. *Id.*

¹⁵² *Cf.* Sukhatme, Billy & Bagwe, *supra* note 4, at 143 (showing the analogous context of voting).

¹⁵³ E. Ann Carson, Danielle H. Sandler, Renuka Bhaskar, Leticia E. Fernandez & Sonya R. Porter, *Employment of Persons Released from Federal Prison in 2010*, at 1 (Bureau of Just. Stat., Pub. No. NCJ 303147, Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/eprfp10.pdf> [<https://perma.cc/SKN3-PLMV>].

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ OR. JUD. DEP’T, COURT ORDERED FINANCIAL OBLIGATIONS: IMPOSITION, COLLECTION, AND DISTRIBUTION 12 (2018) (unpublished presentation slides), <https://berkeley.app.box.com/s/b5f21m57yr12gqbl9nxynfehdb4iegm4> [<https://perma.cc/9VEF-KSND>]. With regard to analogous fee debt, “[a]fter year 5, collection drops to less than 10%” and “debt . . . older than 5 years [is] virtually uncollectable.” *Id.*

¹⁵⁷ NEV. REV. STAT. § 176.0647 (2019).

to collect.¹⁵⁸ In an evaluation of court-ordered fines and fees, the Idaho State Legislature's Office of Performance Evaluation acknowledged that it "is not reasonable to assume that all . . . past due court-ordered obligations can be recovered or should be actively pursued for collection. There will always be a group that cannot or will not pay, regardless of what additional sanctions are applied."¹⁵⁹

The general failure to acquire such revenue prompted the National Center for State Courts to encourage courts to establish a "reasonable level of uncollectible accounts suitable for write-off after appropriate time and effort has been expended."¹⁶⁰ In Florida, according to performance measures¹⁶¹ set by the Clerks of Court Operations Corporation (CCOC), clerks expect to collect only 9% of the circuit criminal court LFOs annually levied.¹⁶² This means that for every dollar assessed, clerks need to collect just 9 cents to meet their internal collection goals. The CCOC considers debts "aged" if they are more than five years old.¹⁶³ For such aged debts, the CCOC recommends the clerks to consider settling for "no less than \$0.60 on the dollar."¹⁶⁴ Given their own internal performance metrics earmark \$0.09 on the dollar, it would be delusional to expect this amount.¹⁶⁵

¹⁵⁸ CAL. GOV'T CODE § 25259.7 (West 2010).

¹⁵⁹ OFF. OF PERFORMANCE EVALUATIONS, IDAHO LEGISLATURE, COURT-ORDERED FINES AND FEES 8 (Mar. 2019), <https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1903.pdf> [<https://perma.cc/E88G-SC8C>].

¹⁶⁰ *Id.* at 46.

¹⁶¹ FLA. STAT. § 28.35(2)(d) (2022). Florida law requires clerks to develop performance barometers to "facilitate an objective determination of the performance of each clerk in accordance with minimum standards for fiscal management, operational efficiency, and effective collection of fines, fees, service charges, and court costs." *Id.* If clerks do not meet the "performance standards," they are required to explicate and develop a corrective action plan, which is then submitted to the legislature. *Id.* The performance metrics are designed to encourage pursuit of collections. However, their thresholds are telling in themselves. A clerk meets the approved standard if they collect at least 40% and 9% of the amounts assessed within five quarters in misdemeanor and felony cases, respectively. FLA. CLERKS OF CT. OPERATIONS CORP., PERFORMANCE MEASURES AND STANDARDS (2023) [hereinafter FCCOC, PERFORMANCE MEASURES AND STANDARDS], <https://flccoc.org/wp-content/uploads/2019/08/CCOC-Performance-Measures-and-Standards.pdf> [<https://perma.cc/UC5M-NEUG>]. While these rates appear abysmally low, the clerks find them too onerous; they are currently seeking to lower the felony collection goal from 9% to 8%. PERFORMANCE IMPROVEMENT AND EFFICIENCIES COMM., FLA. CLERKS OF CT. OPERATIONS CORP., COLLECTIONS AND TIMELINESS WORKGROUP MEETING (2022) [hereinafter FCCOC, WORKGROUP MEETING], <https://flccoc.org/wp-content/uploads/2022/04/CTWG-Meeting-Materials-040522.pdf> [<https://perma.cc/B72R-CY5C>].

¹⁶² FCCOC, PERFORMANCE MEASURES AND STANDARDS, *supra* note 161.

¹⁶³ FLA. CLERKS OF CT. OPERATIONS CORP., CLERK COLLECTION BEST PRACTICES 9 (2015), <https://flccoc.org/wp-content/uploads/2019/08/Best-Practices-Collections-12-10-15.pdf> [<https://perma.cc/7QP4-AKVZ>].

¹⁶⁴ *Id.* at 8.

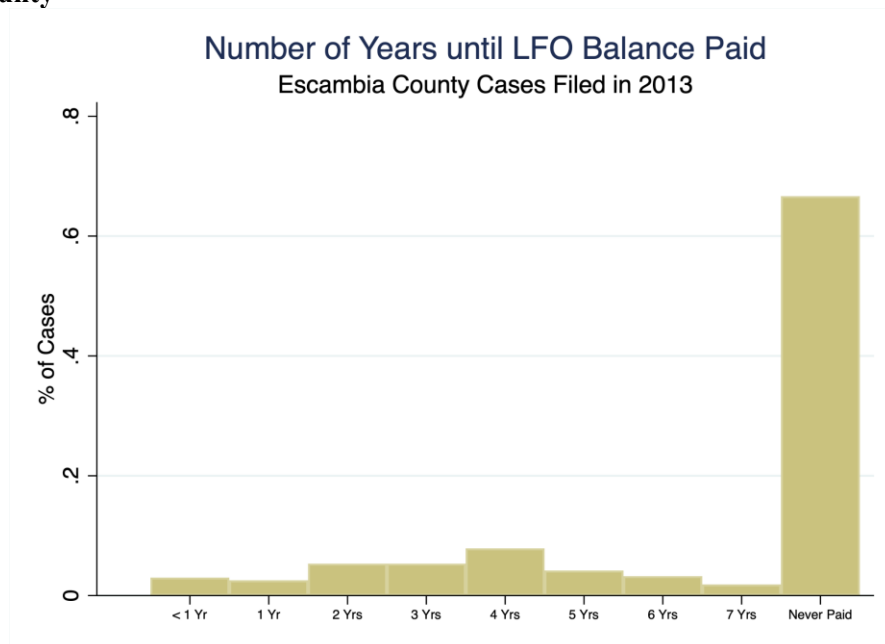
¹⁶⁵ FCCOC, PERFORMANCE MEASURES AND STANDARDS, *supra* note 161.

1. Fee Repayment Case Study

We can study these trends more carefully by examining court records on fee repayment. As a case study, we turn to records from cases filed in 2013 in Escambia County, a relatively small county in the Florida Panhandle that encompasses the City of Pensacola.¹⁶⁶ We limit the data to cases that involve defendant debt responsibility. These cases do not represent the universe of criminal court filings but rather cases linked with individuals in sentencing data maintained by the Florida Department of Corrections. In total, our data comprise 510 cases; payment records are available until 2022.

Figure 1 below captures the annual likelihood an individual clears the LFO balance associated with one case.

Figure 1: Years Until Defendants Clear LFO Balances in Escambia County



As is apparent from the graph, more than two-thirds of criminal cases involve “aged” debt in Escambia County. The likelihood that case debt is cleared is directly related to the assessed amount; the median balance of cases with all LFOs paid is \$768, whereas the median in unpaid cases is \$50. All else

¹⁶⁶ *The Escambia County Budget: Information About Escambia County*, OPENGov, <https://stories.opengov.com/escambiacountyfl/published/BXQQ20V2Z> [https://perma.cc/SW72-RNLB].

equal, this statistic plausibly suggests that clerks prioritize the collection of sizable debt.¹⁶⁷

2. Systemic Fragility

Collections, especially in criminal cases, may trickle in from indigent individuals. Likewise, officials may deem certain LFOs uncollectable. However, these observations do not imply that court debt is itself immaterial. For example, in fiscal year 2021–2022, fines and fees represented 17% (\$115 million) of Florida’s courts’ budget.¹⁶⁸ That is a sizable amount, and its absence or attenuation could lead to systemic risk.

Concerns over structural collapse in Florida can largely be traced to the creation of the State Courts Revenue Trust Fund. Since its advent in 2009, state and local courts (like clerks as of 2004) have financed their operations, at least in part, on fines and fees.¹⁶⁹ Primarily composed of mortgage foreclosure fees and traffic fines, this pool of cash temporarily stabilized the courts and clerks from Great Recession-induced shortfalls.¹⁷⁰ However, secular declines in both mortgage fees¹⁷¹ and traffic fines¹⁷² have restricted funding. This effectively makes the entire court system more reliant on criminal court debt to cover financing once provided by civil fines and fees. Stated differently, creditor courts must draw upon a smaller set of civil remittances collected by budget constrained clerks.

Even if Florida financed the judiciary but not the clerks through general revenue, systematic risk would still exist. Clerks and their staff are paid via fines and fees, which increasingly consist of criminal debt.¹⁷³ Failure to properly collect sufficient amounts of such revenue would halt or at least slow down court operations.

¹⁶⁷ See Sukhatme, Billy & Bagwe, *supra* note 4, at 207 (observing that more than 80% of assessments remain outstanding after five years in Escambia County).

¹⁶⁸ S.B. 2500, 2021 Reg. Sess. (Fla. 2021) (subject to Governor’s line item vetoes). The remaining 83% came from General Revenue. *Id.*

¹⁶⁹ See *supra* notes 110–112 and accompanying text; REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 3; LEGISLATIVE BUDGET COMM’N, STATE OF FLORIDA LONG-RANGE FINANCIAL OUTLOOK: FISCAL YEAR 2011–12 THROUGH 2013–14, at 107 (2010), <http://floridafiscalportal.state.fl.us/Document.aspx?ID=6195&DocType=PDF> [<https://perma.cc/5EXL-KEEL>].

¹⁷⁰ REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 7.

¹⁷¹ See, e.g., *id.* at 4, 7; CORELOGIC, UNITED STATES RESIDENTIAL FORECLOSURE CRISIS: TEN YEARS LATER 4–5 (Mar. 2017), <https://www.corelogic.com/wp-content/uploads/sites/4/2021/07/National-Foreclosure-Report-Ten-Years-Later.pdf> [<https://perma.cc/9ERD-6KDJ>].

¹⁷² FLA. CLERKS OF CT. OPERATIONS CORP., ANNUAL REPORT 11 (2021) [hereinafter FCCOC 2021 ANNUAL REPORT], <https://flccoc.org/wp-content/uploads/2023/01/CCOC-Annual-Report-CFY-2020-21.pdf> [<https://perma.cc/EB2J-XGH3>].

¹⁷³ See *supra* notes 168–171 and accompanying text.

Concern over the stability of criminal LFO revenue is multifold. For one, criminal debt, like civil court fines and fees, is not immune to the vicissitudes of social forces. Criminal debt correlates with underlying crime and arrest rates; both have markedly declined over the past three decades.¹⁷⁴

Although the judiciary has immediate needs, its ability to satiate those needs is imperfect. Clerks' budgets are based on revenue projections.¹⁷⁵ This implies that on occasion, clerks' offices (as well as other fee financed judiciary bodies) will be under-resourced if collections fall below expectations. If fine and fee revenue fails to meet benchmarks, clerks must cut their agency costs. Often, such measures mean a reduction in the number of individuals employed by the clerk; staffing cuts create bottlenecks in the administrative side of the judiciary and trigger systemic risk.¹⁷⁶

The temporal disconnect between needs and resources, furthermore, depends on the time of year.¹⁷⁷ Clerks remit surplus collections at the start of the calendar year.¹⁷⁸ The legislature later allocates the clerks their appropriation.¹⁷⁹ This often occurs nearly two weeks after the clerks remit remaining collections.¹⁸⁰ In effect, clerks must operate with no resources at the start of each year.¹⁸¹

These budget gaps, until recently, have not been smoothed by pools of reserves. Prior to 2021, the Florida legislature captured all revenue beyond clerks' specified budgets.¹⁸² As of 2021, however, clerks have acquired the ability to store surplus revenue in the event of an emergency.¹⁸³ While clerks enjoy some capacity to draw upon reserves, their fund is limited to 16% of the total budget for the clerks of court in the current year.¹⁸⁴ Still, this pool exists if surpluses materialize or extraordinary intervention from the legislature occurs.¹⁸⁵ Absent that, all aforementioned temporal difficulties still apply.

These collective concerns are not hypothetical speculations. Clerks furloughed employees and reduced operations in response to pandemic-related

¹⁷⁴ See, e.g., JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 72 (2017).

¹⁷⁵ See MCGOVERN & GREENBERG, *supra* note 109, at 18, 35.

¹⁷⁶ See, e.g., *id.* at 1–2; see also Susan Taylor Martin, *A Conversation with Pinellas County Clerk of Court Ken Burke*, TAMPA BAY TIMES (Sept. 24, 2020), <https://www.tampabay.com/news/business/2020/09/24/a-conversation-with-pinellas-county-clerk-of-court-ken-burke/> (on file with the *Ohio State Law Journal*).

¹⁷⁷ This issue is not unique to Florida. See, e.g., MCGOVERN & GREENBERG, *supra* note 109, at 17.

¹⁷⁸ FLA. STAT. § 28.37(4)(a) (2022); see *id.* § 28.36(3)(a) (2021).

¹⁷⁹ *Id.* § 28.37(4)(a) (2022).

¹⁸⁰ See REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 21.

¹⁸¹ See *id.*

¹⁸² FLA. STAT. § 28.37(3)(a) (2019) (effective 2019–21).

¹⁸³ *Id.* § 28.37(4)(b) (2021) (effective 2021–23); see also FLA. STAT. ANN. § 28.37(4)(b) (West 2023) (current).

¹⁸⁴ See FLA. STAT. § 28.36(3)(a) (2021).

¹⁸⁵ *Id.* Reserve funds can also be provided by law or appropriated by the legislature. *Id.*

financial distress.¹⁸⁶ Case backlogs emerged that will persist for years.¹⁸⁷ That is not to say these issues are merely recent phenomena either. Budget deficits before the pandemic forced the governor and the state legislature to extend emergency funding to the judiciary.¹⁸⁸ In 2010–2011 fiscal year, the courts received \$44.2 million dollars in such monies; a similar budget deficit occurred the following year,¹⁸⁹ and another deficit occurred in 2022.¹⁹⁰ These budgetary gaps have often been addressed via loans from the legislature or executive office and have left the judiciary itself in debt; in 2011, the courts and clerks owed almost \$100 million to the state.¹⁹¹

B. Fee Diversion

Even if one sets aside the foundational flaws inherent in fee-based systems due to its funding source, this financing model is subject to additional destabilizing forces. These pressures, arising from a complex network of misaligned incentives, involve the stakeholders in the funding apparatus.¹⁹² Namely, the state courts, the legislature, and clerks of court vie for LFO revenue.¹⁹³

A competitive process emerges naturally given the institutional framework surrounding remittances. LFO revenue collected by clerks eventually makes its way to a series of purpose-specific accounts.¹⁹⁴ The objectives of these funds

¹⁸⁶ See, e.g., Stephen Hudak, *Orange Court Clerk Asks for Money Because of Pandemic*, ORLANDO SENTINEL (Aug. 11, 2020), <https://www.orlandosentinel.com/news/orange-county/os-ne-coronavirus-orange-clerk-asks-for-money-20200811-lbd4lfgo5vgctc4hhl6z4vv4e4-story.html> [https://perma.cc/6KVJ-L79R].

¹⁸⁷ Renzo Downey, *Clerks of Court Seek Budget Fix with Gov. Desantis-Approved Bill*, FLA. POLS. (June 18, 2021), <https://floridapolitics.com/archives/436547-clerks-of-court-seek-budget-fix-with-gov-desantis-approved-bill/> [https://perma.cc/NRX4-9RAT].

¹⁸⁸ REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 24.

¹⁸⁹ *Id.* at 7.

¹⁹⁰ Patrick R. Fargason, *Florida Clerks Prepare for a Potential Funding Shortfall*, FLA. BAR (Sept. 9, 2022), <https://www.floridabar.org/the-florida-bar-news/florida-clerks-prepare-for-a-potential-funding-shortfall/> [https://perma.cc/4GKE-4RTS].

¹⁹¹ REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 24–25.

¹⁹² See *infra* Part II.C.

¹⁹³ See *infra* notes 224–228 and accompanying text. Fee diversion is a known problem in other “user-fee” based systems as well, such as the U.S. patent system. See, e.g., Neel U. Sukhatme, *Regulatory Monopoly and Differential Pricing in the Market for Patents*, 71 WASH. & LEE L. REV. 1855, 1879 n.86 (2014) (noting that “excess fees received by the [U.S. Patent and Trademark Office] were often siphoned away by Congress in a process known as fee diversion”).

¹⁹⁴ See, e.g., FLA. STAT. § 318.14(10)(b) (2023) (allocating a \$25 court fee for civil traffic violations to the Child Welfare Training Trust Fund, the Juvenile Justice Training Trust Fund, the General Revenue Fund, the Fine and Forfeiture Fund, and the municipality); see also *infra* Figure 2.

are preordained by statutory and constitutional provisions.¹⁹⁵ Yet the links between the accounts and sources of monies are not one-to-one connections. Rather, a defendant adjudicated guilty or a civil petitioner may ultimately pay a fee redirected to legislature by way of the General Revenue Fund and the clerks of court.¹⁹⁶ The laws determining the distribution vary over time, subject to political and financial exigencies.¹⁹⁷

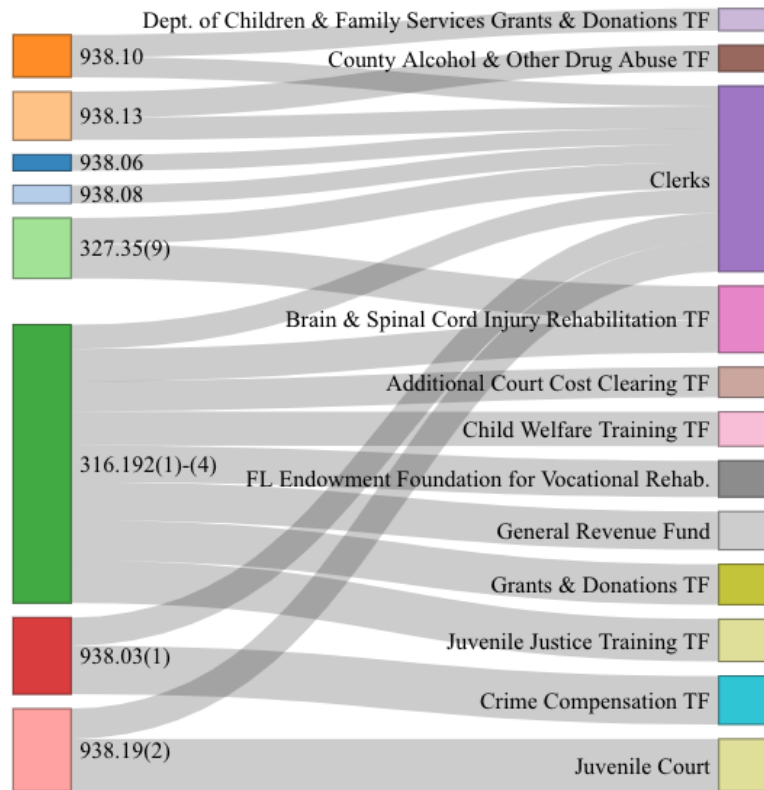
Consider Figure 2 below. This graphic depicts certain infractions that benefit clerks of court in Florida and captures the statutory inflows.¹⁹⁸ We have intentionally included only statutes that transfer revenue to clerks; the schematic would involve many more nodes if regulatory codes that fund all included trust funds but not clerks were incorporated.

¹⁹⁵ See, e.g., FLA. STAT. § 29.22 (2011) (“Moneys credited to the [State Courts Revenue Trust Fund] shall be used for the purpose of funding the activities of the state courts system.”); see also, e.g., FLA. CONST. art. X, § 28(b) (listing purposes for which funds in the Land Acquisition Trust Fund can be expended).

¹⁹⁶ See *infra* Figure 2.

¹⁹⁷ See *infra* notes 206–208, 224–227 and accompanying text.

¹⁹⁸ For readers’ convenience, we have only detailed inflows stemming from a fraction of statutes. We have intentionally omitted all statutes connected to the Fine and Forfeiture Trust Fund due to the complexity and multitude of statutes involved.

Figure 2: Statutory Allocation of Fee Revenue in Florida

Notes: This figure depicts the connections between certain statutory laws and trust funds as of December 2022. The allocation of fee revenue associated with violations of statutes, listed on the left, to trust funds and other beneficiaries. The visualization is limited to statutes that ultimately provide clerks with revenue but for the Fine and Fee Forfeiture Trust Fund, which is excluded for the readers' convenience. The Fine and Fee Forfeiture Trust Fund receives revenue from violations of more than 30 different statutes. Data originally collected by Fines and Fees Justice Center.¹⁹⁹

Figure 2 illustrates the entangled relationship between statutes' fees and objective-specific accounts. The left-hand side lists statutory provisions designed to raise funds for clerks of court. The right-hand side lists where the money raised by those provisions is actually sent. As is apparent, while a portion of each of the statutory provisions is sent to the "Clerks" category on the right, for many categories, a portion of the revenue stream is diverted to other non-clerk related accounts.

¹⁹⁹ Data on file with the author; FLA. STAT. § 318.21 (2023).

For example, Florida Statute § 316.192(1)–(4)—related to fines for reckless driving—allocates revenue to eight separate trust funds.²⁰⁰ The relationship is further complicated by a statutorily prescribed prioritization scheme. That is, unless fees are paid in full, trusts are categorized into tranches that receive money in sequential order until each stakeholder’s share is covered.²⁰¹ The 2022 hierarchy lists the General Revenue Fund at the top followed by clerks, trust funds (on a *pro rata* basis), and then local governments.²⁰² The degrees of prioritization are telling; effectively, they state that “fees”—which should be linked with cost centers—may actually finance completely unrelated activities.

This complex transfer of revenue has given way to a competitive process through which legislators and clerks drain clerks of revenue. Consider Florida Statute § 318.14(10)(b), which charges defendants in non-criminal traffic violations a \$25 fee to offset court costs.²⁰³ Under the 2010 Florida Code, the \$25 was allocated as follows: \$14 to the municipality, \$9 to the Fine and Forfeiture Trust Fund, \$1 to the Department of Revenue for Child Welfare Training Trust Fund, and \$1 to the Department of Juvenile Justice.²⁰⁴ Current law maintains the same structure but with one adjustment.²⁰⁵ It only provides the Fine and Forfeiture Trust Fund with \$8; the remaining \$1 is deposited into the General Revenue Fund.²⁰⁶

In practice, clerks who draw upon the Fine and Forfeiture Trust Fund now see less financing. Legislators, who determine the distribution of the General Revenue Fund, would appear to gain. Moreover, the assessment no longer directly ties to court costs; rather it funds a variety of projects. In theory, legislators may require that the distribution to the General Revenue Fund sponsors activities related to court costs; that said, the fungibility of money casts serious doubt on the notion that every cent operates as intended. Therefore, this example highlights both the temporal diversion and fee mischaracterization issues aforementioned. Nor is this anecdote unique; changes to Florida Statutes § 327.73(11)(a) and § 938.05(1) similarly diverted money from clerks.²⁰⁷

²⁰⁰ FLA. STAT. § 316.192 (2023).

²⁰¹ *Id.* § 28.246(5).

²⁰² *Id.*

²⁰³ *Id.* § 318.14(10)(b).

²⁰⁴ *Id.* § 318.14(10)(b) (2010).

²⁰⁵ FLA. STAT. § 318.14(10)(b) (2023).

²⁰⁶ *Id.*

²⁰⁷ Compare *id.* § 327.73(11)(a) (remitting funds to the General Revenue Fund), with *id.* § 327.73(11)(a) (2010) (not remitting any funds to the General Revenue Fund); also compare *id.* § 938.05(1) (2019) (remitting funds to the General Revenue Fund), with *id.* § 938.05(1) (2008) (not remitting any funds to the General Revenue Fund). A separate but related issue involves the direction of fee revenue toward completely orthogonal government operations. See REBEKAH DILLER, THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES 8 (2010) (“For example, the court imposes a \$135 fee on those who drive a boat under the influence, but not a single penny of this sum goes to the courts. Rather the legislature directs that the money be divided between an emergency medical services trust fund, the statewide crime lab system, and a brain and spinal cord injury rehabilitation trust fund. The mandatory \$500

Clerks and the state courts have not responded amicably to the capture of their agency funding. Their litigious reaction underscores the combative interaction between the parties and signals the significance of these statutory diversions. At least two lawsuits allege the system has put the judiciary at risk of collapse.²⁰⁸ In one matter, the Supreme Court of Florida overturned a lower court's ruling that the distribution of fee revenue into the states' general funds was unconstitutional.²⁰⁹ Separately, several clerks jointly argued that the current fee system undermined a constitutional provision to adequately fund the court; that filing was similarly unsuccessful.²¹⁰

Together, these observations describe a revenue model fraught with internal struggles over distributions. Even if monetary streams were stable (which they are not), the judiciary funding apparatus would still be plagued by structural concerns.²¹¹ To quote a workgroup composed of clerks, state administrators, and judges, "[t]here are currently sufficient funds generated by the Courts and Clerks to fund the Core Court System. However, a significant amount of these revenues is being used to fund other (non-core court) state entities and programs."²¹²

Beyond the risks this siphoning poses to the judiciary, it further pressures the clerks to generate revenue to offset losses of funding. That includes, for example, targeting growth in criminal court revenue. According to the CCOC, clerks appear to have already realized this. Criminal debt—composed of LFOs from criminal traffic, county, and circuit courts—represented 18% of revenues collected by clerks for 2021,²¹³ an increase from 17% in 2019.²¹⁴ This 1% increase masks a 58.5% increase in criminal circuit court debt over the same period; though crime may have risen from 2019 to 2021, it almost certainly did not increase by nearly 50%.²¹⁵ As noted above, this period witnessed a massive

penalty imposed on those who solicit prostitution is another example. The \$500 collected for this offense is used for the 'sole purpose of paying the administrative costs of treatment-based drug court programs.'" (footnotes omitted)).

²⁰⁸ *Accord* *Crist v. Ervin*, 56 So. 3d 745, 752 (Fla. 2010) (alleging the system is unconstitutional); *Frank v. Fla. Dep't of Revenue*, 305 So. 3d 835, 836 (Fla. Dist. Ct. App. 2020) (alleging the system is unconstitutional); Complaint at ¶¶ 69–71, *Frank v. Fla. Dep't. of Revenue*, 305 So. 3d 835 (2020) (arguing that the public has been harmed because the two plaintiffs could not perform their duties).

²⁰⁹ *Crist*, 56 So. 3d at 752.

²¹⁰ *Frank*, 305 So. 3d at 836.

²¹¹ REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 21.

²¹² *Id.* at 6.

²¹³ See FCCOC 2021 ANNUAL REPORT, *supra* note 172, at 11.

²¹⁴ See *id.*; FLA. CLERKS OF CT. OPERATIONS CORP., ANNUAL REPORT 11 (2019).

²¹⁵ The FBI transitioned from the Uniform Crime Report to the National Incident-Based Reporting System in 2021. See Weihua Li, *What Can FBI Data Say About Crime in 2021? It's Too Unreliable to Tell*, MARSHALL PROJECT (June 14, 2022), <https://www.themarshallproject.org/2022/06/14/what-did-fbi-data-say-about-crime-in-2021-it-s-too-unreliable-to-tell> [https://perma.cc/29CB-BSWL]. Uptake of the new program has underwhelmed. Many major agencies including the New York Police Department and the

decline in civil court fines and fees; collectively, these arguments suggest an increasingly pivotal role for criminal court revenue in the funding model.

C. Fee Proliferation

The institutional design flaws of a fee-based court system visible in the Florida model encourage those operating within it to identify opportunities for new revenue streams. While this may materialize internally via fine and fee competition, the search often looks outward. Specifically, the stakeholders tend to focus their attention on parties to litigation. Unstable revenue inflows subject to fierce rivalries over distribution may, at least temporarily, be calmed by expanding the scope and size of fines and fees on litigants.

The legal framework set by the Florida Constitution appears to facilitate proliferation of the LFO network. To wit, the state constitution requires that fees be “adequate and appropriate” to cover costs of performing court-related activities.²¹⁶ This framing offers legitimacy to the augmentation of court fines and fees. The judiciary itself appears to similarly justify such expansion. According to the Supreme Court of the State of Florida’s 5th Principle of Funding Stability:

Any additional fees should be assessed only if there is no chilling effect on Florida citizens’ right of access to the court system, and only in an amount necessary to properly fund court operations so that access is assured.²¹⁷

Such language, in part, gives substantial latitude to justify an ever-growing fee network.²¹⁸ It also provides legislators expedient grounds to legitimize reduced distributions to the judiciary and reasons to counteract those with increased fees.

Financial hardship certainly prompts stakeholders to restructure the levels of LFO costs.²¹⁹ For instance, upon implementation of Article V, the Florida Senate immediately sought to firm up clerk funding; it did so via increased fees and assessments.²²⁰ Likewise, the Great Recession ushered in a series of

most police departments in Florida did not report any data. *Id.* Many criminologists, *e.g.*, Jacob Kaplan, argue that the crime data for 2021 are so poor that drawing inferences from them would be inappropriate. *Id.*

²¹⁶ FLA. CONST. art. V, § 14(b).

²¹⁷ OFF. OF THE STATE CTS. ADM’R, SEVEN PRINCIPLES FOR STABILIZING COURT FUNDING 4 (2009), https://www.flcourts.gov/content/download/218239/file/02-20-2009_Seven_Principles.pdf [<https://perma.cc/T4QH-EBRV>].

²¹⁸ To argue increased fees do not chill participation is entirely misguided from theory and evidence. *See, e.g.*, Louis Kaplow, *Optimal Design of Private Litigation*, 155 J. PUB. ECON. 64, 69 (2017).

²¹⁹ Carlson, Harrison & Hudzik, *supra* note 92, at 13, 120, 128.

²²⁰ Jan Pudlow, *Senate Finds a Way to Pay for Art. V*, FLA. BAR (Apr. 30, 2003), <https://www.floridabar.org/the-florida-bar-news/senate-finds-a-way-to-pay-for-art-v/> [<https://perma.cc/S6EQ-T3VF>]; *see also* Gary Fineout, *State May Cover Costs by Raising*

expansions²²¹ including the creation of the State Court Revenue Trust Fund and increased fees for public defenders.²²²

However, these anecdotes do not preclude the possibility that elected officials leverage the relatively weak bargaining position of the courts to enhance their own financial capabilities. In other words, increased fines and fees do not need to relate to costs or factor in the likelihood of receipt.²²³ Expansions may emerge as a politically convenient way to counteract budget cuts. For example, the list of criminal offenses subject to a \$100 fee that benefits the Florida Department of Law Enforcement expanded in 2012.²²⁴ Counties likewise exploit the opportunity to accumulate fee revenue. For example, Citrus County expanded its traffic fees in 2004.²²⁵ While Citrus County officials' actions appear to have been loosely tied to budgetary concerns, the expanded scope of the \$100 fee does not.²²⁶

This is not to say that elected officials bear all responsibility; they simply wield power to realize these expansions. Clerks and members of the judiciary are complicit; they have explicitly considered increased fees previously to finance their operations.²²⁷ Thus, legislators—possibly at the behest of clerks—have fashioned the current gargantuan fee apparatus.

The aforementioned process is entirely legal. Laid bare, however, it clearly illustrates inherent moral hazard present in a fee-based court system. The stakeholders respond to the incentives before them. Such pressures once again manifest themselves on court users and increasingly on criminal defendants.

Fees, Fines, GAINESVILLE SUN (May 17, 2003),
<https://www.gainesville.com/story/news/2003/05/17/state-may-cover-costs-by-raising-fees-fines/31636429007/> [<https://perma.cc/ES8N-3Q9T>].

²²¹ See, e.g., FLA. STAT. § 938.10(1) (2023).

²²² *Id.* § 29.22 (2009). Compare *id.* § 938.29 (2007) (allowing the courts to set the fee values for public defenders), with *id.* § 938.29 (2008) (creating mandatory minimum fees for public defender services).

²²³ REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 16. This workgroup explicitly discounted the possibility of raising filing fees and fines as it noted that Florida, at least at the time, had some of the highest fines and fees in the country; likewise, the group acknowledged the possibility that increased rates disincentivize use of courts. *Id.* at 3.

²²⁴ STATE OF FLA. OPERATIONAL AUDIT REPORT NO. 2012-081 (2012), at 28. Prior to 2012, the \$100 fee could be collected in connection to violations of FLA. STAT. section 893.13 (2022). However, it was expanded to include any violation within §§ 775–896. *Id.*; see also FLA. STAT. § 938.055 (2023).

²²⁵ Tom Scherberger, *County to Increase Fees to Cover Court Costs*, TAMPA BAY TIMES (Oct. 12, 2005), <https://www.tampabay.com/archive/1992/12/16/court-fees-may-increase/> [<https://perma.cc/SAC5-G7GQ>]. The Citrus County example is likely related to budgetary issues. Based on a cursory review of the legislative history, it does not appear that the expansion to 938.25 was determined by financing concerns.

²²⁶ See Office of the State Court Administrator, *supra* note 82.

²²⁷ Fargason, *supra* note 190 (“We might consider [asking for] a 10% raise on filing fees or perhaps a cost-of-living increase” (alteration in original)).

D. *No Exit, No Voice*

In spite of its dysfunctional nature, the fee-based judiciary continues to operate; its survival, however, is precarious and heavily contingent upon external financing from the other two branches of state government.²²⁸ These interventions completely undermine the existence of a financially independent judiciary.

Though the 1998 amendment that ushered in Florida's fee-based system arose from a desire to provide access to courts "without sale, denial or delay," it can be viewed as nothing short of a policy failure.²²⁹ Financial malaise compromises the means of effectively resolving disputes and redressing injury.²³⁰ Budgetary concerns have created frequent delays.²³¹ As noted above, stakeholders have attempted to address these via a more expansive fee system.²³² Hence, the principle of delivering judicial services "without sale . . . or delay" would appear chimeric under the current framework.²³³

The inability to enforce contracts, secure property rights, seek justice in criminal matters, or mediate disputes on a timely basis undermines the common law tradition. It also bears substantial costs.²³⁴ Though revenue shortfalls near the \$50 million level appear large, they represent less than 1% of annual tax collections in Florida; moreover, the entire clerk budget is approximately 1% of yearly tax collections.²³⁵ While potentially politically distasteful, it would seem exceptionally feasible to finance clerks via general revenue; moreover, the costs of doing so seem sensible from both a principled and cost effective perspective. Therefore, it seems puzzling that the fee-system continues to function.

²²⁸ See, e.g., REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 24–25 (explaining that the Florida legislature and Governor have covered nearly \$100 million in court deficits in 2011).

²²⁹ FLA. CONST. art. I, § 21; see Copelan, Jr. & Labrador, *supra* note 96, at 30.

²³⁰ *Psychiatric Associates v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992).

²³¹ Gary Blankenship, *Clerks Say Expect Delays in Civil Cases*, FLA. BAR (May 1, 2012), <https://www.floridabar.org/the-florida-bar-news/clerks-say-expect-delays-in-civil-cases/> [<https://perma.cc/J5T3-SFKQ>].

²³² See Copelan, Jr. & Labrador, *supra* note 96, at 30–31.

²³³ FLA. CONST. art. I, § 21.

²³⁴ WORLD BANK, *WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE* 4 (2004); Thomas J. Miceli, *Settlement Delay as a Sorting Device*, 19 INT'L R. L. & ECON. 265, 272 (1999); Allen P. Rubine, Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 CORNELL L. REV. 794, 826 (1972).

²³⁵ *State Tax Collections: Total Taxes for Florida*, FED. RSRV. ECON. RSCH. (Dec. 14, 2023), <https://fred.stlouisfed.org/series/QTAXTOTALQTAXCAT3FLNO> [<https://perma.cc/KCW8-H8FR>] (citing data from the U.S. Census Bureau) Clerks collectively operate on a budget around \$450 million. See REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 16. Tax collections in 2011, for example, were \$32.9 billion. *State Tax Collections*, *supra*. Hence, the entire clerk system would account for about 1% of tax collections. *Id.*

Economic theory offers a reason. The judiciary, along with the legislature in its oversight role, is best viewed as a leviathan. Like a monopolist, it provides court services—without competition in its jurisdiction—to a diverse set of litigants, including criminal defendants.²³⁶ Monopolists, however, are constrained by individuals' choices to forgo consumption of the good or service.²³⁷ Criminal defendants do not possess this luxury; they are coerced into their user role. An immediate consequence is that the judiciary retains even greater ability to draw revenue from criminal defendants than consumers in standard monopolist models.²³⁸

The inability to rein in such excesses—also known as the absence of the exit option—reduces the sensitivity of courts and the legislative branch to ability to pay.²³⁹ In settings where consumers are not coerced into purchases, their decision to not patronize a monopolist affects profits; given different willingness to pay among consumers, monopolists set prices according to where the trade-off between a higher price and fewer customers (in conjunction with volume per customer) maximizes their revenue.²⁴⁰ However, no such equilibrating influence exists for the “demand” of criminal court services among defendants. Bureaucrats, therefore, have no incentive to be mindful of income constraints. Further, such fees will, according to the theory of public choice, tend to grow with time both in terms of size and scope as financing needs evolve.²⁴¹

While electoral activism has the potential to expose such exploitation and vote abusive officials out of office, individuals with felony convictions generally lack a vehicle for voice. Namely, returning citizens who have not settled their criminal court debt are often prohibited from voting, as is the case in Florida.²⁴² Therefore, voter disenfranchisement among those with a felony

²³⁶ Kleiman, *supra* note 151, at 536.

²³⁷ *Id.* at 537.

²³⁸ Ariel Jurow Kleiman has described this situation as a “non-market” as “consumer demand cannot exert downward pressure on fee levels.” *See id.* at 553.

²³⁹ Thus, calls for fees to be determined by ability to pay are quixotic. That said, the impetus for fees based on the ability to pay—indigency—should not be ignored. Rather, it suggests the revenue inflows may not sufficiently fund courts. The failure to collect enough revenue risks the solvency of the system; this effectively pits the court's sense of self-preservation against public interest.

²⁴⁰ *See* Kleiman, *supra* note 151, at 553.

²⁴¹ BRENNAN & BUCHANAN, *supra* note 58, at 71, 130.

²⁴² *See* Sukhatme, Billy & Bagwe, *supra* note 4, at 166. While informal complaint channels to enfranchised peers or community leaders may be available, their utility—formally speaking—lacks the effectiveness of unfettered voice mechanisms. Any activism on behalf of those connected to individuals with felony convictions are pitted against the belief that offender-funded courts shield taxpayers from funding; this supposition is highly questionable as courts turn to general tax collections to address their needs as criminal fee revenue sponsors an expansive array of publicly facing projects. *See* Brennan & Buchanan, *supra* note 58, at 20; Curt Anderson, *Judges: Florida Felons Can't Vote Until They Pay Fines, Fees*, ASSOCIATED PRESS (Sept. 11, 2020), <https://apnews.com/article/florida-voting->

conviction in theory might further desensitize courts and legislators to ability to pay.

The aforementioned dynamics describe an environment where, regardless of individualized fees, former criminal defendants find themselves in vulnerable positions. This theory suggests the judiciary and its political affiliates will extract greater value over time from these users, who serve as a captive audience.²⁴³ The lack of recourse further implies that fees and their scope will continue to expand.

IV. CREDITOR COURTS AND COLLECTIONS: CONFLICTS OF INTEREST AND CAMPAIGN FINANCE

The previous section highlights the distortions and inefficiencies inherent in fee-based criminal court systems. Fee-based systems are poor revenue generators, with uncertain revenue streams untethered both temporally and in nature to underlying costs.²⁴⁴ And once state legislatures are empowered to charge fees to those confined within the criminal legal system, they have every incentive to increase the amount and scope of fees charged and divert collected fees away from actual court expenses.²⁴⁵

But the problem is worse than that. As we document in this section, the process of collecting fees from criminal defendants is rife with potential conflicts of interest that further undermine the interests of the state, clerks of court, and criminal defendants.

Focusing once again on Florida, we present results from a survey of clerks of court, which digs into the collections process and its challenges. We also conduct a novel empirical analysis of 102 contracts between collection agencies, spanning 60 of the state's 67 counties. We show these contracts often contain terms that benefit agencies at the expense of the state or criminal defendants. Moreover, there is no evidence these agencies significantly improve collections rates or increase repayment rates to the state by former defendants.

Why might such contracts exist? As we discuss, clerks of court are elected officials who accept campaign donations.²⁴⁶ Using comprehensive campaign finance data from Florida for the 2020 general election, we argue that many candidates for clerk of court often benefit from donations made by collections agencies or their employees. While it is unclear whether there is a causal link between contracts ratified by clerks and donations made by collections agencies to those clerks, the potential conflict of interest—and the resulting harm to the state and criminal defendants—is clear.

rights-elections-courts-voting-b4f68dd4f11a6df4430fbd74ae93de3 [https://perma.cc/S6DY-9UTC].

²⁴³ BRENNAN & BUCHANAN, *supra* note 58, at 130.

²⁴⁴ *See supra* Part III.

²⁴⁵ Pudlow, *supra* note 220, at 4.

²⁴⁶ FLA. STAT. § 106.08(1) (2023).

A. Clerks of Court Survey

To better understand how clerks approach debt collection, we collaborated with the Fines and Fees Justice Center (FFJC) to survey clerks of court across Florida on their methods, challenges, and concerns. Twenty-seven clerks completed the survey, a response rate of approximately 40%. We do not claim these answers represent all clerks of court in Florida, let alone other jurisdictions. Nonetheless, they do offer some insights that illuminate our analysis and can guide further empirical study.

A few themes emerged from the clerks' responses. To begin, clerks of court have tested a number of different approaches to try and increase collection rates. Table 1 below summarizes ones mentioned by the clerks in their survey responses:

Table 1: Clerk of Court Actions to Collect Criminal Court Fines & Fees

Clerk action to process/collect criminal court fines & fees	# Counties
Notify DMV of missed court payment (driver's license suspension)	24
Send to private collection agency	24
Mail notice to individual of requirement to pay fines or fees or set up payment plan	21
Mail notice to individual of late payment	19
Set up payment plans	17
Convert fines or fees to community service	17
Assess additional fines and fees	16
Convert to civil judgment	14
Meet with individual immediately upon sentencing	10
Text/email notice to individual of late payment	5
Text/email notice to individual of requirement to pay fines or fees or set up payment plan	4
Hold in contempt of court	2
Bank account levied or lien placed on property	2

Garnish wages	1
Phone calls to defendants who are late on partial payments	1
Offer driver's license reinstatement days	1

The clerks who responded apply a mix of strategies. Primarily, the respondents use driver's license suspensions or third-party debt collection agencies to acquire revenue. Clerks, however, also seem willing to work with debtors. Most acknowledged they convert LFOs to community service. Public service can enable returning citizens to develop skills, which reduces the likelihood of recidivism.²⁴⁷ Still, these conversions are not the most popular device in our survey or others.²⁴⁸ Moreover, clerks can charge individuals for community service work performed.²⁴⁹

Similarly, clerks' willingness to set up payment plans, which can be tied to ability to pay, seems cooperative.²⁵⁰ Again, however, clerks typically reserve the right to charge debtors a one-time fee to establish this arrangement.²⁵¹ Therefore, even the outwardly altruistic devices employed by clerks have a revenue component attached to them.

The propensity to use extractionary tools is borne out of a recognition that the vast majority of felony court debt is uncollectible.²⁵² Clerks widely recognized this in their survey. According to them, a principal barrier to repayment is the lack of resources to pay fees and costs.²⁵³ Clerks proffered two primary explanations for this inability.

First, some clerks emphasized that individuals who owe criminal court debt are frequently incarcerated. Incarceration clearly interferes with the ability to earn income, which can stymie repayment of court debt. The following comments capture this sentiment:

- "Most of the cases result in incarceration"

²⁴⁷ Hilde Wermink, Arjan Blokland, Paul Nieuwebeerta, Daniel Nagin & Nikolaj Tollenaar, *Comparing the Effects of Community Service and Short-Term Imprisonment on Recidivism: A Matched Samples Approach*, 6 J. EXPERIMENTAL CRIMINOLOGY 325, 328 (2010).

²⁴⁸ DILLER, *supra* note 207, at 14–15, 20–23.

²⁴⁹ *Probation*, LEON CNTY., <https://cms.leoncountyfl.gov/Home/Departments/Office-of-Intervention-and-Detention-Alternatives/Probation/Probation-Highlights> [https://perma.cc/PZ28-V6Q4].

²⁵⁰ FLORIDA CLERKS OF COURT CORP., *supra* note 90, at 4.

²⁵¹ FLA. STAT. § 28.24(27) (2022).

²⁵² *See, e.g.*, FLA. CLERKS OF CTS. OPERATIONS CORP., QUARTERLY PERFORMANCE MEASURES & ACTION PLANS REPORT: 1ST QUARTER COUNTY FISCAL YEAR 2021–22 Tbl. D. (2022), <https://flccoc.org/wp-content/uploads/2022/02/Q1-CFY2122-PMAP-Report.pdf> [https://perma.cc/585G-DYUU].

²⁵³ *Id.*

- “Defendants incarcerated resulting in the inability to collect court costs and fines.”

Second, clerks emphasized that financial hardships, independent of incarceration, plague these individuals. The following comments capture this sentiment:

- “The local economy, incarcerated defendants, and the overall ability to pay greatly affect the collection rate.”
- “Collections are below [expected] percentage due to economic hardships brought upon individuals.”
- “Low-income levels; high unemployment rates. We cannot solve these problems. We are following best practices for collections, but do not have control over all of the relevant factors.”²⁵⁴

Even if clerks recognize limitations to the debt they can collect, they generally expend substantial resources on the pursuit of criminal LFO debt. Clerks of court varied widely in this regard. Clerk estimates of the number of staff who assist with the collection of criminal fines and fees range from a low of 0.5 people (Madison County) to a high of 16 people (Volusia County).²⁵⁵ Not surprisingly, the total number of hours estimated per week spent on criminal fines and fees collections varied widely as well, ranging from 5 hours per week (Hamilton County) to 187.5 hours per week (Santa Rosa County).

Though heterogenous, hours spent per week on LFO debt collection can help facilitate a crude cost-benefit analysis. The median time allocated to criminal debt collection according to the survey is approximately 34 hours per week. Clerks’ staff earn approximately \$37,000 a year.²⁵⁶ That equates to about \$18 an hour. Thus, LFO collections for the median county will result in about \$31,000 in expenses on related administrative activities. Per the CCOC’s statistics, the median county receives about \$128,000 in criminal and civil LFO

²⁵⁴ *Id.* at 13. Interestingly, some clerks used the language “customers” to refer to people who owed fees. *See, e.g., id.* (“Customers not paying due to financial hardships or incarceration.”). This terminology belies the reality that these individuals are not voluntary actors in the criminal legal system, engaging in voluntary transactions.

²⁵⁵ Madison County’s estimate is hard to gauge as it also disclosed it intended to ramp up internal collection efforts. Its clerk provided no estimate of hours spent per week on LFO collections. Separately, one county (Broward County) estimated that 250 people work on collections of criminal court fines and fees, with an estimated 5,000 hours spent per week on collections. While Broward County is one of Florida’s largest counties, those estimates are so different from those from other counties that they seem likely to reflect either a misunderstanding of the survey question or reflect some other data anomaly.

²⁵⁶ *See Florida Court Clerk Salaries*, GLASSDOOR, https://www.glassdoor.com/Salaries/florida-court-clerk-salary-SRCH_IL.0,7_IS3318_KO8,19.htm [https://perma.cc/P4KG-UN8C].

revenue annually.²⁵⁷ Of that, only \$8,900 (7%) consists of criminal debts.²⁵⁸ On net, this implies that criminal LFOs may actually drain resources for clerks.

This statistic is perhaps unsurprising. The weight of the evidence suggests clerks are desperate to address their funding issues. Many will threaten defendants with serious consequences, such as additional debt and driver's license suspensions, in an attempt to collect existing revenue; likewise, they will bargain with legislators to expand the LFO system only to later sue them if revenue inflows do not adequately support them. This reality does not speak to the ethics of clerks; rather, it says the institutional framework under which they operate is broken and prompts acts of self-preservation.

B. *Contracting with Collection Agencies*

As we have shown, despite the ubiquity of criminal court fees, courts across the country face serious challenges in collections. One might believe this failure simply reflects a shortcoming of government actors. Instead, one might wonder if private actors or collection agencies with a clearer profit motive might fare better in collecting criminal court debt.

Prima facie, collection agencies might afford the courts and taxpayers several benefits. For one, they shift costs of servicing debt from taxpayers to private agencies.²⁵⁹ Cost reductions may further be enhanced by efficiencies the firms possess in acquiring hard-to-obtain debt. For example, two of the largest collection agencies in the country—Linebarger, Goggan, Blair & Sampson, LLP (Linebarger); and Perdue, Brandon, Fielder, Collins, and Mott, LLP (Perdue)—are law firms that specialize in debt collection.²⁶⁰ Though their labor force is focused primarily on the logistics of debt collection,²⁶¹ Linebarger and Perdue's

²⁵⁷ Raw data and analysis on file with the author. For the original data, see FLA. CLERKS OF CT. OPERATIONS CORP., ANNUAL REPORT 2020, at 11 (2020), <https://flccoc.org/wp-content/uploads/2021/01/2019-20-Annual-Report-Final.pdf> [https://perma.cc/6HED-R8ST], and FLA. CLERKS OF CT. OPERATIONS CORP., ANNUAL REPORT 2021, at 11 (2021), <https://flccoc.org/wp-content/uploads/2023/01/CCOC-Annual-Report-CFY-2020-21.pdf> [https://perma.cc/L9LV-E7GZ].

²⁵⁸ *Id.*

²⁵⁹ See, e.g., Complaint for Damages and Injunctive Relief at 8–9, ¶ 21, *Champagne v. Linebarger Goggan, Blair & Sampson, LLP*, No. 4:20-cv-00275 (S.D. Iowa Sept. 1, 2020) (“The State benefits from the actions of its delegee in that Linebarger’s business practices allow the State to save costs it would otherwise incur in collecting its own court debt.”).

²⁶⁰ See *About Us*, PERDUE, BRANDON, FIELDER, COLLINS & MOTT LLP, <https://www.pbfc.com/aboutus.html> [https://perma.cc/ZK4N-5MF2] (“Perdue Brandon is a law firm providing customized services exclusively to governmental entities.”); *About*, LINEBARGER, GOGGAN, BLAIR & SAMPSON, LLP, <https://www.lgbs.com/about-us/> [https://perma.cc/EW8F-QZUJ] (“Linebarger Goggan Blair & Sampson, LLP is a national law firm with a practice dedicated to the collection of delinquent government receivables.”).

²⁶¹ See generally Amy E. Lemen, *Technology Propels Law Firm*, AUSTIN BUS. J. (Mar. 21, 2004), <https://www.bizjournals.com/austin/stories/2004/03/22/smallb1.html> [https://perma.cc/5U8F-EZRR]. The staff of these companies primarily consists of business

comparative advantage in legal expertise should not be overlooked; these features likely make them a one-stop-shop for clients in the event of litigation.²⁶²

Still, even if more robust debt collection were socially *optimal* in this context—something we doubt given the large societal costs and distortions resulting from criminal court debt that we have described above²⁶³—introducing collections agencies into the process creates a host of new problems and potential conflicts of interest. Once again, we demonstrate these issues using evidence from Florida.

In an attempt to improve on low collections rates, Florida’s legislature in 2003 gave clerks the opportunity to enter into contracts with private collection agencies and law firms to assist the clerks in acquisition of delinquent court debt.²⁶⁴ The new law read:

(6) A clerk of court *may* pursue the collection of any fees, fines, court costs, or other costs imposed by the court which remained unpaid for 90 days or more, or refer such collection to a private attorney who is a member in good standing of The Florida Bar or collection agent who is registered and in good standing . . .²⁶⁵

The legislature amended the statute the following year, adding a requirement that clerks first attempt to collect the unpaid amount through a collection court, collections docket, or other collections process established by the court before using private collection agencies.²⁶⁶ The legislature also allowed the collection agencies to charge a fee of up to 40% of the amount owed at the time the account was sent to collections, which could but was not required to be, added to the balance owed.²⁶⁷

In 2009, Florida lawmakers revisited the collection provision to seemingly make the use of an attorney or collection agencies mandatory rather than

analysts and tech employees. *Id.* The former CIO of Linebarger described its software-driven, efficient business model in a 2004 interview with the Austin Business Journal. *Id.* This sentiment is echoed by the U.S. Treasury Department, which recognized Linebarger as an industry leader in 2003. *Id.*

²⁶² See, e.g., NEB. DEP’T OF ADMIN. SERVS. REQUEST FOR INFORMATION DOR-01282020, at 2 (Jan. 28, 2020), <https://das.nebraska.gov/materiel/purchasing/RFI%20Revenue/RFI%20Revenue.html> [<https://perma.cc/T749-TNBA>] (“By handling all core collection functions and activity in-house, Linebarger allows for a very simple and efficient oversight process for NDOR [Nebraska Department of Revenue].”).

²⁶³ See *supra* Part II.

²⁶⁴ Act of June 25, 2003, ch. 2003-402, § 34, 2003 Fla. Laws 3683.

²⁶⁵ *Id.*

²⁶⁶ Act of May 28, 2004, ch. 2004-265, § 21, 2004 Fla. Laws 975 (codified as amended at FLA. STAT. § 28.246(6) (2022)).

²⁶⁷ *Id.*

discretionary.²⁶⁸ The new language states that a “clerk of court shall pursue the collection of any fees, service charges, fines, court costs, and liens for the payment of attorney fees and costs . . . which remain unpaid after 90 days by referring the account to a private attorney . . . or collection agent.”²⁶⁹

As we show below, the clerks’ contracts with third-party firms are dominated by a few powerful players. These entities have negotiated favorable terms with the clerks. The contracts include provisions that generally leverage advantages the law provides to third-party debt collectors, while ignoring protections afforded to defendants.²⁷⁰ The contractual relationships, therefore, do little to redress the structural problems facing the fee-based judiciary model.

1. *Contracts*

To better understand the role debt collection agencies play, we turn to data collected by FFJC in conjunction with a 2020 public records requests to each of Florida’s 67 clerks of court. Specifically, FFJC asked to obtain copies of any collection contracts in place in County Fiscal Year 2018–2019 and 2019–2020. This process revealed that formal agreements between clerks and collection agencies are common. 65 of 67 counties acknowledged they have written contracts with private collection firms.²⁷¹ Out of these 65 counties, 60 provided a total of 102 contracts, which we subsequently analyzed.²⁷²

The collection contracts detail a number of provisions of interest. These include terms relating to the fees charged by the collection agencies; how payments received were distributed between clerks and collection agencies; the ability of collection agencies to compromise debts on behalf of the clerk; and the circumstances in which a clerk could recall cases sent to collections.

Note that these cases are typically matters in which an individual does not voluntarily engage with the justice system. Instead, these individuals have

²⁶⁸ Act of June 18, 2009, ch. 2009-204, § 2, 2009 Fla. Laws 2025–26 (codified at FLA. STAT. § 28.246(6) (2022)).

²⁶⁹ *Id.*

²⁷⁰ Contracts on file with authors.

²⁷¹ This statistic is computed from contracts provided to the Fines and Fees Justice Center that reflect fiscal year 2018-2019. Levy and Sumter counties are the only two jurisdictions that stated they did not contract any firm to collect LFO revenue on their behalf. FLA. CLERKS OF CT. OPERATIONS CORP., COLLECTION AGENT ANNUAL REPORT: COUNTY FISCAL YEAR 2018 – 2019, at 3 (2020) [hereinafter FCCOC COLLECTION AGENT 2018–2019 ANNUAL REPORT], <https://flccoc.org/wp-content/uploads/2020/03/CFY1819-Collection-Agent-Report-Ver2.pdf> [<https://perma.cc/6QT5-8TEV>].

²⁷² Copies of the contracts received and reviewed are on file with the Fines and Fees Justice Center. The Florida Clerks of Court Operations Corporation reports active contracts each year. *See, e.g., id.* FFJC did not receive all contracts from Dixie, Madison, Clay, Bradford, Miami-Dade, or Gulf Counties. Neither Sumter nor Levy County had active contracts at the time of our request.

responded to an allegation against them.²⁷³ Such cases include criminal prosecutions (both felony and misdemeanor) as well as criminal and civil traffic cases.

At the time of FFJC's records request, nine different collection agencies contracted with Florida's clerks of court;²⁷⁴ most clerks engaged more than one collection agency at the same time.²⁷⁵ Clerks of court are encouraged to use multiple collection agencies,²⁷⁶ and to move cases from one agency to another if no payments are collected by the first collection agency.²⁷⁷ The multiplicity of collection agency contracts in individual counties is illustrated in Table 2 below.

Table 2: Collection Agencies Used by Florida Counties, 2020²⁷⁸

One Collection Agency	Two Collection Agencies	Three Collection Agencies	Four Collection Agencies
26	26	6	2

While counties tend to contract with multiple collection agencies simultaneously, the market is nonetheless dominated by just three major players.²⁷⁹ These three have contracts with 55 counties in total: Penn Credit Corporation (Penn Credit); Linebarger, Goggan, Blair & Sampson, LLP (Linebarger); and Perdue, Brandon, Fielder, Collins, and Mott, LLP (Perdue).²⁸⁰ Penn Credit and Linebarger are by far the two largest players, holding the majority of the contracts we analyzed.²⁸¹

²⁷³ Contrast these with most civil adversarial proceedings, which typically involve private disputes, or ex parte proceedings, such as seeking a name change.

²⁷⁴ FCCOC COLLECTION AGENT 2018–2019 ANNUAL REPORT, *supra* note 271, at 3.

²⁷⁵ *Id.*

²⁷⁶ FLORIDA CLERKS OF COURT CORPORATION, *supra* note 163, at 8.

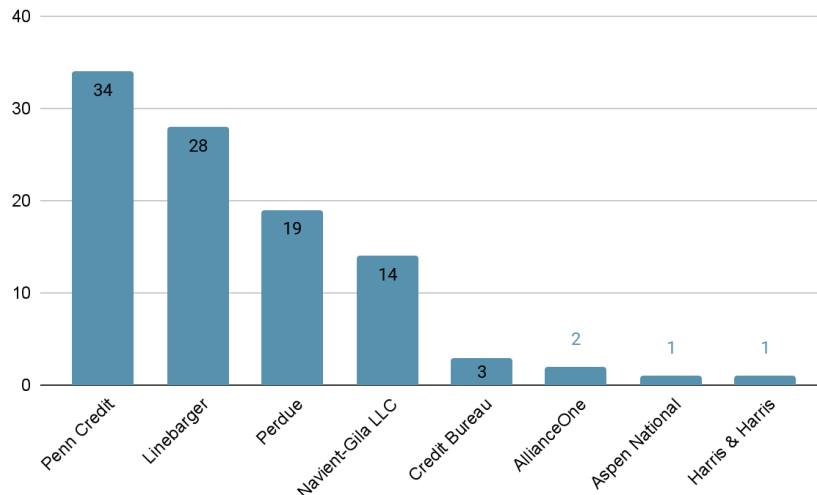
²⁷⁷ *Id.*

²⁷⁸ FCCOC COLLECTION AGENT 2018–2019 ANNUAL REPORT, *supra* note 271.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* The contracts analyzed included those from Linebarger, Goggan, Blair & Sampson, LLP; Penn Credit Corporation; Perdue, Brandon, Fielder, Collins, and Mott, LLP; Gila LLC dba Municipal Services Bureau; Harris & Harris; Aspen National Collections; AllianceOne Inc.; and Credit Bureau of Marianna, Inc. We treat another entity (Court Collection Bureau, Inc.) as part of Perdue, since it had a contract with Volusia County but then became part of Perdue. Similarly, three contracts associated with Pioneer Credit Recovery, Inc. (also known as Municipal Services Bureau, and later as S.C. Services & Associates Inc.) eventually became associated with Gila. In 2015, Gila itself was acquired by Navient Corp., which itself had a contract with Putnam County. *See* Press Release, Owner Res. Grp., Owner Resource Group Sells Gila Corporation to Navient (Feb. 27, 2015), <https://www.orgroup.com/blog/owner-resource-group-sells-gila-corporation-to-navient/> (on file with the *Ohio State Law Journal*). Contracts created by these Gila-associated companies are treated as Gila for our analysis below.

Figure 3: Number of Contracts with Florida Counties by Firm, 2020

2. Agency Fees

Florida law requires court debt to be sent to private collection agencies after 90 days of nonpayment.²⁸² An additional collection fee—up to 40% of the debt owed—is allowed, though not required, by statute to be tacked on to the amount already owed.²⁸³ So, for example, if a criminal defendant owed \$1,000 in court fees, a county could increase the total amount owed up to \$1,400 once the debt is sent to a collection agency.

County clerks have total discretion on the contracted collection fee as long as it does not exceed 40%.²⁸⁴ Taken in conjunction with the clerk's statutory authority to settle court debt, a collection fee could also be absorbed by the clerk of court as a reasonable cost of outsourcing a key constitutional and statutory responsibility.²⁸⁵ Instead, many clerks have created an additional and costly burden on individuals by entering into contracts that include collection fees up to the 40% cap.

In the contracts we analyzed, the most common collection fee percentage was 40%. Apart from two contracts with fees of 5% and 20%, the other 99 contracts²⁸⁶ with percentages all had fees of 25% or more. Table 3 below summarizes these results by collection agency and fee amount.

²⁸² FLA. STAT. § 28.246(6) (2023).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *See id.* § 938.30(9).

²⁸⁶ The total contracts are 101 instead of the full set of 102 because one contract (between Penn Credit and Duval County) indicated that the collection fee would be determined by the clerk and did not provide a specific percentage.

Table 3: Number of contracts by Florida counties with collection agencies by collection fee percentage, 2020

Agency	5%	20%	25%	30%	33%	35%	40%
Penn	0	0	7	1	0	8	17
Linebarger	0	0	13	4	0	2	9
Perdue	1	0	2	13	2	0	1
Gila	0	1	3	5	0	0	5
Other	0	0	2	2	0	0	3
Total	1	1	27	25	2	10	35

3. *Pro Rata Distribution*

The bulk of the contracts reviewed permit collection agencies to take a *pro rata* payment distribution from each dollar received from a debtor. Under such a scheme, individuals are, in effect, paying two separate creditors—the court and the collection agency—each time they submit a payment.²⁸⁷ This setup can extend the time it takes to pay down debt.

To illustrate, suppose again an individual owes \$1,000 in fees. If the debt is turned over to a collection agency, the amount owed will increase up to a potential maximum of \$1,400. Now suppose the defendant repays \$1,000. Before the collections process was initiated, this payment would have been sufficient to clear their debt. Under a *pro rata* regime, however, they still owe *both* the state \$285.71²⁸⁸ and the collection agency \$114.29²⁸⁹ for a total of \$400.

Apart from lengthening individuals' indebtedness, *pro rata* systems also decrease collection agencies' incentives to collect debt as payments are made. Under *pro rata* systems, a portion of every dollar collected goes directly to the collection agency.²⁹⁰ If collections require costly actions (*e.g.*, time spent on

²⁸⁷ See, *e.g.*, FLA. STAT. §§ 28.246(5)–(6) (2023).

²⁸⁸ $\$1,000 - \$1,000 * (\$1,000 / \$1,400) = \$285.71$.

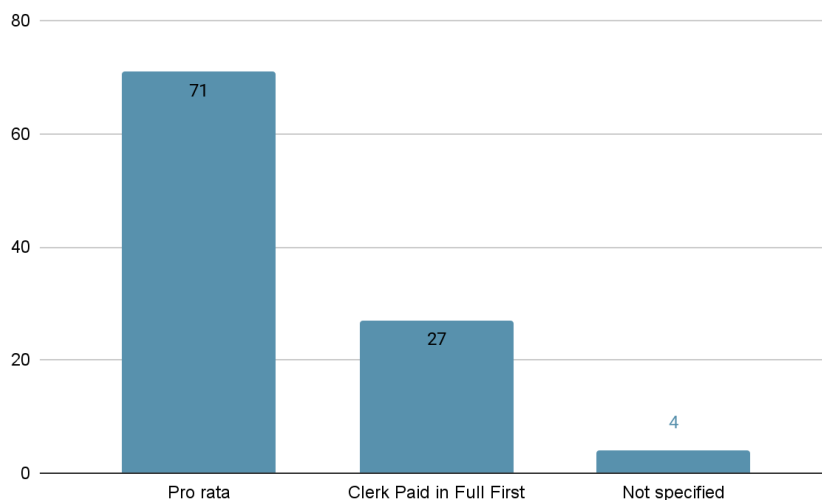
²⁸⁹ $\$400 - \$400 * (\$1,000 / \$1,400) = \$114.29$.

²⁹⁰ See, *e.g.*, *Pro Rata: The Golden Rule of Distribution*, FASTER CAP., <https://fastercapital.com/content/Pro-Rata--The-Golden-Rule-of-Distribution.html>

phone calls, letter drafting, or personal visits to debtors), then collection agencies are less likely to take those actions as the benefit from those actions decreases (*i.e.*, the dollar amount of outstanding debt diminishes). This decreased incentive to collect not only affects the agency but also the court who is not made whole until all outstanding debt has been collected.

A minority of collection contracts avoid these dilemmas by ensuring that any money received goes first to the court;²⁹¹ in other words, the court must be repaid in full before the collection agencies can collect any fee. In this scenario, individuals pay off their court debt but remain indebted to the collection agency beyond the life of that court debt. Still, the added collection fees compound the debt a person owes and can contribute to longer debt payoff time-frame.

Figure 4: Payment Distribution by Collection Agency Contract, 2020



4. Debt Recall

As clerks of court themselves recognize, there are myriad reasons why an individual may be unable to make a payment on their court debt within 90 days of its issuance. Indigent individuals convicted of crimes, by definition, lack the resources to pay. Additionally, under Florida law, once an individual is 30 days behind on payments toward their court debt, a clerk of court can initiate proceedings to suspend their driver's license.²⁹² This complicates individuals' ability to commute to work and earn money to pay their fees.²⁹³ Even more

[<https://perma.cc/XMA5-U4RB>] (Feb. 13, 2024) (providing, in Part 5, examples of pro rata distribution in practice).

²⁹¹ See *infra* Figure 4.

²⁹² FLA. STAT. § 322.245(3) (2023).

²⁹³ See WHITELEMONS, THOMAS & COUTURE, *supra* note 135, at 3.

problematic, some individuals may be sentenced to prison and have no way to pay court fees and costs.²⁹⁴

The additional collection agency fee turns already difficult debt into nearly impossible debt for many individuals. In these circumstances, an individual may seek to have the clerk of court pull any delinquent accounts from collections to avoid the additional collection fee.

While some clerks of court may be reluctant to recall cases after they have been sent to the collections agencies, there is nothing in Florida law that prevents them from recalling the case to save an individual the collection fee. Yet in almost 20% of counties, clerks appear to surrender or restrict their right to recall debt from collection agencies in their contracts with those agencies.²⁹⁵

By rescinding their power to recall debt, clerks ensure that individuals will be saddled with collection agency fees that might account for up to 40% of the amount owed.²⁹⁶ In some circumstances, agencies may themselves have the power to compromise debt and reduce amounts owed.²⁹⁷ However, many collection agency contracts are silent on this practice, as we discuss in the next section.²⁹⁸

Even in counties where recall is technically possible, clerks often face substantial legal hurdles in recalling debt in practice. For example, in Palm Beach County, the clerk's contracts with both Penn Credit and Linebarger include a requirement that an individual obtain a court order before the clerk will recall a case from collections.²⁹⁹ Such requirements can severely hinder clerks' ability to reduce amounts owed by individual defendants.

5. Settlement Authority

Florida law provides broad authority to the clerks of court to compromise, settle, or release individuals from their court financial obligations for less than the full amount.³⁰⁰ According to Clerks of Court Operations Corporation (CCOC) Best Practices, clerks could provide contracted collection firms with clear guidelines for when they may settle court debt.³⁰¹ Yet our review of

²⁹⁴ *Id.* at 4.

²⁹⁵ 83 of the 102 contracts analyzed explicitly permitted clerks of court to recall debt from collections agencies. The others were either silent or unclear on the issue or limited the practice in some way.

²⁹⁶ FLA. STAT. § 28.246(6) (2023).

²⁹⁷ FLA. CLERKS OF CTS. OPERATIONS CORP., *supra* note 90, at 9 (noting that clerks can provide guidelines for agencies with specific settlement authority such as negotiating the interest).

²⁹⁸ Contract on file with authors.

²⁹⁹ Contract on file with authors.

³⁰⁰ FLA. STAT. § 938.30(9) (2023) (noting that “[t]he clerk of the court shall enforce, satisfy, compromise, settle, subordinate, release, or otherwise dispose of” specific court debts or liens).

³⁰¹ FLA. CLERKS OF CTS. OPERATIONS CORP., *supra* note 90, at 9.

collection agency contracts reveals the vast majority of contracts are silent as to the agencies' ability to settle delinquent debt.³⁰²

Fees and court costs are designed to fund the clerks of court in their court-related duties.³⁰³ One of these duties is collecting those very fees and court costs.³⁰⁴ When the Clerks of Court outsource these duties, individuals bear the burden of the funding mechanism twice—first when charged fees to fund the clerks, then again to fund the clerk's outsourced collections costs.

C. Conflicts of Interest

As the contractual details reveal, third-party debt collectors have generally negotiated terms favorable to their interests. They benefit from sizable surcharges and manage debt that, once received, clerks often cannot recover authority over. And while third-party debt firms have existed alongside the fee-based system since its launch, they do not appear to have ushered in a sea change for criminal LFO collection.

That is not to say the agencies are wholly ineffective. After all, clerks have long worked with these enterprises.³⁰⁵ On the margin, third-party debt collection agencies may be more effective than clerks at tapping into flows clerks cannot access. Yet, the mechanisms that give them a competitive advantage might prove alarming. For one, these enterprises have been accused of relying upon predatory practices to acquire outstanding fines and fees; such behavior includes threatening communication via mail or phone, the latter of which occurred outside standard business hours.³⁰⁶ Linebarger previously faced a federal lawsuit in Iowa that alleged, *inter alia*, it attempted to collect debts not requiring payment and intentionally mischaracterized LFOs.³⁰⁷ Perhaps most troubling, Linebarger was accused of threatening to pursue driver's license revocations or incarceration if payments were not received in instances where such punishments were not permissible.³⁰⁸

³⁰² 93 of the 102 contracts analyzed were silent or unclear on the issue of collection agencies' ability to settle or compromise debt. Eight contracts explicitly required the agency to obtain clerk of court approval prior to any compromise; just one contract explicitly authorized the collections agency to compromise or settle debt.

³⁰³ Ruback & Clark, *supra* note 31, at 755.

³⁰⁴ FLA. CLERKS OF CTS. OPERATIONS CORP., *supra* note 90, at 1.

³⁰⁵ See, e.g., WASH. REV. CODE § 36.18.190 (1997).

³⁰⁶ See, e.g., Walker Bragman, "Nothing Is More Important Than You Paying Them," LEVER (June 23, 2021), <https://www.levernews.com/nothing-is-more-important-than-you-paying-them/> [<https://perma.cc/S9KN-6RDU>].

³⁰⁷ *Id.*

³⁰⁸ Complaint for Damages and Injunctive Relief, *supra* note 259, ¶ 11; see also Clark Kauffman, *Lawsuit: Iowa Court Debt Collected Illegally, with Millions Routed To Private Firm*, IOWA CAP. DISPATCH (Sept. 16, 2020), <https://iowacapitaldispatch.com/2020/09/16/lawsuit-iowa-court-debt-collected-illegally-with-millions-routed-to-private-firm/> [<https://perma.cc/BP2U-6UH4>].

Some clerks may turn a blind eye to these practices that prove to be lucrative in their deals. A complementary if not alternative explanation to the long-standing ties between clerks and third-party debt collectors centers on conflicts of interest between the parties. These conflicts ultimately prevent firms from pursuing collections policies that are in the best interests of the government actors they purport to represent.

In the following two sections, we show how these conflicts are rooted in a web of lobbying, campaign finance, and electoral politics. Indeed, interested parties affiliated with debt collection agencies sometimes appear to be bending if not outright defying campaign finance laws.³⁰⁹

1. Contextual Evidence

Given that contractual terms and revenue under management directly influence third-party firms' bottom lines, these agencies have a vested interest in enhancing relations with the clerks.³¹⁰ After all, clerks retain the power to negotiate with these enterprises; they also determine which agencies receive delinquent cases.³¹¹ As such, these firms have an incentive to engage in a litany of *quid pro quo* oriented activities to make their appreciation for the clerks known. From the perspective of clerks, these incentives have the potential to blur the boundaries between business and public interests.

Unsurprisingly, these firms have regularly acted on this impulse. To illustrate, consider the campaign financing activity of Ronald Book³¹² on behalf of Penn Credit. In 2020, Mr. Book and his relatives donated \$6,000 in clerk elections in Charlotte and Flagler counties.³¹³ For example, in Charlotte County, he donated on his own behalf; separately, he donated \$1,000 through his firm,

³⁰⁹ See *infra* Part IV.C.2. Illegality may hinge on the definition of an individual person. See generally FLA. STAT. § 106.08(1) (2023).

³¹⁰ See *supra* Part IV.B.

³¹¹ See Act of June 25, 2003, ch. 2003-402, § 34, 2003 Fla. Laws 3683.

³¹² Ronald Book is the father of current Florida Senate minority leader Lauren Book. Buddy Nevins, *Senate Candidate: Lobbyist Dad a Big Liability*, BROWARD BEAT (Aug. 31, 2015), <https://www.browardbeat.com/senate-candidate-lobbyist-dad-a-big-liability/> [https://perma.cc/K7WD-325B]; *Senator Lauren Book*, FLA. SEN., <https://www.flsenate.gov/Senators/S35> [https://perma.cc/X68K-86ZP]. Mr. Book, one of the most influential lobbyists in the state, is not unaccustomed to advancing the interests of law firms that collect LFOs. He has previously been engaged to defend legislation that fines unlicensed interior designers and puts offenders in jail for up to a year. See, e.g., Arian Campo-Flores, *In Florida, Interior Decorators Have Designs on Deregulation*, WALL ST. J. (Apr. 15, 2011), <https://www.wsj.com/articles/SB10001424052748703551304576260742209315376> [https://perma.cc/WT8X-FB9B]. The State of Florida hired the law firm Smith, Thompson, Shaw, Minacci & Colon to initiate proceedings that resulted in fines for individuals who used the title interior decorator without a license. WILLIAM MELLOR & DICK M. CARPENTER II, *BOTTLENECKERS: GAMING THE GOVERNMENT FOR POWER AND PRIVATE PROFIT* 77 (2016).

³¹³ See, e.g., Campo-Flores, *supra* note 312.

Ronald Book, PA, and another \$1,000 through a company he owns called Gift Scenario, Inc.³¹⁴ He applied a similar strategy in 2023, where his wife donated \$1,000.³¹⁵

The legality of such actions seems questionable. Florida law prohibits individuals from contributing more than \$1,000 in a clerkship election.³¹⁶ But even if permissible, such behavior illustrates campaign finance laws may be circumvented to further the interests of debt collectors. Moreover, these donors, by and large, are not constituents; in fact, many reside outside of Florida. Penn Credit is based out of the Harrisburg, Pennsylvania area; Linebarger has locations throughout the United States but a mass of operations in Texas; and Perdue operates from Texas.³¹⁷

These independent findings are not isolated. They are corroborated by a series of accusations of corruption and bribery involving debt collection agencies. The most notable example involves Penn Credit and a network of Florida officials.³¹⁸ A 2019 federal grand jury indictment alleged Penn Credit, its founder and former CEO Donald Donagher, and several employees engaged in a criminal conspiracy to offer in-kind and cash benefits to several Florida clerks “for the purpose of seeking favorable treatment for Penn Credit in the award, allocation, and retention of debt collection work.”³¹⁹ Prosecutors argued that Donagher attempted to bribe the clerks by making contributions to their pet charities.³²⁰ The prosecution claimed the payments represented an effort to persuade the clerks to contract with Penn Credit to collect unpaid court fees for their offices.³²¹

³¹⁴ CHARLOTTE CNTY. FLA., SUPERVISOR OF ELECTIONS, CAMPAIGN TREASURER’S REPORT CANDIDATE: ROGER EATON, https://www.voterfocus.com/CampaignFinance/candidate_pr.php?op=rp&e=23&c=charlotte&ca=580&sd=549&rellevel=4&dhc=3789&committee=N [https://perma.cc/5ZDK-ZPQP] (citing data from Report Date: P6 July 25–30, 2020); *Gift Scenario, Inc.*, OPEN CORPORATES, https://opencorporates.com/companies/us_fl/K25472 [https://perma.cc/7WAA-8PAW] (showing that Robert Book is an agent of Gift Scenario, Inc.).

³¹⁵ CHARLOTTE CNTY. FLA., SUPERVISOR OF ELECTIONS, CANDIDATE: ROGER EATON, https://www.voterfocus.com/CampaignFinance/candidate_pr.php?op=rp&e=26&c=charlotte&ca=670&sd=731&rellevel=4&dhc=4437&committee=N [https://perma.cc/R4RA-M7TD] (citing data from Report Date: July 1, 2023–Sept. 30, 2023).

³¹⁶ FLA. STAT. § 106.08(1)(a)(3) (2022).

³¹⁷ *Consumer FAQ*, PENN CREDIT, <https://penncredit.com/consumer-faq> [https://perma.cc/9FJ8-A8TY]; *Contact*, LINEBARGER, GOGGAN, BLAIR & SAMPSON, LLP, <https://www.lgbs.com/contact-us/> (on file with the *Ohio State Law Journal*); *Contact Us*, PERDUE, BRANDON, FIELDER, COLLINGS & MOTT LLP, <https://www.pbfc.com/contactus.html> [https://perma.cc/R757-7GC9].

³¹⁸ See generally *Indictment*, United States v. Donagher, 520 F. Supp. 3d 1034 (N.D. Ill. 2021) (No. 1:19-cr-00240).

³¹⁹ *Id.* at 3.

³²⁰ *Id.* at 5.

³²¹ See, e.g., Andrew Marra, *Collections Agency Founder Pleads Guilty to Lesser Charge in Federal Corruption Case*, PALM BEACH POST (Oct. 21, 2021),

Specifically, the indictment alleges Donagher approached a clerk of court during a meeting in which the clerk intended to open its bid process for a new debt collection contract.³²² Donagher apparently offered to provide the official with campaign contributions, fund company outings, and provide sponsorship at charitable events.³²³ Separately, Donagher purportedly provided the county fire chief and sheriff with \$15,500 to be used for charitable purposes; Donagher reportedly requested that these officials contact the clerk in order to secure Penn Credit's contract with the county.³²⁴

Donagher is alleged to have engaged in similar activities elsewhere. For instance, he allegedly contributed \$2,500 to a charity selected by the Orange County clerk of court.³²⁵ Email excerpts suggest that this payment was tied to a desire to solicit business from the newly elected clerk.³²⁶ One email reads, "It seems the deal is that when people want deals to happen in orange county [*sic*] large contributions are made and the deal happens the next day . . . We will move very quickly. We are talk [*sic*] huge amounts of profit here."³²⁷

Ultimately, Donagher pleaded guilty to a lesser charge of providing illegal gratuity to the former Cook County (Illinois) clerk of court.³²⁸ Federal prosecutors dismissed all remaining counts related to the Florida clerks.³²⁹ In a separate arrangement, Penn Credit agreed to pay a \$225,000 fine and take "remedial measures to enhance its ethics and compliance programs."³³⁰ In exchange, prosecutors deferred pursuit of conspiracy charges against the company in the matter.³³¹

Concerns extend beyond the federal indictment. Per investigative reporting from the *Palm Beach Post*, a former Palm Beach clerk of court allegedly received dinners, special event invitations, and offers for private helicopter rides

<https://www.palmbeachpost.com/story/news/2021/10/21/palm-beach-gardens-collections-agency-head-takes-plea-deal-federal-corruption-case/8521538002/> [<https://perma.cc/X3ZP-YZM3>].

³²² Indictment, *supra* note 318, at 9.

³²³ *Id.*

³²⁴ *Id.* at 13–14.

³²⁵ *Id.* at 13.

³²⁶ *Id.* at 14.

³²⁷ *Id.* at 13.

³²⁸ Plea Agreement as to Donald Donagher, Jr. at 2, *Donagher*, 520 F.Supp. 3d 1034 (N.D. Ill. 2021) (No. 1:19-cr-00240).

³²⁹ *Id.* at 10. Earlier, a federal judge had also dismissed charges related to bribery based on the alleged campaign contributions in the Florida counties, saying the indictment lacked statutorily required elements of an agreement by the clerks to meet the standards necessary for the charges. The court, however, allowed charges in the Florida counties related to other alleged gifts to stand. *Donagher*, 520 F.Supp. 3d at 1046.

³³⁰ Press Release, U.S. Att'y's Off. N.D. Ill., Owner of Debt Collection Company Pleads Guilty to Corruptly Providing Benefits to Public Official (Oct. 12, 2021), <https://www.justice.gov/usao-ndil/pr/owner-debt-collection-company-pleads-guilty-corruptly-providing-benefits-public> [<https://perma.cc/XF22-SWE9>].

³³¹ *Id.*

in addition to campaign donations from Donagher and Penn Credit employees.³³² Indulging in such activities appears to violate Florida law, which prohibits public officials from accepting gifts in excess of \$100.³³³ Ultimately, the clerk seems to have rewarded Penn Credit with hundreds of thousands of dollars in business during her tenure; likewise, she raised the max assessment levied by the debt collector from 25% to 40%.³³⁴ Donagher and his entourage subsequently increased their contributions to the clerk's re-election fund from \$4,500 to \$10,000.³³⁵

2. Collection Agencies as Campaign Donors

Apart from these anecdotes, the clerks' financial relationships with collection agencies merits additional statistical inquiry. To get a glimpse of the magnitude of their contributions, alongside FFJC, we pulled data from each county supervisor's website that details payments made in clerkship elections.³³⁶ Table 4 summarizes these records.

³³² See Andrew Marra, *Post Investigation: Ex-PBC Clerk Took Favors from a Vendor, Boosted His Business*, PALM BEACH POST (Feb. 19, 2021), <https://www.palmbeachpost.com/story/news/2021/02/19/ex-pbc-clerk-took-favors-vendor-boosted-his-business/6791892002/> [<https://perma.cc/GR9E-KJ4V>].

³³³ See FLA. STAT. §§ 112.313(2), (4)–(6) (2023) (providing an overview of laws relating to “Things of Value”, Gifts, and Expenditures).

³³⁴ See Marra, *supra* note 332.

³³⁵ See *id.*

³³⁶ Data on campaign contributions were manually downloaded from all Florida County Supervisor of Election websites listed at *Find Your County's Supervisor of Elections*, FLA. SUPERVISOR OF ELECTIONS, <https://www.myfloridaelections.com/Contact-your-SOE> [<https://perma.cc/QQT2-G25Z>], and compiled into a spreadsheet with variables for the collection firm name; court clerk's name and county; and contribution amount. The spreadsheet is on file with the authors pending archival at Georgetown Law Dataverse, <https://dataverse.harvard.edu/dataverse/georgetownlaw> [<https://perma.cc/4VQR-CFJ4>].

Table 4: Clerkship Elections Donations & Debt Collection Agencies' Share

County	Contributions	Agencies' Share	County	Contributions	Agencies' Share
Alachua	\$10,000	0%	Leon	\$34,210	1%
Baker	\$14,076	0%	Levy	\$200	0%
Bay	\$705	0%	Liberty	\$10,661	0%
Bradford	\$22,015	0%	Madison	\$2,850	0%
Brevard	\$25,791	0%	Manatee	\$23,320	0%
Broward	\$25,111	23%	Marion	\$132,631	0%
Calhoun	\$120	0%	Martin	\$407	0%
Charlotte	\$109,483	9%	Miami Dade	\$180,522	8%
Citrus	\$1,000	0%	Monroe	\$57	0%
Clay	\$34,105	9%	Nassau	\$934	0%
Collier	\$39,242	8%	Okaloosa	\$10,544	0%
Columbia	\$7,250	0%	Okeechobee	\$14,206	0%
Dixie	\$15,430	0%	Osceola	\$65,100	0%
Duval	\$325,942	1%	Pasco	\$33,373	9%
Escambia	\$220	0%	Pinellas	\$33,608	9%
Flagler	\$33,180	21%	Polk	\$20,350	0%
Franklin	\$19,696	0%	Santa Rosa	\$2,000	0%
Gadsden	\$11,655	0%	Sarasota	\$19,784	3%
Glades	\$9,116	0%	St. Johns	\$69,935	4%
Hendry	\$100	0%	St. Lucie	\$43,817	0%
Hernando	\$1,597	0%	Sumter	\$300	0%
Highlands	\$32,273	2%	Suwannee	\$500	0%
Holmes	\$16,362	0%	Volusia	\$13,290	23%
Indian River	\$1,906	0%	Wakulla	\$4,782	0%
Jackson	\$17,862	0%	Walton	\$6,875	0%
Lake	\$2,600	96%	Washington	\$3,894	0%
Lee	\$35,035	9%			

Table 4 illustrates the amounts involved are not trivial. On average, debt collectors' donations represent 5% of clerks' campaign budgets. In jurisdictions with competitive elections such as Broward, Miami-Dade, and Pinellas Counties, the contributions exceed the mean share. In tight elections with low-

turnout, these donations could prove instrumental.³³⁷ That may extend the horizon of favorable contract terms with clerks of court or further pad income flows courts are not equipped to tap into.

Consistent with this argument, simple cross-sectional correlational analyses lend some weak empirical support for the existence of the *quid pro quo* relationships. Debt collection agencies' share of contributions is positively correlated with the revenue it receives from clerks.³³⁸ However, none of the contractual features appear to be tied to the share of donations made on behalf of third-party firms.³³⁹

We stress that these positive but weak correlations are simple and should not be interpreted causally. Though larger amounts of debt managed by firms correlate with higher campaign contributions, this relationship is not robust; its statistical significance depends on specification. Moreover, the underlying data are cross-sectional; they only capture a snapshot of the universe of contracts and campaign contributions. Therefore, we do not claim insight into the dynamics between clerks and debt collectors over time, especially given our small sample sizes and limited time frame.³⁴⁰ Nonetheless, our results suggest this relationship might be worthy of more sustained empirical study.

³³⁷ To illustrate, it appears only about 23% of the Broward County electorate turned out to re-elect incumbent Brenda Forman into office. See Amanda Batchelor & Jeff Weinsier, *Brenda Forman Re-Elected Broward Clerk of Courts Despite Recent Bizarre Behavior*, LOCAL10.COM (Aug. 19, 2020), <https://www.local10.com/vote-2020/2020/08/18/august-2020-primary-broward-clerk-of-courts/> [<https://perma.cc/NQ46-76UW>]; *Voter Registration - By County and Party*, FLA. DIV. OF ELECTIONS, <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reports/voter-registration-by-county-and-party/> [<https://perma.cc/X6V3-6NBD>] (Mar. 21, 2024).

³³⁸ Lake County is a clear outlier. In that jurisdiction, 96% of the clerks' election contributions came from debt collectors. Exclusion of this observation attenuates the arguments made; hence, the inclusion of Lake County would only serve to further facilitate our claims but at the risk of clear problems of internal validity. See *supra* Table 4.

³³⁹ That perhaps should be expected given statutory limits over contractual terms and the cross-sectional nature of our data.

³⁴⁰ Taken at face value, our estimates imply that a \$28 increase in donations (the mean contribution of firms to clerks is approximately \$2,840; \$28 is approximately a 1% increase) results in approximately a \$500,000 increase in the amounts debt collection agencies can pursue. Given they—on average—retain 32% of the LFOs, this represents a potential boon of \$160,000. Even if 25% of this amount is collected, that implies a \$28 increase in donations results in \$40,000 of additional revenue for debt collection agencies. While seemingly large, we should not entirely discount these results because of their seeming implausibility. Such massive gains from lobbying are well-documented in the political economy literature in other settings. See, e.g., Luigi Zingales's discussion of the Tullock Paradox in *A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY* (2014); Tullock, Gordon (1980). "Efficient rent-seeking". In Buchanan, J.; Tollison, R.; Tullock, G. (eds.). *Toward a Theory of the Rent-Seeking Society*. COLLEGE STATION: TEXAS A&M PRESS. 97–112.

V. IMPLICATIONS: THE FUTURE OF COURT FUNDING

The previous sections show how an economic perspective can explain the dysfunction that prevails across fee-based judiciaries and creditor courts. As we show in this section, that same lens enables us to make positive policy prescriptions that benefit stakeholders, taxpayers, and defendants. We bifurcate our suggestions between short-term policy tweaks that temporarily alleviate symptoms of the fee-based system and corrective measures that address the deep fissures in the funding mechanism.

A. *Temporary Relief*

1. *Delinquency Extension*

Clerks, like other debt servicers, adjudicate when LFOs enter delinquency. Under current law, court debts reach such status after 90 days.³⁴¹ This affords defendants one month less than federal law provides homeowners.³⁴² Given the relative paucity of resources for most defendants, additional time could prevent disastrous consequences. Empirical evidence from real estate markets supports this hypothesis. Specifically, enhanced communication between the debt servicer and property owner in conjunction with extension of the time until foreclosure significantly improves loan performance; further, it lowers the probability of foreclosure.³⁴³

Prolonging the period between assessment and delinquency would likely stem the flow of revenue managed by debt collection agencies. For at least some defendants, this will effectively reduce the magnitude of the financial burden they face; that is, they will not be required to pay the surcharge levied by collection agencies. Given that most debt remains aged, this will likely have an inconsequential effect on revenues collected by third-party firms.³⁴⁴ Nonetheless, the benefits to defendants on the margin will be meaningful. Similar to a recommendation by Adamson (2020),³⁴⁵ one reform might be for LFO collection practices to mirror industry standards; namely, penalties should not be triggered until at least 120 days after the last payment. If the results from real estate markets are externally valid, then extending the horizon until delinquency will provide relief to both the judiciary, clerks, and defendants.

³⁴¹ FLA. STAT. § 28.246(6) (2023).

³⁴² 12 C.F.R. § 1024.41(f)(1) (2023).

³⁴³ Manisha Padi, Helen Willis Banga, & Chen Meng, *Mortgage Servicing and Household Financial Distress 2* (Working Paper, 2023).

³⁴⁴ See *supra* notes 163–167.

³⁴⁵ Adamson, *supra* note 51, at 333.

2. *Technological Investments*

As our survey results and prior research has illustrated, clerks' offices spend substantial time and resources tracking outstanding debt.³⁴⁶ This costly process, in part, originates from poor data management policies. Florida—like most states—lacks a centralized data system that includes criminal histories and LFO balances.³⁴⁷ The absence of digitalized, uniform records not only requires clerks to devote public resources to records collection and review, it also creates problems for former defendants.³⁴⁸ A number of individuals have become aware of stale court debt long believed to have been paid once paperwork turns up; this could result in driver's license suspensions or concerns, sometimes unwarranted, about voter eligibility.³⁴⁹

To avoid these issues and reduce clerks' overhead, states should embrace technological infrastructure to track debts and contact those who hold LFO balances. Critics have contended this investment would cost millions of dollars.³⁵⁰ However, as we have demonstrated elsewhere, a functional model is much less expensive.³⁵¹ Therefore, upfront investments in technology could eventually pay for themselves by reducing outlays on clerks' offices. The expenditures will also be offset by induced demand; the lack of readily available information on LFO balances has likely prevented many from paying their current debts.³⁵²

Technological investments to track debts would move the financing model on to more stable grounds by cutting costs long-term and improving inflows. Beyond that, the infrastructure would provide a meaningful restraint on expansions of the fee system. In locations such as Florida where settling LFO debt is a requirement for re-enfranchisement,³⁵³ technological investments could elevate the voices of returning citizens. In theory, this would strengthen the currently debilitated equilibrating market forces. In other words, citizens would gain additional checks at the ballot box on encroachments by clerks, the judiciary, and legislators.

³⁴⁶ See Sukhatme, Billy & Bagwe, *supra* note 4, at 204–05.

³⁴⁷ See *id.* at 163.

³⁴⁸ *Id.* at 204.

³⁴⁹ See *id.* at 202; Jones v. DeSantis, 462 F. Supp. 3d 1196, 1209 (N.D. Fla. 2020); see also Complaint for Damages and Injunctive Relief, *supra* note 208, at 16–20.

³⁵⁰ See Lawrence Mower, *Amendment 4 Will Likely Cost Millions' To Carry Out. Here's Why*, TAMPA BAY TIMES (Apr. 4, 2019), <http://www.tampabay.com/florida-politics/2019/04/04/amendment-4-will-likely-cost-millions-to-carry-out-heres-why> [<https://perma.cc/X8Y5-4HKF>].

³⁵¹ See Sukhatme, Billy & Bagwe, *supra* note 4, at 174–76.

³⁵² *Id.* at 200.

³⁵³ *Id.* at 199.

3. Federal Debt Protection

Currently, a legal channel provides civil debtors some degree of protection from unscrupulous third-party collection agencies. That medium—the Fair Debt Collection Practices Act (FDCPA)—prohibits third-party agencies from employing threats of criminal sanctions or harassing individuals; the FDCPA also provides means for debtors to lodge complaints.³⁵⁴

As other commentators have noted, criminal debtors receive much less protection under the FDCPA. For one, it only applies to third-party debt collectors.³⁵⁵ This implies that government agencies that issue the debt are not subject to the FDCPA. In theory, this still shields former defendants who owe LFOs from third-party debt collectors. However, this holds only if monetary sanctions legally constitute a debt.³⁵⁶ Under certain statutory regimes, LFOs may not be recognized as such.³⁵⁷

By broadening the scope of the FDCPA to include LFOs, individuals can better voice concerns as well as combat abuse.³⁵⁸ A more inclusive FDCPA could also raise awareness within federal agencies of *quid pro quo* campaign financing schemes.

4. Federal Fee Regulation

Per the Congressional Research Service, fees are voluntary payments linked to activities that benefit users.³⁵⁹ They are typically deposited into special funds for future appropriations by the agencies or organizations that supply the services associated with the fees.³⁶⁰ Courts have generally adopted this interpretation as well.³⁶¹ That is, legally speaking, fees must (1) benefit the user;

³⁵⁴ See 15 U.S.C. § 1692g(b).

³⁵⁵ See Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez & Ted Mermin, *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L. L. REV. 107, 133 (2019); see also Adamson, *supra* note 51, at 333.

³⁵⁶ See ABBY SHAFROTH, DAVID SELIGMAN, ALEX KORNYA, RHONA TAYLOR & NICK ALLEN, NAT'L CONSUMER L. CTR., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR LITIGATION 75 (Sept. 2016), <https://www.nclc.org/wp-content/uploads/2022/09/confronting-criminal-justice-debt-2.pdf> [<https://perma.cc/FP37-3UT7>].

³⁵⁷ *Id.*

³⁵⁸ See Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 538 (2016); Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841, 842 (2017).

³⁵⁹ See Austin, *supra* note 141, at 1.

³⁶⁰ *Id.*

³⁶¹ Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 344–45 (2003).

(2) be tied to the service provided; and (3) be voluntary.³⁶² Yet criminal legal fees share little in common with traditional user fees.

First, bureaucratic inventiveness has led to liberal use of fee revenue. As we have demonstrated, officials in Florida finance activities completely orthogonal to the services associated with fees.³⁶³ Florida is not alone. In other locales, tenuous links between fees and activities supported by those revenues have been deemed acceptable.³⁶⁴

Second, the economic model of fee-based judiciaries relies entirely on coercion. Defendants do not outright consent to LFOs.³⁶⁵ Even if participants in crime—in some abstract sense—tacitly agree to face potential repercussions with some probability, the capriciousness and vague monetary sanctions they face is unexpected.

Together, these features of criminal “fees” may prompt federal authorities to adopt standards on what constitutes a fee. While that might rein in certain excesses, beneficiaries of LFOs could eventually replace those with fines or other monetary sanctions that fit federal guidelines.

B. Reform Measures

While improvements on the status quo, the aforementioned policies seem unlikely to yield meaningful lasting change. The uncertain receipt of LFO debt, subject to phenomena outside the control of the state, will never cease; likewise, self-interested legislators will likely continue to target funding to achieve political and social goals. Hence, the proclivity to divert and expand fees will continue to exist as long as fees support stakeholders. Thus, cost saving measures or checks on expansions of the fee system seem likely to provide only temporary relief.

Ultimately, the fee-system is inherently incompatible with a stable, reserved court system. This does not imply that massive investment in a new funding model is required. For example, Floridians already finance a substantial portion of the judiciary’s activities through injections of emergency loans and grants.³⁶⁶ Annually, a court system funded by general revenue in Florida would only

³⁶² See, e.g., *Thompson v. Wyandanch Club*, 127 N.Y.S. 195, 200 (1911); *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984); *City of Gainesville v. Florida*, 863 So.2d 138, 145 (Fla. 2003).

³⁶³ See *supra* Figure 2.

³⁶⁴ See, e.g., *Allen v. Texas*, 570 S.W.3d 795, 808 (Tex. Ct. App. 2018) (“summoning witness/mileage” fee of \$200 was permissible even though fee proceeds were directed to general revenue fund); *Broyles v. State*, 688 S.W.2d 290 (Ark. 1985) (\$250 fee levied against a DUI defendant was constitutional even though part was applied to fund a highway safety program and another part went to alcohol and drug abuse programs instead of going toward actual court costs).

³⁶⁵ See NAT’L TASK FORCE ON FINES, FEES AND BAIL PRACTICES, *supra* note 6.

³⁶⁶ See REVENUE STABILIZATION WORKGROUP, *supra* note 18, at 7.

increase tax collections by approximately 1%;³⁶⁷ this seems like a remarkably small cost for sizable downstream benefits.

To move beyond a fee-based system, initiatives will likely need to take place at the state constitutional level. For one, the whims of legislators would likely quell any altruistic sentiment to eliminate fees.³⁶⁸ The temptation to dip into fee revenue, however tenuous it may be, has thus far proven too great to expect a legislative body to willingly surrender a financing source.³⁶⁹ Even if one set of legislators did so, that would still not provide sufficient restraints on subsequent bodies of officials from exploiting future criminal defendants. Likewise, it is difficult to imagine a decision from the courts that would adequately eliminate fees without opening the door to other means of exploitation.

Whether reform vehicles materialize via constitutional committees or ballot initiatives, these entities must be sensitive to the needs of stakeholders. Without the buy-in of legislators, judicial officials, and clerks of court, constitutional reforms will likely fail. But many of those stakeholders—including court authorities and clerks—are primed for the elimination of fee-based judiciaries. To wit, when surveyed, the responsive clerks largely agreed (17 out of 22) with the assertion that their offices should be financed by general revenue in lieu of LFOs.³⁷⁰

Practically, the largest hurdle reformers will face is convincing legislators who fund pet projects that benefit their constituents with fee revenue. They will likely raise concerns—echoing the Taxpayer Revolt proponents—that ordinary citizens will foot the bill for services they did not enjoy. To avoid such a “Bootlegger-and-Baptist” argument, it would be prudent to couple constitutional reforms with some revenue neutral tax policy.³⁷¹

VI. CONCLUSION

Though a fee-based court system might seem to be a fiscally responsible mechanism to finance court operations, its benefits are dominated by substantial costs. Economic theory and contextual evidence illustrate such costs originate from structural defects inherent to a fee-based system: competing interests among stakeholders; legislative appropriation of funds intended to benefit the judiciary; and revenue sourced from typically indigent criminal defendants.

These design flaws encourage a creeping tyranny whose existence relies on coercion, extortion, and disenfranchisement of criminal defendants. Yet even

³⁶⁷ See FED. RSRV. ECON. RSCH., *supra* note 235.

³⁶⁸ See *generally* BRENNAN & BUCHANAN, *supra* note 58.

³⁶⁹ *Id.*

³⁷⁰ One clerk responded, “Return to county funding. We were financially supported back then. It’s awful now.” (on file with authors).

³⁷¹ See Bruce Yandle, *Bootleggers and Baptists in Retrospect*, 22 REGULATION 5, 5 (1999).

with this leverage, the fissures of creditor courts prevent the judiciary and its affiliates from ever achieving financial independence. This financial languor has in turn seeded relationships with third-party debt collectors. These entities appear—per simple, correlative analyses and qualitative evidence from criminal court proceedings and independent investigations—to sometimes engage in unethical, perhaps illegal, conduct.³⁷²

Viewed under this lens, the weight of the evidence implies that constitutional reform at the state level is the best path to overcome these concerns. States should transition from creditor court systems to judiciaries funded by general revenue. Absent that, stopgap measures will only halt the growth of a bureaucratic syndicate whose interests do not align with citizens.

³⁷² *Id.*