

Memorandum

To: U.S. Commission on Civil Rights
From: Tennessee Advisory Committee
Date: May 9, 2019
Subject: Preliminary Advisory Memorandum on Legal Financial Obligations in Tennessee

The U.S. Commission on Civil Rights establishes advisory committees and charges them with collecting and providing it with information, findings and recommendations about civil rights matters in their states. In keeping with these responsibilities, the Tennessee Advisory Committee (“Committee”) held a public briefing on March 27, 2019, to examine the policies and practices governing legal financial obligations (LFOs) in Tennessee and whether LFOs impose disproportionate burdens on women, indigent persons or communities of color.

Following its full examination of the issues, the Committee will provide, in due course, a comprehensive analysis and set of recommendations to the U.S. Commission to be shared with Tennessee stakeholders and policymakers. At this time, however, the Committee wishes to highlight a few of its key observations arising out the recent testimony by legislators and policymakers, subject matter experts, advocates and members of the public, including formerly incarcerated Tennesseans. The Committee submits this preliminary memorandum with a view to informing and advising the U.S. Commission on the current developments and future direction of the Committee’s work in this area.

Key Observations

Key observations include that: (i) LFOs can create barriers to successful reentry and reintegration of formerly incarcerated individuals, contrary to the pursuit of a fair and effective justice system; (ii) the number and type of fines and fees in Tennessee, both in civil and criminal proceedings, for juveniles as well as adults, have grown substantially in the past decades, vary significantly by county and can create uncollectable debt; (iii) accrued penal debt may exacerbate an individual’s complex challenges in finding stable work, housing and transportation after a period of incarceration. It also can negatively impact a person’s family and social networks; and (iv) the harsh consequences of penal debt appear to fall disproportionately upon women, the poor and communities of color.

The observations highlighted here are relevant to certain policy reforms currently under consideration by the 111th General Assembly. Criminal justice reform bills filed this past legislative session, along with other recent legislation,¹ suggest a clear public policy emerging in Tennessee to support formerly incarcerated individuals in successfully reentering and reintegrating into society as productive and law-abiding members. Such bills seek to reduce the barriers to productive

¹ See, e.g., H.B. 2181, 110th Leg., Reg. Sess. (Tenn. 2018) (establishing a framework for the Department of Correction to make grants to local sheriff departments or probation offices for the purpose of funding successful reentry programs designed to reduce recidivism and probation revocations); See also H.B. 926, 111th Leg., Reg. Sess. (Tenn. 2019) (expanding the definition of recidivism in Public Chapter 1051 to include locally-sentenced felons and state-sentenced felons).

reentry not only for returning individuals, their families, children and neighbors, but for the benefit of taxpayers of Tennessee and members of the public, as well. All Tennesseans benefit from policies that promote a cost-effective, efficient criminal justice system that operates to reduce recidivism and enhance public safety; promotes reintegration and the health and well-being of families, children and neighbors of formerly incarcerated individuals, and ensures for justice involved individuals the fair and equitable administration of justice. To that end, we hope that the information we provide in this preliminary memo regarding the impact of LFOs in our state will be useful to members of the 111th General Assembly.

This memorandum was adopted unanimously by the Committee on May 3, 2019.

A. Legal financial obligations in Tennessee.

Legal financial obligations (LFOs), or penal debt, refer to the system of fines, fees, court costs and other monetary obligations imposed on those who come within the ambit of the criminal justice system on account of being charged or convicted of a criminal offence or violation.² Commentators note that the scope and scale of LFOs have grown in recent decades as the criminal justice system has expanded to accommodate a rising number of incarcerated individuals.³ To help defray the costs of maintaining this system, states increasingly have looked to impose an array of fines, fees and other costs on offenders and other justice-involved individuals at all stages of the criminal justice process.⁴

In Tennessee, the ever-expanding use of LFOs over the past decade as a funding mechanism for the state has been the subject of recent legislative inquiry and concern. A 2017 Tennessee study found that there were hundreds of state and local court fees and taxes ranging from 50 cents to \$3,000.⁵ It noted the difficulties of clearly establishing how this money was being disbursed by counties to fund various parts of the criminal justice system. The study also cited legislators, court clerks, and other stakeholders that expressed concern that high levels of penal debt could potentially limit access to justice in civil cases and create uncollectable court debt.⁶ At our public briefing in March, the Committee heard testimony, which we highlight below, that justifies these concerns regarding the deleterious effects of penal debt as a way to fund our court system.

² Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 Harv. L. Rev. 1024 (2019) ("These monetary obligations are not contractual liabilities in the ledger of an Ebenezer Scrooge, but sums that the state itself assesses through the criminal justice system. Sometimes called "legal financial obligations" (LFOs), the total debt generally includes a mix of fines, fees, court costs, and interest.").

³ See for example, William Stuntz, *The Collapse of American Justice*, 6-10 (2011); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, the Sentencing Project (Jun. 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 Harv. L. Rev. 1024, 1025 (2019).

⁵ Tennessee Advisory Commission on Intergovernmental Affairs, *Tennessee's Court Fees and Taxes: Funding the Courts Fairly* (Jun. 2017), p. 1.

⁶ For a detailed analysis and discussion of fines and fees in Tennessee, Tennessee Advisory Commission on Intergovernmental Affairs, *Tennessee's Court Fees and Taxes: Funding the Courts Fairly* (Jun. 2017).

B. The Committee's key observations based upon testimony from the public hearing.

1. Penal debt undermines successful reentry and reintegration of formerly incarcerated individuals.

Panelists described the difficulties of rehabilitating and reintegrating offenders following incarceration owing to the burden imposed by fines and fees.⁷ Even for individuals who see their charges dismissed, paying off fees can create serious challenges, as individuals still have to pay off fees and costs that accrue prior to trial (*e.g.*, police transportation, drug testing, court costs or legal assistance).⁸ Such fees, along with a myriad other court costs, taxes and interest payments, billed to offenders (even where charges are dismissed), are explicitly intended to raise revenue and often are imposed on top of other forms of criminal justice debt, such as fines and restitution.⁹

For many, accumulated LFOs often represent an overwhelmingly high sum to pay. The variety of fines and fees that accrue from pre-trial through probation, incarceration and post-release parole or supervision can amount to several thousand dollars-worth of debt; one panelist reported average LFO debt as high as \$9,000 to \$12,000.¹⁰ For individuals with limited (or negligible) financial resources, such levels of debt can be insurmountable. In addition, child support obligations keep accruing throughout the period of incarceration. On exiting, therefore, a returning parent must be in a position to make monthly payments on accrued penal debt as well as payment of any accrued and on-going child support.¹¹

Several panelists testified that formerly incarcerated individuals routinely struggle to manage repayment of fines and fees on top of the already complex challenges of integrating back into everyday economic and social life.¹² Formerly incarcerated individuals are often only able to secure low-paying or temporary jobs after release, notwithstanding their efforts, due to stigma, disqualifying criminal records, or having few job or technical skills.¹³ Individuals with penal debt can thus become desperate and turn to maxing out high-interest credit cards, loan sharks or pay day lenders that may perpetuate their financial woes.¹⁴ Financial hardships also can be experienced

⁷ Cara Suvall, Written Testimony to the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, submitted April 25, 2019, p. 1.

⁸ *Id.*, pp. 2-3.

⁹ *Id.*, p.6.

¹⁰ Rebecca Delius, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 157.

¹¹ Senator Brenda Gilmore, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 141.

¹² *See, e.g.*, Terrance Akins, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, pp. 110-111; Donald E. Mabon, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 61; Delius Testimony, Nashville, Tennessee, Briefing Transcript, pp. 157, 159-160; Deniece Thomas, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, pp. 114, 116.

¹³ Thomas Testimony, Nashville, Tennessee, Briefing Transcript, pp. 114-116.

¹⁴ *Id.*, p. 123-124; *see also* Dawn Harrington, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 56.

by a returning individuals' family and friends who try to help them make regular payments on accrued debt and keep up with the costs involved in on-going probation and parole (*e.g.*, electronic monitoring or drug testing.) Commentators¹⁵ noted that the system thus indirectly punishes those within familial and support networks, rather than just the offender. Relationships can become strained and returning offenders can face a rougher path to integration as a result. Those without such support networks can face even longer odds in successfully repaying their debt. According to panelists, the chronic challenges for justice-involved individuals in securing stable employment, housing, and transportation is magnified for those struggling under penal debt without help from family, friends and community networks.¹⁶

Harsh consequences exist for failing to pay LFOs after release. Panelists repeatedly testified that individuals, whether released on probation or parole, or who have fully reentered the community following a period of incarceration, risk re-incarceration if they are unable to pay or are late in making payments on their accrued penal debt.¹⁷ In addition to the immediate threat of returning to jail, individuals who cannot pay in a timely manner can lose their driver's license, dealing a blow to those who need a vehicle to get to work and/or to transport themselves or family members to school or places of employment or training.¹⁸ A high debt load and the possibility of non-payment can also damage a person's credit reports, reduce access to reputable financial services and discourage future employers and potential landlords.¹⁹

Such consequences can be especially grave for juveniles who are looking forward to pursuing their future plans and ambitions. One expert noted that the burden of fines and fees on young people can result in failed reentry, years of crippling debt and demoralization, especially where juvenile records cannot be expunged owing to outstanding penal debt. As part of this testimony, the expert highlighted the sharply contrasting futures of those that could pay their penal debt versus those

¹⁵ Alex Friedman, testimony, public comments, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 87; Casey Wilson, testimony, public comments, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, pp. 89-90. *See also* Gicola Lane, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, pp. 65-66; Thomas Testimony, Nashville, Tennessee, Briefing Transcript, p. 117; Harrington Testimony, Nashville, Tennessee, Briefing Transcript, pp. 59-60.

¹⁶ *See, e.g.*, Mabon Testimony, Nashville, Tennessee, Briefing Transcript, pp. 61-62; Thomas Testimony, Nashville, Tennessee, Briefing Transcript, p. 130.

¹⁷ *See, e.g.*, Tom Castelli, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 52; Mabon Testimony, Nashville, Tennessee, Briefing Transcript, pp. 61, 80; Akins Testimony, Nashville, Tennessee, Briefing Transcript, pp.110-111; Gilmore Testimony, Nashville, Tennessee, Briefing Transcript, pp. 141-142.

¹⁸ The 111th General Assembly passed H.B. 839, which would allow an individual determined to be unable to pay accrued penal debt to obtain, under certain circumstances, a restricted driver's license. If enacted, the specific manner of implementation of this reform and consistency in use across the State likely would determine its impact. H.B. 839, 111th Leg., Reg. Sess. (Tenn. 2019). Relatedly, the Sixth Circuit is hearing an appeal in the case of *Thomas v. Haslam*. This appeal examines constitutionality of revoking an individual's driver's license owing to the non-payment of court fines and fees and without effective inquiry into the individual's ability to pay. *Thomas v. Haslam*, 329 F.Supp.3d 475 (M.D. Tenn. 2018), *appeal docketed*, No. 18-5766 (6th Cir. Jul. 27, 2018).

¹⁹ Cara Suvall, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 21.

that could not: young people able to pay their penal debt can see their criminal charges/convictions expunged and records cleared; those that cannot must carry the stigma of a criminal record until such time as they are able to pay off their debt.²⁰ As a result, penal debt results in impoverished juveniles losing out on opportunities to contribute to society and to pursue their goals and can compound social and mental health problems among vulnerable youth.²¹ Another panelist testified that family members of youth are obligated to pay child support to cover the costs of maintaining the child in detention.²² Parents can see their wages and tax refunds garnished by the state in order to cover court debts assessed against a youth.²³

Also significant, panelists who experienced incarceration noted that they were prohibited from exercising their right to vote until such time as they had repaid all outstanding LFOs in full. One panelist described this disenfranchisement as the most important consequence of LFOs in Tennessee as some individuals with penal debt and limited financial opportunities might never be able to pay off their LFOs, no matter their diligence.²⁴ In the meantime, panelists noted, offenders are forbidden from voting for public officers who could pursue policy reform.²⁵

A number of panelists observed that individuals with penal debt can become overwhelmed with the economic burden of fines and fees – and the threat of returning to jail if they cannot pay.²⁶ There was testimony that carrying penal debt, which continues to grow due to interest charges such that in some cases it would never be paid off in one’s lifetime, often causes formerly incarcerated individuals to suffer from stress and poor mental health, as well as a sense of defeat.²⁷ Rather than supporting reentry, such circumstances do the opposite and risk creating damaging outcomes for individuals with unmanageable levels of debt. With low to no financial resources, some may turn to desperate measures such as driving with a revoked license to get to a needed job, engaging in ill-advised activities (*e.g.*, gambling), or re-offending (*e.g.*, stealing or sale of illicit drugs), in a bid to make LFO payments and avoid a return to prison.²⁸ Individuals under the threat of re-incarceration due to penal debt also can fall into self-destructive patterns of behavior (*e.g.*, substance abuse, skipping parole meetings or fleeing the probationary jurisdiction), resulting in revocation of parole and re-incarceration.²⁹

²⁰ *Id.*, pp. 20-24.

²¹ *Id.*, pp. 24-25.

²² Lane Testimony, Nashville, Tennessee, Briefing Transcript, p. 65.

²³ *Id.*, pp. 65-66.

²⁴ Akins Testimony, Nashville, Tennessee, Briefing Transcript, pp. 111-112.

²⁵ The Tennessee Advisory Committee issued a report on voting rights restoration in Tennessee in 2014; the 111th General Assembly now is considering significant legislative reform in this area to allow for the restoration of voting rights without first requiring payment of accrued penal debt and child support. See Tenn. Advisory Comm. to the U.S. Comm’n on Civil Rights, *The Right to Vote and Ex-Felon Disenfranchisement in Tennessee* (2014).

²⁶ Akins Testimony, Nashville, Tennessee, Briefing Transcript, pp. 111-112; Harrington Testimony, Nashville, Tennessee, Briefing Transcript, p. 80.

²⁷ Mabon Testimony, Nashville, Tennessee, Briefing Transcript, pp. 60-61; Suvall Testimony, Nashville, Tennessee, Briefing Transcript, pp. 20-24.

²⁸ Castelli Testimony, Nashville, Tennessee, Briefing Transcript, pp. 75-76; Mabon Testimony, Nashville, Tennessee, Briefing Transcript, p. 81.

²⁹ See, *e.g.*, Mabon Testimony, Nashville, Tennessee, Briefing Transcript, p. 80.

2. Fines and fees create a disproportionate burden on women, the poor and communities of color.

Testimony noted the disproportionate burden of fines and fees on women, minorities, and indigent individuals.

Panelists highlighted that women confront particular difficulties in paying fines and fees.³⁰ In addition, women are often primary caregivers for their children and shoulder some or all the costs of arranging childcare, education and maintenance. As a result, women are restricted in their choice of jobs to positions where an organization can accommodate child care needs and/or provide flexibility in working hours. Some panelists reported that women can be forced to work multiple jobs in order to pay off LFOs as well as generate the income needed to provide for their families.³¹ Importantly, the consequences of non-payment can be especially damaging for women. The threat of being returned to jail on account of non-payment is likely to cause enormous turmoil for those with dependent children - more so, where children lack other caregivers.³²

Overall, the framework of fines and fees in criminal justice poses serious risks for the indigent. Unpaid LFOs can cause exponential increases in the amount of debt owed through added interest and administration fees.³³ The poor invariably struggle. As noted, those with penal debt can face a return to incarceration if their debt goes unpaid. Panelists observed that the criminal justice system has come to include what are functionally “debtor’s prisons,” populated, to an increasing degree, by those who are unable to discharge their debt.³⁴ Prisons also include those on pre-trial detention who cannot afford to make bail payments and any added penal debt.³⁵ Where penal debt accrues against those whose charges are eventually dismissed, it raises the question whether these individuals might still end up in prison if they miss LFO payments.³⁶ This tendency to implicate the apparatus of criminal justice in debt collection appears to be in tension with the U.S. Supreme Court’s decision in *Bearden v. Georgia*, prohibiting local courts from incarcerating those whose personal circumstances limit their ability to pay fines.³⁷

It is well established that African-Americans and Hispanics are over-represented within the criminal justice system. As a consequence, African-American and Hispanic defendants as a group carry a heavier economic burden on account of being arrested and incarcerated at higher rates than white

³⁰ Jasmine Heiss, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 182.

³¹ Thomas Testimony, Nashville, Tennessee, Briefing Transcript, pp. 129-131; Heiss Testimony, Nashville, Tennessee, Briefing Transcript, pp. 182-183, 185-186.

³² Heiss Testimony, *supra*, p. 183.

³³ Harrington Testimony, Nashville, Tennessee, Briefing Transcript, pp. 71-72, 80.

³⁴ *See, e.g.*, Castelli Testimony, Nashville, Tennessee, Briefing Transcript, p. 75; Sayil Camacho, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 95.

³⁵ Heiss Testimony, Nashville, Tennessee, Briefing Transcript, pp. 148, 151-152.

³⁶ *See, e.g.*, Lane Testimony, Nashville, Tennessee, Briefing Transcript, p. 76.

³⁷ *Bearden v. Georgia*, 461 U.S. 660, 672-3 (1983) (“depriv[ing] a probationer of his conditional freedom simply because, through no fault of his own he cannot pay a fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment.”).

defendants.³⁸ A further factor compounds the difficulty faced by African-American communities. Research points to the persistence of high levels of wealth disparity between African American and white communities, with African-Americans also possessing fewer opportunities to access financial services (*e.g.*, checking accounts, credit facilities). Fines and fees can thus prove to be doubly harmful for communities of color: they are imposed at higher rates on African Americans and Hispanic defendants relative to white defendants; further, far lower levels of wealth and limited access to financial services can increase the difficulties in paying off LFOs.³⁹ In this context, it is worth noting that certain counties in Tennessee are home to a significant number of single-parent families. In Knox County, for example, 74% of African-American families were headed by single-parents (as measured between 2010-2014).⁴⁰ Given the relatively higher population of African-Americans within the criminal justice system, penal debt can create particularly harsh difficulties for those that must take care of dependent children.

Although Tennessee provides sources of relief for the indigent, these sources of assistance can be limited in their impact and used inconsistently.⁴¹ For instance, defenders can petition for indigency status to reduce or eliminate the amount of debt owed and Tennessee has established a fund that can help cover some of the costs of electronic monitoring, if indigency is established.⁴² Experts, however, pointed to the difficulty of establishing indigency status in courts. The process is neither straight-forward nor user-friendly and defendants often lack legal counsel.⁴³ Courts do not have the time, information and resources to conduct individual investigations into whether a defendant can afford to pay LFOs. Further, judges vary in their willingness to waive debt, with many opting to create long-term payment plans.⁴⁴ Commentators have observed variation in practices between urban centers and rural counties, such that the question of whether the poor have to pay - and if they do, how much - can ultimately end up becoming a matter of geography or the particular court.⁴⁵

C. Next Steps

The substantial use of LFOs to fund the Tennessee court system appears to have serious negative consequences not only for individuals caught within the purview of the justice system, their families, children and neighbors, but for all Tennesseans. This is an area in need of significant

³⁸ Camacho Testimony, Nashville, Tennessee, Briefing Transcript, p.95.

³⁹ See Heiss Testimony, Nashville, Tennessee, Briefing Transcript, pp. 149-150, 183, 185-186; Camacho, Testimony, Nashville, Tennessee, Briefing Transcript, pp. 95, 97.

⁴⁰ <http://www.etindex.org/demographics/families-households/single-parent-families/single-parent-families-by-race-ethnicity>.

⁴¹ Delius Testimony, Nashville, Tennessee, Briefing Transcript, pp. 157-159.

⁴² Andy Baggenstoss testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 13.

⁴³ See, *e.g.*, Delius Testimony, Nashville, Tennessee, Briefing transcript, pp. 157-160; Suvall Testimony, Nashville, Tennessee, Briefing transcript, p. 41.

⁴⁴ Delius Testimony, *supra*, pp. 158-160.

⁴⁵ See, *e.g.*, Baggenstoss Testimony, Nashville, Tennessee, Briefing Transcript, pp.13-14; Julie Warren, testimony, Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Nashville, Tennessee, March 27, 2019, transcript, p. 30; Suvall Testimony, Nashville, Tennessee, Briefing Transcript, 33-35.

continued reform in order to improve the fairness and efficacy of our state's criminal justice system. To that end, the Committee looks forward to issuing policy recommendations in our upcoming full report on LFOs in Tennessee, which is expected to be released in the coming months.