

Legal Financial Obligations in the Tennessee Criminal Justice System



A Report of the
Tennessee Advisory Committee to the
U.S. Commission on Civil Rights

November 2019

LETTER OF TRANSMITTAL

To the United States Commission on Civil Rights:

The Tennessee Advisory Committee issues this briefing report on legal financial obligations (LFOs) in Tennessee's criminal justice system as part of its responsibility to study and report on civil rights issues in Tennessee. This report was adopted by a vote of 12 yes and 0 no at a meeting of the Committee on November 19, 2019.

Over the past few decades, the practice of assessing legal financial obligations, such as fees, taxes, surcharges and other costs, on users of the Tennessee court system has grown substantially as a means for funding the State's courts and criminal justice system. In recent years, however, there has been a growing concern among some stakeholders and policymakers in Tennessee that imposing legal financial obligations, known as LFOs, on individuals involved with the justice system might have unintended negative consequences, contrary to emerging state policy of promoting the successful reintegration of formerly incarcerated individuals and ensuring a just, fair and equitable criminal justice system in Tennessee.

Based upon its investigation, the Committee found that concerns about the negative consequences of an LFO funding model are warranted. Specially, the Committee found that criminal fines and fees can create barriers to successful reentry and reintegration of formerly incarcerated individuals, and that accrued penal and court debt may exacerbate an individual's complex challenges in finding stable work, housing and transportation after a period of incarceration. The Committee also found that the number and type of fees in Tennessee in criminal proceedings have grown substantially in the past decades, vary significantly across county and local courts and are assessed inconsistently, risk creating uncollectable debt for the locale and the potential for perverse incentives for courts to assess such LFOs to add to their own local funding. Finally, the Committee found that the harsh consequences of criminal justice related debt appear to fall disproportionately upon women, the poor and communities of color, contrary to the pursuit of a fair and effective justice system.

In light of the concerns raised through its investigation, the Committee recommends that the Tennessee General Assembly and the Governor consider moving away from LFOs as a funding model. In the alternative, the Committee sets forth other recommendations as to how to best ameliorate the harsh, negative consequences of the use of LFOs in Tennessee to fund its criminal justice system. These recommendations include both steps that may be taken immediately, as well as mid and long term reforms of the current system, all to achieve the State's policy goals of successful reintegration of justice involved individuals and a fair and equitable justice system in Tennessee.

Respectfully submitted,

Diane Di Ianni
Chair, Tennessee Advisory Committee

Advisory Committees to the U.S. Commission on Civil Rights.

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. These committees are composed of state/district citizens who serve without compensation; they are tasked with advising the Commission of civil rights issues in their state/district that are within the Commission's jurisdiction. Committees are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's/district's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their state/district.

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EXECUTIVE SUMMARY

The Tennessee Advisory Committee issues this briefing report following its March 2019 public hearing on financial obligations in Tennessee's criminal justice system, and the issuance of its May 2019 preliminary memorandum on the topic. The Committee finds that based on its examination, the policies and practices governing criminal fines and fees, taxes, surcharges and other costs imposed on individuals at every stage of the criminal process systems (collectively, legal financial obligations or LFOs), are not aligned with the important policy goals in Tennessee of promoting the successful reentry of justice involved individuals into our communities and ensuring the fair and equitable system of justice.

More specifically, the Committee found that **i)** the burden of criminal fines and fees 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 fees in Tennessee have grown substantially in the past decades, vary significantly by county, and can create uncollectable debt; **iii)** accrued penal and court debt may exacerbate an individual's complex challenges of finding stable work, housing and transportation after a period of incarceration, and negatively impact the person's family and social networks; and **iv)** the harsh consequences of criminal justice system related debt appear to fall disproportionately upon women, the poor and communities of color. In this report, the Committee outlines and discusses key recommendations regarding potential areas for reform.

The Committee's key recommendation, for the reasons stated herein, is that **lawmakers consider ending outright the current practice of using LFOs to fund the criminal justice system.**

In the event that such recommendation is not adopted, the Committee recommends, in the alternative, that policymakers: **i)** reevaluate the role of counties and judges in establishing their own local fines in favor of moving to a statewide model in light of the attendant risks and unintended negative consequences of the current, locally-driven system, **ii)** consider the impact of LFOs on wider considerations of justice and equity and adopt reforms such as ensuring voting rights are not contingent on repayment of LFOs, requiring adoption of an ability to pay analysis prior to assessing LFOs, expanding the right to counsel to include assistance regarding LFOs, reviewing impact and equities of LFOs with respect to juvenile offenders, streamlining the process of establishing indigency to enhance time and cost efficiencies, and reducing or eliminating the practice of "debtor's prison," as explained herein.

The Committee further recommends that policymakers **iii)** establish a statewide supervisory body to oversee LFO practices with the responsibility to evaluate any new proposed LFOs,

establish enhanced data-collection and reporting to the General Assembly, the Administrative Office of the Courts (AOTC), and the public, and provide monitoring of community supervision service providers and debt collectors; and **iv)** finally, in light of the complexity in type, nature and number of LFOs interspersed throughout state and local statutes, codes, ordinances and rules, provide enhanced clarity on the schedule of fines and fees assessed through the various stages of the criminal justice process, including those charged as post-incarceration financial obligations.

I. INTRODUCTION

The Tennessee Advisory Committee to the U.S. Commission on Civil Rights¹ held a public briefing on March 27, 2019, on Tennessee’s policies and practices governing criminal fines and court fees in order to assess whether these obligations impose disproportionate burdens on women, indigent persons, or communities of color.²

On May 9, 2019, the Committee issued an advisory memorandum based on this briefing that summarized the testimony received and provided commentary on the issues raised by the panelists.³ This briefing report elaborates on the observations contained in the preliminary advisory memorandum, compiles the relevant briefing and other reference materials, and contains the Committee’s recommendations to policymakers.

II. TENNESSEE’S SYSTEM OF CRIMINAL LEGAL FINANCIAL OBLIGATIONS

The phrases “fines and fees,” “legal financial obligations,” “criminal justice debt,” and/or “penal debt,” are used to refer to a complex system of fines, fees, court costs, taxes, surcharges, and other related 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.⁴ As

¹ The U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. 42 U.S.C. § 1975a. Advisory committees are composed of citizens who serve without compensation. They are authorized to advise the Commission about matters related to discrimination and equal protection of the laws. 45 C.F.R. § 703.2.

² The briefing was held at the Nashville public library. A court reporter transcribed the proceedings. The transcript is included herein as Appendix A. The briefing was divided into four panels consisting of academics, advocacy groups, service providers, and elected officials.

³ Tenn. Advisory Committee to the U.S. Comm’n on Civil Rights, *Advisory Memorandum on Legal Financial Obligations*, May 9, 2019, <https://www.usccr.gov/pubs/2019/Advisory-Memo-on-Legal-Financial-Obligations-in-Tennessee.pdf>.

⁴ See, e.g., Arthur W. Pepin, “The End of Debtors’ Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations,” Conference of State Court Administrators, 2016, <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx> (accessed August 4, 2019); Note, *State Bans on Debtors’ Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024 (2019) (“These monetary obligations are...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.”).

used in this report, the term “LFOs” does not include court-ordered restitution or accrued child support payments.

A useful taxonomy for Tennessee’s legal financial obligations is found in a Comptroller of the Treasury’s study⁵ of the state’s court system:

- Fine: monetary penalties for violations of the law.⁶
- Fee: monies paid for services rendered by court or law enforcement personnel.⁷
- Tax: set amounts imposed per case or charge for misdemeanors and felonies.⁸
- Commission: monies retained for collection and remittance of funds for others.⁹

This briefing report follows the above terminology to distinguish between criminal fines, on the one hand, and court fees, surcharges, and taxes, on the other hand. In Tennessee, fines, fees, surcharges and taxes may be assessed against individuals as part of the court or law enforcement process even for those who ultimately are not convicted of an offense. For those who are convicted, there are numerous additional fees and costs assessed both during and following periods of incarceration, including, for example, for probation and parole services and electronic monitoring, as well as many others, including those that county and municipal legislative bodies may establish, charge and collect at their discretion pursuant to such authority provided under

⁵ Office of the Comptroller of the Treasury, *Tennessee’s Court System: Is Reform Needed?*, 6, 2004, https://comptroller.tn.gov/content/dam/cot/orea/documents/orea-reports-2004/2004_OREA_CourtReform.pdf (hereinafter “Comptroller’s Report”)

⁶ See e.g., TENN. CODE ANN. § 40-35-111.

⁷ TENN. CODE ANN. § 8-21-401 authorizes court clerks to “demand and receive” money or fees for services provided.

⁸ TENN. CODE ANN. §67-4-602 authorizes local governments to impose state and local taxes to help cover court operating expenses.

⁹ TENN. CODE ANN. § 8-21-401 authorizes court clerks to retain a commission for collecting payments.

state law.¹⁰ All such fees and charges may accrue interest, thereby potentially increasing the amount of the unpaid debt obligation over time.¹¹

Commentators note that the scope and scale of LFOs have grown nationally in recent decades as the criminal justice system has expanded to accommodate a rising number of incarcerated and justice-involved individuals.¹² 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.¹³ As noted by the Conference of State Court Administrators in a 2016 policy position paper on this topic: “When fees proliferate and fines are disproportionately high relative to the offense, courts can be placed in the position of becoming a revenue source to fund government operations.”¹⁴

¹⁰ For example, under TENN. CODE ANN. § 8-26-105(a), which authorizes county legislative bodies to impose “jailer’s fees” on misdemeanor inmates, Anderson County passed a resolution to charge misdemeanor prisoners in their county detention facility a fee of \$50 per day (“pay to stay”) for both pre-trial and post-trial incarceration. Resolution No. 13-08- (Aug. 19, 2013). The County also passed a resolution under TENN. CODE ANN. § 41-4-115, authorizing its Chief Jailer to establish co-pay amounts of all charges billed to the county for inmates associated with medical care and treatment, pharmacy services or substance abuse treatment by a licensed provider. Resolution No. 13-08-467 (Aug. 19, 2013). In addition, TENN. CODE ANN. § 41-4-142 allows counties and municipalities to charge inmates for “issued items,” and in 2013, Anderson County voted to assess charges for toiletries, prison garb, and transportation services to medical treatment/ Resolution No. 13-08-466 (Aug. 19, 2013), <http://www.andersoncountyclerk.com/wp-content/uploads/minutes/2013/08-19-13.pdf>; *See* <https://www.brennancenter.org/our-work/analysis-opinion/tennessee-inmates-must-pay-stay> (discussing the 2013 approved resolutions to charge prisoners in the Anderson County Jail for everything from toilet paper (29 cents per roll) to their prison garb (\$9.15 for pants)).

¹¹ Criminal Justice Policy Program at Harvard Law School 50-State Criminal Justice Debt Reform Builder, [https://cjdebtreform.org/data-explorer/fines-and-fees?deff\[0\]=state:123&deff\[1\]=type_of_charge:36&deff\[2\]=type_of_charge:34&deff\[3\]=type_of_charge:35](https://cjdebtreform.org/data-explorer/fines-and-fees?deff[0]=state:123&deff[1]=type_of_charge:36&deff[2]=type_of_charge:34&deff[3]=type_of_charge:35).

¹² *See e.g.*, 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, June 14, 2016, <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

¹³ *State Bans on Debtors’ Prisons and Criminal Justice Debt*, *supra* note 4, at 1025.

¹⁴ Pepin, “The End of Debtors’ Prisons.”

A number of national studies have examined the impact of fines and fees with a view to understanding their effectiveness in promoting the goals of justice, fairness and rehabilitation.¹⁵ Broadly, this research paints a critical picture of states' reliance on LFOs, underscoring the damaging effects of fines and fees on the lives of defendants seeking to reintegrate into society.

For example, in its study of 15 states with the highest prison populations (this study did not include Tennessee), the Brennan Center found a pattern of state authorities frequently introducing an ever-growing array of new kinds of fees, increasing the dollar amount of existing fees and acting aggressively to collect these fees from defendants.¹⁶ According to this report, fee schedules included layers of state as well as municipal fees, late fees, interest, collection and payment plan fees that were, unsurprisingly, especially burdensome on those unable to pay them on time and in full. A number of states required defendants to pay for public defenders, placing an economic price on the ability of defendants to exercise their constitutional right to counsel. In imposing such user fees, states consistently failed to account for the ability of defendants to pay. As a consequence, defendants ended up caught within a vicious cycle of debt and desperation that led those in default to face the prospect of returning to prison, adding to the already serious challenges involved in rehabilitating themselves and reentering society. The Brennan Center observed that for courts, reliance on fees as a key source of revenue, complicated their incentives to offer impartial and independent adjudication.¹⁷

Importantly, these studies underscore the disproportionate burden of fines and fees on minorities, particularly African-Americans and the indigent.¹⁸ In its study of those facing bail, fines and fees in New Orleans (Louisiana), the Vera Institute for Justice observed that the burden of paying these costs “falls primarily on Black Americans, most of whom are struggling economically. And black people make up the overwhelming majority of those in jail—incarcerated at a rate far outstripping their percentage of the population. Black residents of New Orleans paid \$5.4 million, or 84 percent, of the \$6.4 million dollars in bond premiums and associated government

¹⁵ Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Re-entry*, 1-18 (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> ; American Civil Liberties Union, *In For a Penny, The Rise of America's New Debtor's Prisons* (Oct. 2010); Vera Institute for Justice, *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans* (Jan. 2017); The Hamilton Project, *Addressing Modern Debtors' Prisons with Graduated Economic Sanctions that Depend on Ability to Pay*, Policy Brief 2019-04 (March 2019).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *See for example*, Vera Institute for Justice, *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans* (Jan. 2017), 12-19; Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Re-entry*, 19, 29 (2010).

fees in 2015. And of the \$3.8 million in conviction fines and fees judges imposed in 2015, black residents were charged 69 percent, or \$2.7 million. While black people who can pay are covering the lion's share of these costs, those who can't pay bear the brunt of enforcement."¹⁹ Indeed, in its report into the City of Ferguson (Missouri) Police Department, the Department Justice Department pointed to the potential for racial bias to systematically taint the imposition and collection of fines and fees.²⁰ In the case of Ferguson, the Justice Department highlighted the role played by fines and fees as a revenue source for the municipality and underscored that police practices and municipal court actions to collect monies disproportionately and seriously hurt African-American residents.²¹

In Tennessee, the ever-expanding use of LFOs over the past decade as a funding mechanism has similarly been the subject of recent legislative inquiry and concern.

a. Tennessee's Model for Funding the Courts

As noted in the Comptroller of the Treasury's 2004 report, problems and inconsistencies surrounding legal financial obligations in Tennessee stem at least in part from a decentralized system of funding for the courts:

Court funding, unlike court administration, is not centralized. Tennessee has a bifurcated funding system. The state funds state court judges and the counties fund general sessions and juvenile court judges and all clerks, whether state or local (many clerks serve as clerk for both state and local courts). The courts are funded with taxes, fees, fines, and commissions. If collections do not cover a court's operating costs, the county (or city, if municipal court has general sessions jurisdiction) supplements the budget with appropriations from the general fund. Any excess revenues are deposited in the county or municipal general fund.²²

¹⁹ Vera Institute for Justice, *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans* (Jan. 2017), p. 19.

²⁰ U.S. Dep't of Justice, *Investigation of the Ferguson Police Department*, (March 2015), pp. 68-69, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

²¹ *Ibid.*

²² Comptroller's Report, p. 6.

The election of local judges²³ and clerks²⁴ may compound issues related to inconsistencies in costs, inefficiencies, and compliance. This is particularly true as the funding of local courts through fees, taxes and costs imposed on the criminal defendant can directly impact the resources available to that court and law enforcement agency for such things as salary increases for elected judges and other court personnel, renovations, and other such local benefits.²⁵ This raises the specter of creating distorted local incentives to promote LFOs as a revenue stream, jeopardizing the policy goals of ensuring justice and successful reentry following a period of incarceration.

b. State Law Fines for Felonies and Misdemeanors

All felony and misdemeanor offenses in Tennessee carry a potential fine.²⁶ The potential fines for an individual defendant range from \$50,000 for Class A felonies to \$50.00 for Class C misdemeanors.²⁷ Certain drug offenses carry a mandatory minimum fine.²⁸ In general, Tennessee's constitution requires fines in excess of \$50.00 to be assessed by juries.²⁹

c. State and County Fees and Taxes

In addition to the aforementioned penal fines, Tennessee law authorizes the assessment of fees and taxes against criminal defendants. The Tennessee Advisory Commission on Intergovernmental Relations, in a 2017 study, identified and analyzed the state's 245 criminal

²³ *Ibid.*, 8 (“Many local judges and clerks do not feel compelled to comply with state policies because they are elected and paid locally”).

²⁴ *Ibid.*, 15 (“Electing and employing multiple clerks in each county is costly and inefficient”).

²⁵ Tennessee Advisory Commission on Intergovernmental Affairs, Tennessee's Court Fees and Taxes: Funding the Courts Fairly (June 2017), p. 16, available at https://www.tn.gov/content/dam/tn/tacir/documents/2017_CourtFees.pdf. Appendix #.

²⁶ TENN. CODE ANN. § 40-35-111.

²⁷ *Id.*

²⁸ TENN. CODE ANN. § 39-17-428.

²⁹ TENN. CONST. art. 6, § 14 “No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars.” *Id.*; see generally *Tenn. Criminal Trial Practice* § 29:10 (2018-2019 ed.).

court fees and taxes, ranging from 50 cents to \$3,000, that are found in Tennessee law.³⁰ Many of the state's fees and taxes are codified at Tennessee Statutes § 8-21-401. Many others are scattered throughout the Code.³¹ The complexity of the LFO system in Tennessee is illustrated by the Tennessee Advisory Commission on Intergovernmental Relations study, which noted that "even for a relatively minor offense such as driving with a revoked . . . license, the costs charged in general sessions criminal court could include up to 17 separate fees and taxes totaling a minimum of approximately \$112 to over \$300."³²

The Tennessee Advisory Commission on Intergovernmental Relations report summarized the state's criminal court fees and taxes structure as follows:

Of the 245 fees and taxes, 104 (42%), all of them fees, apply only to Knox County's civil circuit, civil general sessions, and chancery courts. These Knox County courts still use the itemized fee structure that was replaced in all other counties by the simplified structure passed in 2005. Of the remaining 109 fees and 32 taxes, 100 fees and 20 taxes apply statewide, and nine fees and 12 taxes apply to one or more other specific counties. Sixty-six (47%) of the 141 apply in criminal cases, 32 (23%) in civil cases, and 43 (30%) apply to both. Ninety (64%) are mandatory, and 51 (36%) are optional. Of the 105 responding county court clerks to a 2016 survey by the Advisory Commission, 80 (76%) reported collecting at least one of the optional fees or taxes. Less than half, 47 (43%), of the 109 fees are statewide fees in the simplified statute, Tennessee Code Annotated, Section 8-21-401, 37 of which are mandatory. The other 62 fees are miscellaneous ones that are scattered throughout other statutes.³³

The Tennessee Advisory Commission on Intergovernmental Relations report noted the difficulties of clearly establishing how this money, once collected, was being disbursed. The study also cited legislators, court clerks, and other stakeholders that expressed concern that high

³⁰ Tennessee Advisory Commission on Intergovernmental Affairs, *Tennessee's Court Fees and Taxes: Funding the Courts Fairly* (June 2017), p. 1. https://www.tn.gov/content/dam/tn/tacir/documents/2017_CourtFees.pdf; Appendix #.

³¹ For a compilation of the 245 fees and taxes and their statutory authority, see *Ibid.*, 67-90.

³² *Ibid.*, 14.

³³ *Ibid.*, 2.

levels of criminal justice debt could potentially limit access to justice and create uncollectable court debt.³⁴

At our public briefing in March, the Committee heard testimony, which we highlight below, that justifies these concerns regarding the deleterious effects of criminal legal financial obligations as a way to fund our criminal justice system or other programs.

d. Municipal Fines, Fees, and Taxes

Municipalities in Tennessee may set their own court fees by ordinance.³⁵ These municipal obligations are not included in the Tennessee Advisory Commission on Intergovernmental Relations report's analysis of fees and taxes found in the Tennessee Code. The Municipal Technical Advisory Service's Municipal Court Manual explains the powers of municipal courts to set fines as follows:

Unless a municipal court has concurrent general sessions criminal jurisdiction, only ordinance violations can be heard in municipal court. Municipalities are authorized to adopt ordinances that mirror, substantially duplicate, or reference certain state laws for offenses that are Class C misdemeanors. The penalty for violating the ordinance cannot exceed \$50 with no imprisonment.³⁶

“[T]o the extent that a municipal court is exercising...concurrent general sessions court jurisdiction...costs...shall be assessed, collected and distributed in the same manner as such costs are assessed, collected and distributed in the court of general sessions.”³⁷

According to the Tennessee Courts' website, “[m]ost often, these courts hear speeding tickets and other traffic violations. However, these courts also hear codes violations such as dogs

³⁴ 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).

³⁵ TENN. CODE ANN. § 16-18-304(a) (“Notwithstanding any law to the contrary, municipal court costs shall be set and collected in the amount prescribed by municipal law or ordinance.”).

³⁶ Municipal Technical Advisory Service, *Municipal Court Manual 1(2007)* available at https://trace.tennessee.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1082&context=utk_mtaspubs (accessed August 4, 2019).

³⁷ TENN. CODE ANN. § 16-18-304(b).

running loose, high grass or other violations of city ordinances that seek to ensure the public safety and welfare.”³⁸

“While generally, a municipal court can impose a fine of up to \$50 (Fifty Dollars) plus court costs for violations, in some instances, these courts can impose a civil penalty of up to \$500 (Five Hundred Dollars).”³⁹

To take one example, the municipality of Oakland, Tennessee, permits the municipal court judge to impose a “tax” for each case of \$110.00: “In all cases heard or determined by him, the municipal judge shall tax an amount of one hundred ten dollars (\$110.00) for court costs.”⁴⁰

While there appears to be no study of the impact of Tennessee’s criminal court fees and fines at the municipal level, the Committee notes that studies of U.S. Census Bureau data identify a correlation between a municipality’s reliance on fines and fees as sources of revenue and the proportion of a municipality’s residents who are African-American.⁴¹

III. THEMES AND OBSERVATIONS FROM THE ADVISORY COMMITTEE’S PUBLIC MEETING

The Committee’s key observations from the public briefing held on March 27, 2019 are as follows: (i) legal financial obligations 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;⁴² (iii) accrued penal debt may exacerbate an

³⁸ Tennessee State Courts, “About Municipal Courts,” <http://www.tsc.state.tn.us/courts/municipal-courts/about> (accessed August 4, 2019).

³⁹ Ibid.

⁴⁰ Oakland, Tennessee Municipal Code Section § 3-202, <https://www.mtas.tennessee.edu/system/files/codes/oakland-t3.pdf> (accessed August 5, 2019).

⁴¹ See, e.g. Michael W. Sances and Hye Young You, “Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources,” *Journal of Politics*, Volume 79, Number 3. Published online May 11, 2017. <http://dx.doi.org/10.1086/691354>; Dan Kopf, *The Fining of Black America*, PRICEONOMICS, June 24, 2016, <https://priceonomics.com/the-fining-of-blackamerica/>.

⁴² According to the 2017 report of the Tennessee Advisory Commission on Intergovernmental Affairs, although the General Assembly revised and simplified many court fees and taxes with passage of Public Chapter 429, Acts of 2005, which replaced several sets of itemized fees with single flat fees, the

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.

These observations 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,⁴³ 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 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.

a. 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.⁴⁴ Even for individuals who see

legislature has continued to promulgate new fees since 2005, including 46 bills that increased or added new court fees and taxes or authorized local governments to impose them. Tennessee Advisory Commission on Intergovernmental Affairs, *Tennessee's Court Fees and Taxes: Funding the Courts Fairly* (June 2017), at pp. 1-2.

⁴³ See, e.g., H.B. 2181, 110th Leg., Reg. Sess., Pub. Ch. 1051 (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); the Tennessee State Legislature recently passed H.B. 926, 111th Leg., Reg. Sess. (Tenn. 2019) which expanding the definition of recidivism in Public Chapter 1051 to include locally-sentenced felons and state-sentenced felons (codified as amended at Tenn. Code Ann. § 40-35-323).

⁴⁴ Cara Suvall, Written Statement for the Legal Financial Obligations Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, April 25, 2019, at 1 (hereinafter Suvall Statement). See also Tom Castelli Testimony, Legal Financial Obligations Briefing, pp. 51-52; Dawn

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).⁴⁵ Such fees, along with a myriad other court costs, taxes, surcharges 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.⁴⁶

For many, accumulated LFOs often represent an overwhelmingly high sum to pay.⁴⁷ 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 \$12,000.⁴⁸ 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.⁴⁹

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

Harrington Testimony, *Legal Financial Obligations Briefing*, pp. 56-57; Donald E. Mabon Testimony, *Legal Financial Obligations Briefing*, p. 61; Terrance Akins Testimony, *Legal Financial Obligations Briefing*, pp. 110-111; Deniece Thomas Testimony, *Legal Financial Obligations Briefing*, pp. 114, 116-117.

⁴⁵ *Ibid.*, 2-3.

⁴⁶ *Ibid.*, 6.

⁴⁷ Many of the accumulated court fees, taxes and charges, along with the additional new charges assessed during incarceration (for such things as telephone calls, medical, transportation, clothing, toiletries), are to be paid while individuals are incarcerated. For those individuals without their own funds, such charges are deducted from their earning from prison jobs, if such jobs are available to them. *See, e.g.*, Donald Mabon, testimony, *Briefing before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights, Legal Financial Obligations*, Nashville, Tennessee, March 27, 2019, transcript, pp. 62-63 (hereinafter *Legal Financial Obligations Briefing*). For context, the Tennessee Department of Corrections standardized inmate pay rate for 2019 ranges from \$0.17 to \$0.34/hour for Unskilled workers and from \$0.42 to \$0.59/ hour for Highly Skilled workers. <https://www.tn.gov/content/dam/tn/correction/documents/504-04.pdf>

⁴⁸ Rebecca Delius Testimony, *Legal Financial Obligations Briefing*, p. 157.

⁴⁹ Senator Brenda Gilmore Testimony, *Legal Financial Obligations Briefing*, p. 141.

everyday economic and social life.⁵⁰ 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.⁵¹ Individuals with penal debt thus can become desperate and turn to maxing out high-interest credit cards, over-drafting accounts with their associated high fees or using loan sharks or pay day lenders that may perpetuate their financial woes.⁵² Financial hardships also can be experienced 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.) Commentators⁵³ 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 are magnified for those struggling under criminal justice debt without help from family, friends and community networks.⁵⁴

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

⁵⁰ See, *e.g.*, Terrance Akins Testimony, *Legal Financial Obligations Briefing*, pp. 110-111; Donald E. Mabon Testimony, *Legal Financial Obligations Briefing*, p. 61; Delius Testimony, *Legal Financial Obligations Briefing*, pp. 157, 159-160; Deniece Thomas Testimony, *Legal Financial Obligations Briefing*, pp. 114, 116.

⁵¹ Thomas Testimony, *Legal Financial Obligations Briefing*, pp. 114-116.

⁵² *Ibid.*, 123-124; see also Dawn Harrington Testimony, *Legal Financial Obligations Briefing*, p. 56.

⁵³ 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, *Legal Financial Obligations Briefing*, pp. 65-66; Thomas Testimony, *Legal Financial Obligations Briefing*, p. 117; Harrington Testimony, *Legal Financial Obligations Briefing*, pp. 59-60.

⁵⁴ See, *e.g.*, Mabon Testimony, *Legal Financial Obligations Briefing*, pp. 61-62; Thomas Testimony, *Legal Financial Obligations Briefing*, p. 130.

making payments on their accrued criminal fines.⁵⁵ In addition to the immediate threat of returning to jail, individuals who cannot pay in a timely manner can lose their driver's licenses, 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.⁵⁶ 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.⁵⁷

Such consequences can be especially grave for young people 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 criminal 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 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.⁵⁸ As a result, penal debt results in impoverished young people losing out on opportunities to contribute to society and to pursue their goals and can compound social and mental health problems among vulnerable youth.⁵⁹ Another panelist testified that family members of children in juvenile court

⁵⁵ See, e.g., Tom Castelli Testimony, *Legal Financial Obligations Briefing*, p. 52; Mabon Testimony, *Legal Financial Obligations Briefing*, pp. 61, 80; Akins Testimony, *Legal Financial Obligations Briefing*, pp. 141-142.

⁵⁶ See *infra*, at p. 26, discussing the enactment of H.B. 839, 111th Leg., Reg. Sess. (Tenn. 2019), which allows an individual determined to be unable to pay accrued penal debt to obtain a restricted driver's license under certain circumstances. The specific manner of implementation of this reform and its consistency in application across the State are likely to determine the extent of its impact. Relatedly, as a result of this new Act, the appeal in *Thomas v. Haslam*, the federal lawsuit examining the constitutionality of revoking an individual's driver's license for non-payment of court fines and fees without effective inquiry into the individual's ability to pay, was declared moot by the Sixth Circuit. *Thomas v. Haslam*, 329 F.Supp.3d 475 (M.D. Tenn. 2018), *appeal docketed*, No. 18-5766 (6th Cir. Jul. 27, 2018), mootness decision, *sub. nom. Thomas v. Lee* (September 12, 2019).

⁵⁷ Cara Suvall Testimony, *Legal Financial Obligations Briefing*, p. 21.

⁵⁸ Akins Testimony, *Legal Financial Obligations Briefing*, pp. 111-112.

⁵⁹ 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).

are obligated to pay child support to cover the costs of maintaining the child in detention.⁶⁰ Parents can see their wages and tax refunds garnished by the state in order to cover court debts assessed against a youth.

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 criminal justice debt and limited financial opportunities might never be able to pay off their LFOs, no matter their diligence.⁶¹ In the meantime, panelists noted, offenders are forbidden from voting for public officers who could pursue policy reform.⁶²

A number of panelists observed that individuals with criminal justice debt can become overwhelmed with the economic burden of fines and fees – and the risk of returning to jail if they cannot pay.⁶³ 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.⁶⁴ 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.⁶⁵ Individuals under the threat of re-incarceration due to penal debt also can fall into self-destructive

⁶⁰ Akins Testimony, *Legal Financial Obligations Briefing*, pp. 111-112; Harrington Testimony, *Legal Financial Obligations Briefing*, p. 80.

⁶¹ Akins Testimony, *Legal Financial Obligations Briefing*, pp. 111-112.

⁶² 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).

⁶³ Akins Testimony, *Legal Financial Obligations Briefing*, pp. 111-112; Harrington Testimony, , *Legal Financial Obligations Briefing*, p. 80.

⁶⁴ Mabon Testimony, *Legal Financial Obligations Briefing*, pp. 60-61; Suvall Testimony, *Legal Financial Obligations Briefing*, pp. 20-24.

⁶⁵ Castelli Testimony, *Legal Financial Obligations Briefing*, pp. 75-76; Mabon Testimony, *Legal Financial Obligations Briefing*, p. 81.

patterns of behavior (e.g., substance abuse, skipping parole meetings or fleeing the probationary jurisdiction), resulting in revocation of parole and re-incarceration.⁶⁶

b. 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.⁶⁷ 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, many women are restricted in their choice of jobs to positions where an organization can accommodate childcare needs and/or provide flexibility in working hours. Some panelists reported that women may be forced to work multiple jobs in order to pay off LFOs as well as generate the income needed to provide for their families.⁶⁸ 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.⁶⁹

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.⁷⁰ 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.⁷¹ Prisons also include those on pre-trial detention who cannot afford to make bail payments and any added penal debt.⁷² Where

⁶⁶ See, e.g., Mabon Testimony, *Legal Financial Obligations Briefing*, p. 80.

⁶⁷ Jasmine Heiss Testimony, *Legal Financial Obligations Briefing*, p. 182.

⁶⁸ Thomas Testimony, *Legal Financial Obligations Briefing*, pp. 182-183, 185-186.

⁶⁹ Heiss Testimony, *Legal Financial Obligations Briefing*, p. 183.

⁷⁰ Harrington Testimony, *Legal Financial Obligations Briefing*, pp. 71-72, 80.

⁷¹ See, e.g., Castelli Testimony, *Legal Financial Obligations Briefing*, p. 75; Sayil Camacho Testimony, *Legal Financial Obligations Briefing*, p. 95.

⁷² Heiss Testimony, *Legal Financial Obligations Briefing*, pp. 148, 151-152.

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.⁷³ 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.⁷⁴

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 defendants.⁷⁵ 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.⁷⁶ 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). 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.⁷⁷ 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.⁷⁸ 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

⁷³ See, *e.g.*, Lane Testimony, *Legal Financial Obligations Briefing*, p. 76.

⁷⁴ *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.”).

⁷⁵ Camacho Testimony, *Legal Financial Obligations Briefing*, p. 95.

⁷⁶ See Heiss Testimony, *Legal Financial Obligations Briefing*, pp. 149-150, 183, 185-186; Camacho Testimony, *Legal Financial Obligations Briefing*, pp. 95, 97.

⁷⁷ Delius Testimony, *Legal Financial Obligations Briefing*, pp. 157-159.

⁷⁸ Andy Baggenstoss Testimony, *Legal Financial Obligations Briefing*, p. 13.

counsel.⁷⁹ 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.⁸⁰ 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.⁸¹

⁷⁹ See, e.g., Delius Testimony, *Legal Financial Obligations Briefing*, p. 41.

⁸⁰ Ibid., 158-160.

⁸¹ See, e.g., Baggenstoss Testimony, *Legal Financial Obligations Briefing*, pp.13-14; Julie Warren Testimony, *Legal Financial Obligations Briefing*, p. 30; Suvall Testimony, *Legal Financial Obligations Briefing*, 33-35.

IV. RECOMMENDATIONS

a. Summary of Key Recommendations

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 continued reform in order to improve the fairness and efficacy of our state's criminal justice system.

The Committee offers to the Commission the following recommendations regarding legal financial obligations in Tennessee. These recommendations reflect findings based on the testimony received during a public briefing in March 2019, written submissions and research. The recommendations are stated in list form below, and discussed in more detail in the following section. Note that, while the key recommendation of the Committee is that Tennessee policymakers consider moving away from using LFOs as a funding model for the courts and criminal justice system, other recommendations are included in this report as alternative areas of reform for policymakers' consideration. The Committee also believes that it is *important to consider the views of individuals directly impacted by current LFO practices in discussion of reforming such practices.*

The Committee recommends to the Commission, in the alternative, that policymakers consider the following reforms:

1. End the current practice of using LFOs to fund the criminal justice system.
2. Evaluate the role of counties and judges in setting fines and fees and move to a statewide model.
3. Review the impact of LFOs on wider considerations of justice and equity, including consideration of the following:
 - Voting rights: Ensure that the right to vote is not contingent on repayment of LFOs
 - Require adoption of an ability to pay analysis prior to assessing LFOs
 - Consider expanding the right to counsel to include assistance regarding LFOs
 - Streamline process of establishing indigency to enhance time and cost efficiencies
4. Reduce or eliminate the practice of "debtor's prison," as explained below.

5. Review the system of LFOs for juvenile offenders
6. Establish a statewide supervisory body to oversee LFO practices

Develop a statewide evaluative body to review any new proposed LFOs, establish enhanced data-collection and reporting to the General Assembly, AOTC and the public, and provide oversight and monitoring of community supervision service providers and debt collectors.
7. Provide enhanced clarity on the schedule of fines and fees covered assessed through the various stages of the criminal justice process, including post-incarceration financial obligations.

b. DISCUSSION OF COMMITTEE'S RECOMMENDATIONS

This section discusses in more detail the Committee's six key recommendations, stated above.

1. END THE CURRENT PRACTICE OF USING LFOS TO FUND THE CRIMINAL JUSTICE SYSTEM

The Committee questions whether the funding needs of our state and local criminal justice system are best served by earmarking funds collected through imposing fines, fees, taxes, and other such costs on criminal defendants. Often, such fines and fees have the unintended consequence of creating uncollectable debt for the jurisdiction and are detrimental to achieving Tennessee's policy goals of promoting the successful reintegration of formerly incarcerated individuals. The burden of penal debt often complicates a formerly incarcerated individual's ability to secure the stable employment, housing and transportation and frequently is a source of financial and mental distress for offenders and their families and social networks. As such, using LFOs as a funding tool likely is an inefficient and counterproductive means through which to fund state and local criminal courts and related law enforcement services. A unitary funding model whereby criminal courts and the penal system are adequately funded through the state's general appropriation process, would allow for enhanced transparency, fairness, accountability and legislative control statewide.

The Committee recommends to the Commission that:

- i) Tennessee consider ending its current practice of funding the criminal justice system through a vast and complex system of state and local fees, taxes, surcharges and other costs assessed against criminal defendants;
- ii) Tennessee move towards a model of fully funding the criminal justice system by ensuring that any monies collected by the state or local courts be deposited in the State's general fund for processing through its general budgetary appropriations process.

2. EVALUATE THE ROLE OF COUNTIES AND JUDGES IN SETTING FINES AND FEES AND MOVE TO A STATEWIDE MODEL

In the event that the LFO funding model for the criminal court system is retained, the Committee recommends the elimination or reduction in the role of county and municipal jurisdictions and their respective courts in setting and earmarking local criminal fines and fees. The Committee finds that having county and local jurisdictions use fines and fees as a means of funding county and local courts and law enforcement is problematic. Such funding measures often earmark a portion of fines and fees collected towards the funding of particular local services or benefits (e.g., salaries of judges and court officials). The Committee observes that this funding model can be inefficient and inequitable, and create inconsistencies in the amount of LFOs

assessed across the system. Further, it risks creating perverse incentives in local court and police administration settings where officials can be influenced or motivated to establish or impose fines and fees in order to help pay for local salaries and other benefits or services. The Committee recommends to the Commission that policymakers:

- Eliminate or reduce the role of county and local officials in setting and earmarking local fines and fees. The Committee recommends moving to a State-wide schedule of fines and fees, rather than allowing fines and fees to be established at the local level and thus vary by county or local jurisdiction.
- Further, the Committee recommends severing economic links between local court systems and the fines and fees collected within the jurisdiction. In other words, the Committee recommends that any fines and fees collected by local jurisdictions either be deposited in the State's general fund to be utilized by the State through the appropriation process, or deposited locally as funds earmarked by the general assembly or the AOTC for specific funding purposes. In this way, individual counties/ municipalities themselves would not be able to use the criminal justice system as a general revenue source for their own local funding needs. This approach would further the important public policy goals of transparency, accountability, regional equity, and eliminating the risk of creating financial incentives to punish or incarcerate Tennesseans.

3. REVIEW THE IMPACT OF LFOS ON WIDER CONSIDERATIONS OF JUSTICE AND EQUITY

The Committee recommends to the Commission that policymakers consider the impact of LFOs on broader issues of justice and equity. For many, the process of repayment of penal debt can take a number of years—indeed, for some, their debt, along with the accruing interest payments on the debt, can represent an enduring burden that continues to accumulate indefinitely. Indeed, the Committee heard testimony that some formerly incarcerated individuals with payment plans will never be able to pay it off in their lifetime. Carrying penal debt can adversely affect one's ability to get “back on his or her feet;” it can harm one's efforts at securing stable housing, transportation and employment, and it can be detrimental to one's ability to sustain social support networks, engage civically, and enjoy a general sense of mental health and well-being. In addition, justice involved individuals can feel disempowered owing to the unavailability of counsel to help understand and contest the imposition or amount of LFOs or to assist in seeking modification or waivers of payment plans in the event of changed financial circumstances.

The Committee recommends to the Commission that policymakers:

- **Voting rights:** Ensure that the right to vote is not contingent on repayment of LFOs. In this regard, the Committee supports the proposal found in legislation pending before the General Assembly, Senate Bill 589/House Bill 547, providing that the right to vote “shall not be...denied due to: (1) The inability or failure to pay any monetary obligations, including, but not limited to, civil or criminal penalties; or (2) The extension of a probationary period due to failure to pay monetary obligations or penalties.”⁸²
- **Ability to pay analysis:** Establish and adopt a statewide, uniform system of fines and fees, and include a process by which such fines and fees, set at the state level, may be calibrated to an individual’s ability to pay through a court’s downward adjustment, where appropriate, to ensure that LFOs assessed are consistent with both ability to pay and successful reintegration of the individual.⁸³ The Committee also supports and recommends expanding community service options, where fair, just and appropriate, instead of, and as an alternative to, assessing monetary LFOs against individuals.
- **Right to counsel:** Consider expanding the right to counsel to include assistance for understanding, contesting and repaying LFOs. The hearing revealed that defendants did not understand how to petition for indigency status, contest the amount of fines and fees, provide input into the development of payment plans, or how to deal with issues of financial distress arising on account of difficulty in repaying this debt. Given that non-payment of LFOs can result in re-incarceration as well as severely impact professional and personal outcomes (e.g. employment), access to counsel can ensure that Tennesseans are treated more justly. Intervention by counsel in helping defendants with LFOs may help mitigate the especially adverse effect of LFOs on minorities, women and the indigent. In particular, counsel may be effective in ensuring that defendants can petition for indigency status, help with the development of a payment plan and request leniency and latitude in the event of non-payment.
- **Streamline process of establishing indigency:** The Committee heard testimony about the inefficiency and burden of the current practice of requiring individuals to establish

⁸² S.B. 589, 111th Leg. Reg. Sess. (Tenn. 2019) “An Act to amend Tennessee Code Annotated, Section 2-2-102 and Title 40, Chapter 29, relative to felon voting rights,” <http://www.capitol.tn.gov/Bills/111/Bill/SB0547.pdf> (accessed July 10, 2019); *see also* <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0589>.

⁸³ *See* Priya Raghavan, “Criminal Justice Solutions: Model State Legislation,” 2, 18-24 (December 2018), *at* <https://www.brennancenter.org/publication/criminal-justice-solutions-model-state-legislation> (accessed July 5, 2019). This model legislation would also allow defendants to convert their fines to a proportionate number of hours of programmatic participation or community service.

indigency or an inability to pay again and again throughout the criminal justice process. For instance, criminal defendants are required to establish indigency in order to secure right to defense counsel. Separately, such individuals then are required to establish inability to pay at the time of assessment of fines and fees, at various points in the criminal justice process – from pre-trial fees, surcharges and taxes, to those added in the event of incarceration, and those assessed in connection with post-incarceration services, such as probation or community monitoring. The Committee recommends that Tennessee adopt a streamlined, uniform process for establishing indigency, such that once established, further indigency determination proceedings are waived. Such an approach also would promote enhanced time- and cost-efficiencies for the courts.

Finally, in light of the critical importance of access to transportation for securing stable employment and housing, the Committee recognizes the important policy reform accomplished by the 111th General Assembly in ensuring that a person’s driver’s licenses will not be automatically suspended or revoked for failure to pay fine and fees relating to driving or other offenses. The new law, passed as HB 839 in May 2019 and signed by the Governor the same month (2019 Tenn. Public Chapter No. 438), effective, July 1, 2019, applies retroactively and creates an indigency exception to the law, requiring courts to take a licensee’s ability to pay the fines and other LFOs into account prior to encumbering the license. It also provides for reasonable installment payment plans, where requested, based on the licensee's income and ability to pay and subject to modifications for changes in financial circumstances or other good cause. It provides that if a licensee is indigent or has a payment plan, a restricted license will be issued to the individual, allowing for travel necessary for employment, school, or religious worship. The Committee believes that this recent reform of Public Chapter 438 furthers the state’s important goals of promoting the financial and social stability of justice involved individuals to the benefit of all Tennesseans.⁸⁴

4. REDUCE OR ELIMINATE THE PRACTICE OF “DEBTOR’S PRISON”

In addition to ensuring that LFOs are calibrated to an individual’s ability to pay, the Committee recommends to the Commission that policymakers:

⁸⁴ In July 2018, a federal judge ruled that Tennessee’s automatic suspension of driver’s licenses due to unpaid court debt was unconstitutional. *Thomas v. Haslam*, 329 F.Supp.3d 475 (M.D. Tenn. 2018), *appeal filed*, No. 18-5766 (6th Cir.). Due to the enactment of Public Chapter 438, the parties notified the Sixth Circuit Court of Appeals that the contested matter was now moot. *See Thomas v Haslam, vacated as moot and remanded sub. nom. Thomas v. Lee*, 776 Fed. Appx. 910 (6th Cir., filed September 12, 2019) (mem).

- Eliminate the use of re-incarceration as a substitute for payment of penal debt or, at a minimum, require that any such order be used only “as a last resort.” Likewise, the Committee recommends that policymakers consider adopting a best practice of prohibiting courts from ordering incarceration of individuals awaiting hearing on indigency status or ability to pay
- Establish a user-friendly vehicle with which to petition the court for waiver/reduction of penal debt where an individual’s financial circumstances have changed since the last assessment of fines and fees; align the waiver/reduction process as a “work-out,” absent the threat of re-incarceration
- Consider adopting a process by which accumulated LFOs are capped, and in some cases waived, where the amount of fines and fees, along with accruing interest, cannot be paid off in full within a reasonable amount of time.

5. *Review the System of LFOs for Juvenile Offenders*

The Committee recommends to the Commission that legislators and policymakers review the rationales and framework for imposing LFOs on juvenile offenders. The Committee notes that juveniles can become subject to a burdensome system of fines and fees, similar to adults.⁸⁵

⁸⁵ See, e.g., Tenn. Code. Ann. §8-21-401 (e), which sets out a fee schedule for juvenile court proceedings, including, for example, a standard court cost (\$100), for certain juvenile proceedings, including requests to establish support or nonsupport, proceedings related to parentage, paternity cases, and legitimations; a \$75.00 fee for requests for modification of child support, a fee of \$42.00 in juvenile traffic cases, consent orders, diversion and non-judicial disposition of juvenile cases, voluntary motions to grant custody, attachment pro corpus, and bench warrants, and a \$62.00 fee in delinquency and unruly cases in juvenile court, among others. Juvenile proceedings also are subject to numerous other court clerk fees set out in Tenn. Code Ann. §8-21-401(i), for example, standard post-judgment fee of \$25.00, chargeable per occurrence and which applies to post-judgment interrogatories, publications, motions to set installment payments, and orders and pleas; fees for subpoenas (\$6.00), and requests for continuances (\$5.00), a \$40.00 clerk fee for receiving funds paid into the clerk pursuant to court order for collecting and paying out the proceeds; and a \$300 for preparing a record on appeal from a court of record to an appellate court, among other fees.

In 2016, a new fee was established in Tenn. Code Ann. §8-21-402, permitting at least one or more county legislative bodies to establish a \$75.00 fee in all special juvenile courts and all courts of general sessions having juvenile court jurisdiction from any person who enters a plea of guilty or nolo contendere, is adjudicated at trial or whose case is handled under pretrial diversion or is found in violation of a

Further, debt loads can leave a permanent scar on young people, impacting their future chances for rehabilitation, recovery, education and integration into adult social life. The Committee finds that LFOs on young offenders can result in disparate outcomes depending on whether a young person is able to pay. Where someone can pay, their records are often expunged in contrast to those who cannot. The same bad act can result in two vastly diverging pathways for young persons, depending on their capacity to pay off LFOs.

The Committee recommends to the Commission that policymakers:

- Consider reducing or eliminating LFOs for juvenile offenders, or establishing a presumption of inability to pay for juvenile offenders.⁸⁶ At a minimum, the State ought to reflect on whether a separate regime for juveniles would be advisable, recognizing the diminished capacity of young people to have available savings, earnings and capacity to pay. Further, the impact of LFOs may be especially harmful for young people both economically as well as from the perspective of mental distress.
- Ensure that young people, their lawyers, advocates, and families are fully informed of LFOs, the process for application for indigency status and the kind of information they need to provide in order to contribute to the creation of a workable payment plan.
- Review the impact of juvenile LFOs on juveniles and also their families. The Committee learned that family members could, in some circumstances, be forced to pay off LFOs owed by their children. Failure by parents to pay this debt can result in parents facing the prospect of jail. Such practices can severely hamper the ability of young offenders to develop familial and social bonds, impact their relationships on a long-term basis and reduce their chances of reintegrating into society.
- Consider eliminating liability of parents/guardians to repay LFOs accrued in their child's juvenile proceedings as such liability may severely impair the creditworthiness of the parents through no fault of their own.

probationary or valid court order. The purpose of the fee, subsection 402(c) states, is for construction and maintenance of new facilities for juvenile courts in their respective counties. *See* 2016 Pub.Acts, c. 901, § 1, eff, July 1, 2016.

⁸⁶ *See generally*, U.S. Comm'n on Civil Rights, *Targeted Fines and Fees against Communities of Color*, 2019, p. 31-34, 75 (surveying practices regarding juveniles and recommending that “[c]ourts and municipalities...establish a standard for evaluating an individual’s ability to pay including a presumption of inability to pay for... juveniles”) https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

6. ESTABLISH A STATEWIDE SUPERVISORY BODY TO OVERSEE LFO PRACTICES

A Statewide supervisory body, if established, should be charged with supervising the setting, and collection of LFOs in Tennessee, ensuring that such practices are fair and not unduly punitive or counterproductive in view of Tennessee's policy goals of promoting successful reintegration of formerly incarcerated individuals into our communities and neighborhoods. In addition, such entity could oversee counties and local jurisdictions to ensure that LFOs are being consistently imposed by judges and county officials to ensure equitable treatment of individuals irrespective of race, gender or other demographic characteristics. This supervisory body also could play an important role in monitoring private companies within the criminal justice system that are charged with imposing and collecting LFOs (*e.g.*, private providers of probationary services).

The establishment of such a statewide entity to evaluate any new proposed fines and fees before adoption of new or increased LFOs was recommended by Tennessee Advisory Commission on Intergovernmental Affairs in its 2017 report to the Tennessee General Assembly.⁸⁷ According to Tennessee Advisory Commission on Intergovernmental Affairs, at least one state has developed such an entity to oversee and monitor fees and fines related to their criminal justice systems.⁸⁸

Another approach would be to require periodic reporting of statewide changes (increases/decreases) of criminal court related fines and fees and how they are applied.⁸⁹

The Committee recommends to the Commission that policymakers:

- **Develop a statewide evaluative body.** Such body should be charged with determining whether any proposed new kind of criminal fines and fees, or any proposed increases in existing criminal fines and fees, should be adopted, and whether such proposal are

⁸⁷ See 2017 Tennessee Advisory Commission on Intergovernmental Affairs Report, p. 5.

⁸⁸ Ibid., 5 (“Tennessee could, as is done in Louisiana, provide more thorough analysis of court costs, how they accumulate, and related earmarks through the use of a judicial committee that reviews and makes recommendations on bills proposing to add or increase court costs.”).

⁸⁹ See, *e.g.*, The Legislative Analyst's Office, California's Legislature's Nonpartisan Fiscal and Policy Advisory Office's most recent analysis providing an overview of state-wide changes in criminal justice fees and fines over time. The Legislative Analyst's Office, *Overview of State Criminal Fines and Fees and Probation Fees*, 2018, <https://lao.ca.gov/Publications/Detail/3926>.

consistent with Tennessee's important policy goals of promoting the successful reentry of justice involved individuals.

- *Data-collection and reporting.* Task the statewide body with enhancing statewide data collection, sharing, and analysis regarding LFOs, including assessment, waiver, and collection practices across counties to include demographic information regarding LFO assessments on justice-involved individuals. Require such summary data to be presented, annually and as requested, to the General Assembly and the AOTC.
- *Oversight of community supervision service providers and debt collection.* Task the statewide entity with authority over, and monitoring of, private service providers within the state criminal justice system, including, for example, probation or electronic monitoring companies or penal debt collectors. The Committee heard testimony regarding allegations of third party vendors using threats and intimidation in connection with penal debt collection.⁹⁰ Unmonitored, such threats, for example, to have a person re-incarcerated, even if inconsistent with the law – can cause severe stress and mental anguish for a formerly incarcerated person, thus interfering with successful reentry and efforts to get back on his or her feet.⁹¹ The Committee therefore further recommends to the Commission that:

⁹⁰ Ms. Harrington, Executive Director of Free Hearts, testified that private collection and electronic monitoring service providers at times threatened individuals with a return to jail if they were unable to pay assessed LFOs, for instance, probation fees or electronic monitoring fees. She noted that collection practices "were like a debt collector on a payday loan, ... they were very aggressive, calling, saying they were going to send you back to jail, and everything like that." As a result, formerly incarcerated individuals often report that "in order to pay these fees that they had to borrow money from people, get their credit and max out credit cards, give up their apartments, and take other extreme measures to pay these fees." Harrington Testimony, *Legal Financial Obligations Briefing*, pp. 57, 80.

⁹¹ Mr. Mabon, representing No Exceptions, testified about the great stress of returning from incarceration with "just the shirt on [your] back," substantial penal debt, and no means to pay it back. He reported that the threat of being returned to jail because of an inability to pay LFOs causes some individuals without options "to just go on the lam. They will just flee, you know, become a fugitive." Mabon Testimony, *Legal Financial Obligations Briefing*, pp. 61, 80.

- a process for investigating grievances against electronic monitoring companies or contractors regarding their debt collection practices should be established and widely publicized. Such process would tend to deter unfair and abusive tactics that could be used by private companies that are inconsistent with Tennessee's policy goals of fostering successful reintegration.
- the State limit the discretion of private vendors or contractors who provide community supervision and other related services by requiring strict compliance with acceptable standards of care; establish compliance with standards of care as enforceable conditions of contract.

**7. PROVIDE CLARITY ON THE SCHEDULE OFFEESANDFINES
OVERED BY LFOS**

The Committee recommends to the Commission that greater clarity on the schedule of fines, fees and all related costs, such as interest payments, that are covered by LFOs. A key theme emerging from the Committee's public hearing on LFOs was the systemic lack of clarity regarding the scope of fines and fees. The Committee recommends that policymakers:

- Publish a comprehensive schedule of currently existing fines, fees, and related costs that are covered by LFOs. The number of fines and fees are substantial and growing. The State should evaluate the basis for such an expansive schedule of fines and fees and examine whether it creates the risk of offenders facing uncollectable debt and long-term financial and mental stress on account of being unable to pay off LFOs.
- Offer guidance to offenders on what fines and fees they may become subject to, the implications of becoming subject to fines and fees, and how to petition for indigency status. In addition, the State should offer guidance on payment plans, what information a court needs in order to establish feasible plans, and information on how fines and fees may be contested by the offender.
- Study the consequences of non-payment that takes into account the severe difficulties that are faced by offenders in paying off fines and fees. A number of panelists pointed to the growth of functional "debtor's prisons" that are populated by those who are unable to pay off fines or those that miss payments while on probation or parole. The State should consider whether these present practices are, in fact, in the interests of justice and support broader efforts to de-emphasize incarceration and encourage offender integration into social and economic life following incarceration.

End of Document

**Tennessee Advisory Committee to the
United States Commission on Civil Rights**



U. S. Commission on Civil Rights

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