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Assessing the Ad Hoc Nature of Financial Obligations Arising in the ILLINOIS CRIMINAL JUSTICE SYSTEM

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A New York state bill known as the “Madoff” bill received national attention last year because it would have required wealthy defendants to bear the costs of their incarceration.¹ The bill’s namesake, Bernard Madoff, is serving a 150-year prison sentence for defrauding thousands of investors out of billions of dollars through a massive Ponzi scheme. In explaining the rationale behind the name, the bill’s sponsor said, “[H]e’s a poster person for somebody who has gained monetarily by breaking the law—and is going to continue to victimize taxpayers by being in prison for the rest of his life and getting three square meals a day.”²

What the sponsor did not mention, however, are the people that Madoff *actually* victimized, such as those whose life savings were completely wiped out by his scheme. Even if the court had ordered Madoff to pay restitution to each victim, funds were very unlikely to be enough to cover these losses. Rather than increase the likelihood that these victims would get back what they lost, the Madoff bill sought to add the state of New York to the line of those looking for their share of this finite supply of funds.

This disconnect between the political popularity of using people in the criminal justice system to generate revenue and the practical consequences of these plans has manifested itself in state legislatures all over the country. To move toward rationalizing the usually irrational system of criminal justice-related financial obligations, the Sargent Shriver National Center on Poverty Law last year issued a report entitled “Debt Arising from Illinois’ Criminal Justice System: Making Sense of the Ad Hoc Accumulation of Financial Obligations.”³

¹Assembly Bill 9055, 2009 Legis. (N.Y. 2009). As of this writing, this bill has not become law.

²M.J. Stephy, *Making Prisoners Pay—Literally*, TIME, July 22, 2009, <http://bit.ly/5EuP9K>.

³See my *Debt Arising from Illinois’ Criminal Justice System: Making Sense of the Ad Hoc Accumulation of Financial Obligations* (2009), <http://bit.ly/5ctPH5>.

Part of this endeavor was to show the extent to which these policies disproportionately have an impact on low-income defendants. More than half of the people leaving Illinois prisons end up in Chicago. Most are concentrated in six neighborhoods with the highest levels of poverty in the city.⁴ More than half of the people released in 2001 did not finish high school.⁵ In a study of men returning home to Chicago after being incarcerated in Illinois prisons, one out of five men reported owing money because of child support, fines, restitution, court costs, supervision fees, and other types of financial obligations. Of this group, nearly three-fourths found those debts difficult to pay down.⁶

The report focused on taking stock of the different types of financial obligations. The authority for these financial obligations is scattered throughout Illinois statutes, giving them different names, such as fines, penalties, assessments, fees, costs, and surcharges. How the criminal justice system treats a financial obligation, however, depends on its purpose, not its label. Restitution makes the victim whole by requiring the defendant to pay an amount that covers the victim's loss.⁷ Fines punish the defendant for his actions, and fees recoup the government's costs in labor and services.⁸ This assessment led to the three key findings below, which I expand upon so that advocates can assess the criminal justice-related financial obligations in their own states.

Restitution Does Not Receive Top Priority

The report found that Illinois did not prioritize restitution over all other financial obligations.⁹ State law shows that restitution's priority in relation to fines and fees is, at best, ambiguous. For example, before a court can impose certain fines, it must consider the effect of that fine on the person's ability to pay restitution.¹⁰ This requirement suggests that restitution trumps these fines. However, if a person's financial obligations are being paid out of his cash bond, fines, along with court costs, are first in line. Only when fines and court costs are satisfied does the remainder of the cash bond go to restitution.¹¹

This ambiguity does not exist in other states. The Wisconsin legislature, for example, directs the payment of financial obligations in the following order: (1) restitution, (2) fines, (3) costs and fees, and (4) reimbursement of court-appointed counsel.¹² Similarly Arizona and North Carolina prioritize restitution over all other payments, including fines, to the state.¹³

Like these states, Illinois should give restitution top priority. The purpose of restitution is twofold: to make victims whole and to require defendants to pay for the costs that arise from their actions.¹⁴ Only restitution helps individual victims directly; other financial obligations, if they do help victims, subsidize services gener-

⁴Nancy G. LaVigne et al., Urban Institute Justice Policy Center, *A Portrait of Prisoner Reentry in Illinois* 48, 51 (2003), <http://bit.ly/7nbTGP>.

⁵*Id.* at 29, fig. 14.

⁶Nancy G. LaVigne et al., Urban Institute, *Chicago Prisoners' Experiences Returning Home* 10 (2004), <http://bit.ly/8Ya6g3>.

⁷See, e.g., *People v. Villanueva*, 596 N.E.2d 1182, 1187 (Ill. 1992).

⁸See *People v. Jones*, 861 N.E.2d 967, 975 (Ill. 2006).

⁹Debt Arising from Illinois' Criminal Justice System, *supra* note 3, at 7–8 (Nov. 2009).

¹⁰730 ILL. COMP. STAT. 5/5-9-1(d)(2) (2009).

¹¹730 ILL. COMP. STAT. 5/5-5-6(e).

¹²Wis. STAT. § 973.20(12)(b) (2009).

¹³ARIZ. REV. STAT. ANN. § 13-809(A) (2009); N.C. GEN. STAT. § 7A-304(d)(1) (2009).

¹⁴See, e.g., *Villanueva*, 596 N.E.2d at 1187.

ally.¹⁵ Because restitution considers both parties, it is more likely than fines and fees to repair the harm caused by helping the victim and holding the defendant accountable. Given its potential for restoring justice, restitution in Illinois and other states should be prioritized over all other financial obligations.

Fees Have Rapidly Grown Within a Short Period

In the area of fees, the report noted the rapid growth of these types of financial obligations in a relatively short period, especially fees to the clerk of the circuit court of Cook County, Illinois.¹⁶ Cook County houses the largest unified court system and the largest jail in the country.¹⁷ Aimed at cost recovery, these fees tend to be triggered simply by a conviction or judgment of guilty. Instead of courts, legislative bodies set the amount of these fees; thus they apply regardless of the seriousness of the underlying offense.

For a misdemeanor conviction, a person pays \$250 in fees to the circuit clerk. A felony conviction brings that number up to \$355. More than 40 percent of those amounts come from the filing fee and goes into the county general fund.¹⁸ Nine different fees account for the remainder

of the money. This money is earmarked for specific activities, such as

- covering the medical costs of people in the custody of the Cook County Jail,¹⁹
- automating court records,²⁰
- providing security for the courthouse,²¹
- operating children's advocacy centers,²² and
- funding diversion courts for youth and people with mental health or drug problems.²³

Focusing on those nine fees, we see that what emerges is a trend of imposing more fees on people with convictions. The Cook County Board of Commissioners created four out of the nine fees between 2005 and 2008.²⁴ A fifth fee, while not new, was expanded in 2008 to apply to all criminal convictions and judgments of guilty, not just traffic convictions.²⁵ Through this expansion, the county board essentially created a new fee that had not existed in the county's criminal justice system. As for three other fees, their creation may not have been recent, but they did experience significant growth during the same period between 2005 and 2008. Two fees earmarked for automating court records tripled, going from \$5 to \$15 each.²⁶ An-

¹⁵See, e.g., Illinois Attorney General, Helping Crime Victims: Violent Crime Victim Assistance (VCVA) (for victims of violent crimes, a fund generally subsidized by fees collected under the Violent Crime Victims Assistance Act), <http://bit.ly/5I3Qic>.

¹⁶See, e.g., Debt Arising from Illinois' Criminal Justice System, *supra* note 3, at 17.

¹⁷Heather O'Donnell & Ralph Martire, Cook County's Revenue System Is Structurally Unable to Support the Public Services It Provides 1 (2007), <http://bit.ly/8kVjKF>.

¹⁸For filing fees, see the Criminal and Quasi-Criminal Costs section of the Circuit Court of Cook County's filing costs form at <http://bit.ly/6zYCYz>.

¹⁹See COOK COUNTY CODE ch. 46, § 3(a) (2009).

²⁰See *id.* ch. 18, § 33 (court automation fee), § 34 (court clerk document storage fee).

²¹See *id.* ch. 18, § 32.

²²See *id.* ch. 18, § 41.

²³See *id.* ch. 18, § 36 (mental health court fee), § 37 (peer and teen court fees), § 38 (drug court fee).

²⁴See Cook County Ordinance Authorizing Cook County to Collect a Fee to Finance Its Mental Health Court, No. 05-O-11 (Feb. 1, 2005); Cook County Ordinance Authorizing Cook County to Collect a Fee to Finance Its Peer or Teen Court, No. 05-O-15 (March 1, 2005); Cook County Ordinance Authorizing Cook County to Collect a Fee to Finance Its Drug Courts, No. 06-O-39 (Oct. 17, 2006); Cook County Ordinance Authorizing the Circuit Court of Cook County to Establish a Fee to Finance Children's Advocacy Centers, No. 08-O-04 (Dec. 18, 2007).

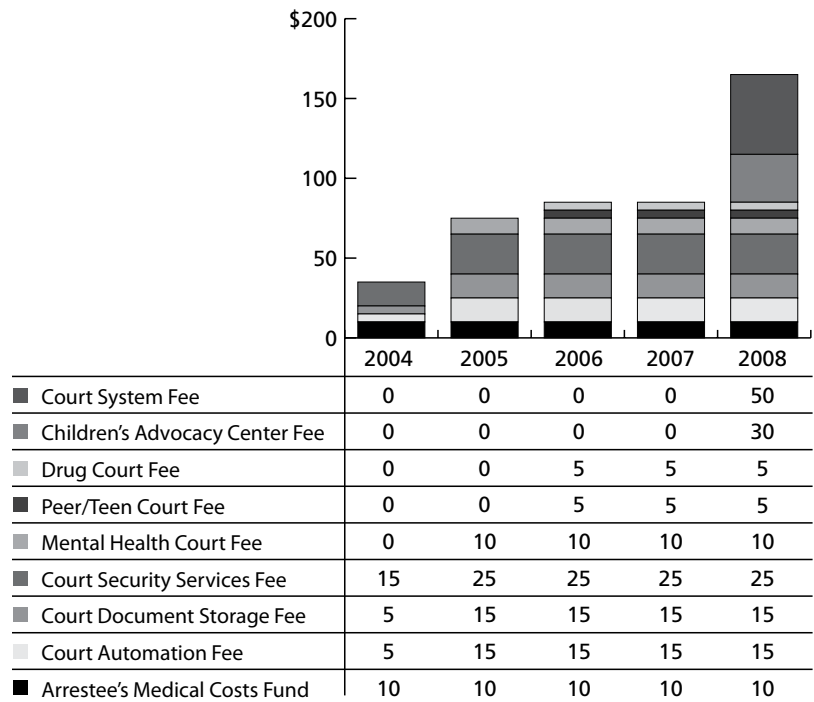
²⁵See Cook County Board of Commissioners, New Items 3 (Feb. 6, 2008) (court system fee), <http://bit.ly/6Xjwtd>.

²⁶Cook County Board of Commissioners, Post Board Action Agenda 26 (Sept. 20, 2005) (increasing the court automation fee and the court document storage fee), <http://bit.ly/5i42GG>.

other fee for court security services increased by 66 percent.²⁷ Out of nine fees, only one fee remained constant.²⁸

Increases of a few dollars here and there may seem insignificant when the framework is an individual fee, especially for legislators passing these fee increases. In the aggregate, however, these increases paint a different picture. As Table 1 shows, a felony defendant today owes over *four* times as much in fees to Cook County as he would have owed in 2004. Where he would have paid \$35 in 2004, the amount due today would be \$165. These increases, however, are not limited to Cook County. Rather, they reflect a trend in the state as a whole because Cook County may not increase these fees without authority from the Illinois General Assembly to do so.²⁹ Each of these increases, therefore, reflects a decision by the General Assembly to impose more fees on people in the criminal justice system. It is time for both legislative bodies to consider the cumulative impact of these fee increases, especially when the trigger for these fees is a conviction for *any* offense.

Table 1.—County Fees Assessed on People with Felony Convictions in Cook County, 2004–2008



Drug Offenses Generate Significant Financial Obligations

When the Illinois General Assembly does choose specific offenses as triggers for financial obligations, it has often chosen drug-related offenses. Given how often drug convictions are processed in the criminal justice system, there is a danger of relying too heavily on this population to generate revenue.

A case study using a conviction for Class 4 felony possession of controlled substances is particularly illuminating. As

the lowest-level drug offense in Illinois, Class 4 felony drug possession accounts for the highest percentage of the Illinois Department of Corrections' incoming population. In 2004, more people were sent to Illinois prison for possession of a controlled substance than for any other single criminal offense.³⁰ The number of people committed to the corrections system for Class 4 felony drug offenses in 2004 amounts to twice the number ten years earlier, significantly contributing to an overall increase in admissions to the corrections system over that period.³¹

²⁷Cook County Ordinance Increasing the Court Security Services Fee Collected by the Circuit Court of Cook County, No. 08-O-19 (Feb. 20, 2008) (increasing fee from \$15 to \$25), <http://bit.ly/8QzKXJ>.

²⁸See Act of August 14, 1996, 1996 Ill. Laws 676 § 5 (creating the fee for the Arrestee's Medical Costs Fund and setting the fee at \$10, the same amount that it is today).

²⁹See, e.g., Cook County Board of Commissioners, *supra* note 25 (showing that all increases of Cook County's court automation fee and court document storage fee followed statewide legislation allowing counties to increase these fees).

³⁰See Jessica Ashley & Christopher Humble, *A Profile of Class 4 Felony Offenders Sentenced to Prison in Illinois*, RESEARCH BULLETIN, Dec. 2005, at 3 (“[d]rug offenders constituted 55 percent of Class 4 felony offenders committed to [Illinois Department of Corrections] in SFY04, with 94 percent having convictions for possession of a controlled substance”), <http://bit.ly/5wXPeC>; see also Chicago Metropolitan 2020, 2006 Crime and Justice Index 19 (2006), <http://bit.ly/6QkV4x>. For purposes of this article, the Illinois Department of Corrections' incoming population does not include people who go back to prison for violating parole.

³¹Ashley & Humble, *supra* note 30, at 1–2.

As of January 2010, a person convicted of Class 4 felony possession for the first time in Cook County will incur a minimum of \$1,445 in financial obligations. Nearly half of that amount comes from fees triggered simply by the felony conviction—namely, fees to the circuit clerk described earlier and fees to the state’s attorney who prosecuted the case.³² An additional fee is imposed to help finance a deoxyribonucleic acid (DNA) database.³³

The remainder of the \$1,445 arises from six fines imposed on drug-related offenses. Proceeds from these fines flow into special revenue funds that finance the following activities:

- criminal labs,³⁴
- tests for performance-enhancing drugs,³⁵
- drug task forces,³⁶
- hospital trauma centers,³⁷
- research for a cure for spinal cord injury paralysis,³⁸ and
- either the state’s drug treatment fund or the county’s County Health Fund.³⁹

Illinois courts have classified these financial obligations as fines because these obligations are intended as penalties.⁴⁰ But the obligations operate more like fees because their values are fixed and not calibrated to punish the defendant in

proportion to his offense. Moreover, the proceeds are earmarked to fund specific activities and thus serve more of a cost-recovery purpose.

Although other offenses trigger similar types of fines, most of them are limited to one or two additional fines.⁴¹ Drug possession and delivery are the only offenses that trigger, on top of all the other financial obligations already assessed, six separate fines that fund loosely related activities. Given how prevalent these convictions are, advocacy is needed to ensure that the state does not add more financial obligations for a group that is much more likely to benefit from treatment than incarceration.

Note that \$1,445 is an incomplete figure. It includes only financial obligations whose amounts are fixed by statute and not those whose amounts are variable. A conviction for possession of controlled substances, for example, also comes with a fine equal to the street value of the controlled substance.⁴² The court adds \$14 for every \$40 already assessed in fines, the proceeds of which go to assist victims of violent crimes.⁴³ Additional proceeds go into various law enforcement funds.⁴⁴ Nor does the \$1,445 include correctional fees, such as monthly probation fees and fees assessed by jails and prisons. Table 2 summarizes all of the fines described above.

³²55 ILL. COMP. STAT. 5/4-2002.1(a) (2009).

³³See 730 ILL. COMP. STAT. 5/5-4-3(a), (j), (k).

³⁴See 730 ILL. COMP. STAT. 5/5-9-1.4(b).

³⁵See Act of August 7, 2009, 2009 Ill. Laws 132 § 10.

³⁶See Act of August 13, 2009, 2009 Ill. Laws 402 § 5.

³⁷See 730 ILL. COMP. STAT. 5/5-9-1.1(b).

³⁸See 730 ILL. COMP. STAT. 5/5-9-1.1(c).

³⁹See 720 ILL. COMP. STAT. 570/411.2(h)–(i).

⁴⁰See, e.g., *Jones*, 861 N.E.2d at 979–80 (classifying the drug assessment as a fine because, among other reasons, “the legislature did refer to the charge as a ‘penalty’ in subsection (f), a term which denotes a fine, not a fee”); *id.* at 981 (“Not only is [the Trauma Fund charge] called a fine, it is also referred to as an ‘addition to’ a ‘penalty.’”).

⁴¹E.g., only one fixed fine attaches to the unlawful use of a weapon; it is set at \$100, which goes to the Trauma Center Fund (730 ILL. COMP. STAT. 5/5-9-1.10). Even arson triggers only one fixed fine: \$500 that goes to the Fire Service and Small Equipment Fund (730 ILL. COMP. STAT. 5/5-9-1.12).

⁴²730 ILL. COMP. STAT. 5/5-9-1.1(a).

⁴³725 ILL. COMP. STAT. 240/10.

⁴⁴730 ILL. COMP. STAT. 5/5-9-1(c).

Table 2.—Financial Obligations for a Conviction for Class 4 Felony Possession of Controlled Substances

Triggering Event	Type of Financial Obligation	Amount
Felony conviction	Filing fee for felony complaint	\$190
Felony conviction	State's attorney fee for felony conviction	\$60
Preliminary hearing	State's attorney fee for preliminary hearing	\$20
First felony conviction	State DNA identification system fee	\$200
Conviction	Court automation fee	\$15
Conviction	Document storage fee	\$15
Conviction	Court security services fee	\$25
Conviction	Court system fee	\$50
Conviction	Diversion court fees	\$20
Conviction	Arrestee's medical costs fund fee	\$10
Conviction	Children's advocacy center fee	\$30
Conviction	Juvenile expungement fee	\$30
Drug-related conviction	Trauma fund	\$100
Drug-related conviction	Spinal injury paralysis cure research fund	\$5
Drug-related conviction	Performance-enhancing substance testing fund	\$50
Drug-related conviction	State police services fund	\$25
Drug-related conviction	Drug assessment	\$500
Drug-related conviction	Crime lab drug analysis	\$100
	Fixed subtotal	\$1,445
Conviction	Violent crime victims assistance	\$4 for every \$40 in fines
Conviction	Criminal and traffic conviction surcharge	\$10 for every \$40 in fines
Drug-related conviction	Fine for drug-related offenses	Street value of controlled substance

Policy Making on Financial Obligations Often Lacks Coordination

This growth in fixed fines and fees, whether triggered by any conviction or certain offenses, means that the decisions about how much to charge defendants are shifting from courtrooms to legislatures. Yet when the Illinois General Assembly made policy on criminal justice-related financial obligations, the policymaking lacked coordination, the consequences of which bear most heavily on low-income defendants.

This disconnect manifests itself in the story of the DNA analysis fee. In Illinois every person convicted of a felony offense must submit his DNA to a database operated by the state police. To help cover the costs of operating this database, he must also pay the DNA analysis fee.⁴⁵ When this fee was first created in 1998, it cost \$500.⁴⁶ Courts could waive this cost for defendants who could not pay.⁴⁷

Unlike most other financial obligations, this fee has decreased, rather than increased, since its creation. In 2002 the Illinois General Assembly lowered the fee by 60 percent to \$200. This fee also became mandatory, that is, the court may no longer waive it.⁴⁸ To ease the burden on defendants, the Illinois General Assembly added a provision allowing defendants to enter into a twenty-four-month payment plan if they cannot pay the fee at sentencing.⁴⁹

In making these changes, legislators believed that this fee would generate more

revenue if it was set at a lower, more realistic amount. Even then, however, they knew that not everyone was going to be able to pay. The bill's sponsor, Rep. Tom Cross, explained: "[T]here are about 75–77,000 convicted felons in the State of Illinois. The hope is that about half of those are on probation as opposed to going to the Department of Corrections and realistically we can expect those people to pay this \$200."⁵⁰

Consequently, he later elaborates, "[W]e're only really focusing on those on probation, not those incarcerated where we're gonna collect the \$200."⁵¹ Rather than tailor the bill to people on probation, the Illinois General Assembly, knowing that people who are sentenced to prison probably cannot pay the fee, made this fee mandatory.

What the legislators failed to consider, however, were the consequences of nonpayment. A month before the Illinois General Assembly approved these changes, it passed legislation allowing the circuit court clerks to report unpaid fees and fines to credit-reporting agencies.⁵² A person who leaves the Illinois Department of Corrections without having paid his DNA analysis fee, therefore, risks the delinquent debt showing up on his credit report.

Employers used to check credit reports only for certain positions, such as caretakers and money-handlers. As of 2004, however, over 40 percent of employers checked a job applicant's credit and often used debt as an indicator of intangibles such as poor judgment or lack of

⁴⁵730 ILL. COMP. STAT. 5/5-4-3(a), (j)–(k).

⁴⁶Act of July 22, 1997, 1997 Ill. Laws 130 § 30.

⁴⁷Act of August 22, 2002, 2002 Ill. Laws 829 § 5 (deleting from 730 ILL. COMP. STAT. 5/5-4-3(j) the following language: "Upon verified petition of the person, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.").

⁴⁸92d Gen. Assemb., H. Rep. Transcription Deb., 132d Legis. Day 27 (Ill. 2002) (legislators noting that the bill was taking away judicial discretion to waive this fee), <http://bit.ly/6u7Enp>.

⁴⁹730 ILL. COMP. STAT. 5/5-4-3(j). The General Assembly expanded the pool of payers from only sex offenders to all felony offenders (Act of July 22, 1997, 1997 Ill. Laws 130 § 30).

⁵⁰92d Gen. Assemb., H. Rep. Transcription Deb., 132d Legis. Day 37 (Ill. 2002) (statement of Ill. State Rep. Tom Cross), <http://bit.ly/6u7Enp>.

⁵¹*Id.* at 44–45.

⁵²Act of July 11, 2002, 2002 Ill. Laws 653; see also 725 ILL. COMP. STAT. 5/124A-10.

character.⁵³ A person still carrying debt from the criminal justice system therefore has two strikes against him in his job hunt—a criminal history and a poor credit report—thus impairing his chances for earning the money that he needs to pay down his debts and that the state needs to support the different activities funded by these financial obligations. At a time when negative credit reports increasingly yield negative employment consequences, the legislature’s practice of setting a fee at an amount that only half of the correctional population can pay creates yet another barrier to successful reentry.



Like many other states, Illinois is in the midst of seriously reconsidering how it

sustains itself financially by assessing its tax system and other means of generating revenue. The people of this state should consider whether it makes sense to look to the criminal justice system for revenue, especially when so many people in the system are poor and will continue to be poor because of their criminal records and the debt with which they are saddled. Illinoisans should also consider how to prioritize those financial obligations, especially where restitution is involved. Relying on an ad hoc accumulation of financial obligations will not bring the government closer to resolving these issues, nor will it enhance public safety or bolster the budget. The time has come to rationalize the financial obligations in the criminal justice system.

COMMENTS?

We invite you to fill out the comment form at www.povertylaw.org/reviewsurvey. Thank you.

—The Editors

⁵³Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, NEW YORK TIMES, Aug. 7, 2009, at A1, <http://bit.ly/5tYzQP>.



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