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Griffin v. Illinois: Justice Independent of Wealth

Neil Sobol
Texas A&M University School of Law, nsobol@law.tamu.edu

GRIFFIN V. ILLINOIS: JUSTICE INDEPENDENT OF WEALTH?

Neil L. Sobol*

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[1]
>
> —Justice Hugo Black (1956)
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> "My work with the poor and the incarcerated has persuaded me that the opposite of poverty is not wealth; the opposite of poverty is justice."[2]
>
> —Bryan Stevenson (2014)

I. INTRODUCTION

Justice Hugo Black's frequently quoted comment from *Griffin v. Illinois*[3] reflects a fundamental notion that justice should not depend on the financial resources of a defendant.[4] Unfortunately, more than sixty years after Justice Black's warning, the American justice system remains

 Professor of Law, Texas A&M University School of Law. J.D., *cum laude*, Order of the Coif, Southern Methodist University; M.S. and B.A., with distinction, Stanford University. This Article was inspired by a panel organized by Professors Cynthia Alkon and Catherine Hancock for the 2018 Southeastern Association of Law Schools Conference regarding the impact of the Warren Court on the Criminal Justice System. Stetson University College of Law did an outstanding job of hosting a symposium on the issue. I appreciate the hospitality shown by the editors and staff of the *Stetson Law Review* and Professors Marco Jimenez and Ellen Podgor. I am grateful for the feedback I received at the symposium and the editorial suggestions I received during the editing process. Above all, I appreciate the support and understanding from my wife, Rebecca, and my daughters, Megan, Aubrey, and Ella.

1. Griffin v. Illinois, 351 U.S. 12, 19 (1956).
2. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 18 (2014).
3. 351 U.S. 12 (1956).
4. *Id.* at 19; *see* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 107 (2000) (characterizing Justice Black's statement as "one of the most famous sentences in the *United States Reports*"); Bertram F. Willcox & Edward J. Bloustein, *The* Griffin *Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 9 (1957) (declaring that *Griffin* states "clearly, and for the first time, that a state may not condition a person's assertion of basic legal rights on financial ability").

a two-tier system, reflecting Bryan Stevenson's concerns that many defendants face injustice because of their poverty.[5]

Under the current system, indigent defendants are more likely to face difficulty obtaining adequate representation, more likely to be jailed before trial, more likely to plead guilty to avoid continued incarceration, more likely to face difficulty with fees assessed during incarceration, more likely to face continued monetary charges while on probation or parole, and more likely to face incarceration based on inability to pay criminal justice debt.[6] Moreover, the collateral consequences arising from these differences are significant, often trapping indigent defendants and their families in a never-ending cycle of debt, leading to additional confrontations with the justice system, and creating fear and distrust.[7]

This Article describes *Griffin* and its impact on jurisprudence regarding a defendant's ability to pay on the justice the defendant receives. In many ways, *Griffin* laid the foundation for case law and legislation designed to address equal protection and due process concerns for defendants who lack financial resources.[8] Unfortunately, despite subsequent rulings and statutes, actual practice shows that the justice system, instead of providing justice independent of wealth, remains a two-tier system with wealthy defendants receiving justice while those without resources face injustice.[9]

This Article proceeds in three Parts. Part II focuses on the promise of *Griffin* and its progeny of Supreme Court cases to foster a system where justice is independent of a defendant's wealth or income level. Unfortunately, as Part III illustrates, the equal justice promise of *Griffin* has gone largely unfulfilled in modern society. Indigent defendants confront and struggle with a different system of justice than defendants who have financial resources. Moreover, such a system creates collateral consequences that tend to perpetuate the inequities in the criminal justice system and society in general. Part IV identifies the hopes for

5. STEVENSON, *supra* note 2, at 18.

6. *See infra* pt. III.B (discussing the two-tier system of criminal justice that indigent defendants face).

7. TEX. APPLESEED & TEX. FAIR DEF. PROJECT, PAY OR STAY: THE HIGH COST OF JAILING TEXANS FOR FINES & FEES 4–6 (2017).

8. Note, *Fining the Indigent*, 71 COLUM. L. REV. 1281, 1281 (1971).

9. *See infra* pt. III.B. The concept of access to justice is related to the idea of equal justice; however, it focuses on the ability of the system to provide resources to defendants. The question of access to justice is beyond the scope of this Article. For more information, see, e.g., Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001); Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47 (2003); Jennifer M. Smith, *Rationed Justice*, 49 SUFFOLK U. L. REV. 353 (2016).

restoring the promise of *Griffin*. Specifically, it presents an overview of some reforms and recommendations to help the system move away from Bryan Stevenson's concerns over the injustice of poverty to better reflect the promise of Justice Hugo Black's concept of equal justice.

II. THE PROMISE: JUSTICE NOT DEPENDENT ON WEALTH

This Part describes the development of Justice Black's notion that justice provided to defendants should not be dependent on one's financial resources. It provides a brief analysis of *Griffin* and develops how subsequent Supreme Court cases have expanded the reach of *Griffin*'s equal justice.

A. *Griffin v. Illinois*—Establishing the Promise

Interestingly, *Griffin*, the case generally cited for establishing the concepts of equal justice for indigent defendants in the criminal justice system, dealt with an indigent's struggle at the appellate rather than trial stage.[10] Specifically, the issue in *Griffin* was whether the requirement that defendants pay a fee for a trial transcript necessary for an appeal violated the due process and equal protection rights of indigent defendants.[11] An Illinois county criminal court had convicted Judson Griffin and James Crenshaw of armed robbery. Griffin and Crenshaw filed a request for a certified copy of the record, including a trial transcript, so that they could appeal their convictions under state law. Their request asserted that they were "'poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal.'"[12] The trial court denied the request without a hearing.[13] While Illinois law waived transcript fees for indigent defendants in capital cases, it generally did not permit waiver in other criminal matters.[14]

Similarly, the trial court, without hearing any evidence, denied a request under the Illinois Post-Conviction Hearing Act claiming that the refusal to provide the transcript to the indigent defendants violated due

10. Willcox & Bloustein, *supra* note 4, at 1–2 (predicting that *Griffin* would be a "milestone" case because its analysis was "broad enough to apply to many other of the injustices arising from the poverty of litigants").

11. Griffin v. Illinois, 351 U.S. 12, 13, 16 (1956).

12. *Id.* at 13.

13. *Id.* at 15.

14. *Id.* at 14 (citing 38 ILL. REV. STAT. § 769a (1955)).

process and equal protection.[15] The Illinois Supreme Court affirmed the decision on the basis that no substantial state or federal constitutional grounds were raised.[16] On appeal, the United States Supreme Court vacated the judgment and remanded the matter.[17]

Justice Black authored the plurality opinion joined by Chief Justice Warren and Justices Clark and Douglas.[18] Justice Frankfurter filed a concurring opinion,[19] and the remaining four justices dissented.[20]

In his decision, Justice Black referred to both due process and equal protection concerns.[21] He stated that the clauses "call for procedures in criminal trials which allow no invidious discriminations between persons . . . [so that] all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"[22] Further, he acknowledged that the concept that treatment under the law should not be dependent on one's wealth was not a new idea, instead, "[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem."[23] He compared discrimination based on poverty to other forms of discrimination: "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."[24]

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15. *Id.* at 15 (citing 38 ILL. REV. STAT. §§ 826–832 (1955)).
16. *Id.* at 15–16.
17. *Id.* at 20.
18. *Id.* at 13.
19. *Id.* at 20.
20. *Id.* at 26.
21. *Id.* at 16–17. A detailed analysis of the constitutional basis for *Griffin* is beyond the scope of this Article. Judges and scholars have addressed Justice Black's reliance on the due process and equal protection clauses. *See, e.g.*, Douglas v. California, 372 U.S. 353, 361 n.1 (Harlan, J., dissenting) (declaring that *Griffin* relied "on a blend of the Equal Protection and Due Process Clauses"); Ralph S. Abascal, *Municipal Services and Equal Protection: Variations on a Theme by* Griffin v. Illinois, 20 HASTINGS L.J. 1367, 1376 (1969) (stating *Griffin* "presented a dominant equal protection question, yet Justice Black persisted in averting to the due process clause as well"); Willcox & Bloustein, *supra* note 4, at 2 (stating that *Griffin* was "the first time the Supreme Court has addressed itself squarely to the impact of poverty on constitutional rights under the due process and equal protection clauses of the fourteenth amendment"). Additionally, Willcox and Bloustein, citing five law review articles written shortly after *Griffin*, state that "[m]ost law review commentators consider that the *Griffin* decision was based both on due process and on equal protection." *Id.* at 10 n.39 (citations omitted). For recent discussions of the constitutional basis for *Griffin*, see Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 62–64 (2019) (asserting that *Griffin*'s reliance on both due process and equal protection concerns laid the basis for scrutiny different than the traditional notions of scrutiny associated with either clause and applying this approach to voter disenfranchisement based on the inability to pay criminal justice debt); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2019) (adopting the term "equal process" to describe the combined application of the equal protection and due process clauses to constitutional concerns regarding wealth inequality).
22. *Griffin*, 351 U.S. at 17 (citing Chambers v. Florida, 309 U.S. 227, 241 (1940)).
23. *Id.* at 16.
24. *Id.* at 17.

Inability to pay does not mean a defendant should be denied justice, as Justice Black elaborated, "[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."[25]

Moreover, Justice Black asserted that concerns about discrimination should not be limited to trial but extend to appellate review.[26] He commented, "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."[27] While Justice Black conceded that states are not required to provide an appellate review, he found that if states do establish an appeal process, then states cannot discriminate based on an appellant's inability to pay.[28]

Justice Black acknowledged that given the substantial number of reversals of criminal convictions, states recognize the importance of the appellate process to the final determination of guilt.[29] As a result, he concluded with his often-quoted statement: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[30]

The four dissenting Justices sympathized with the notion that a state should pay for the indigent defendant's transcript; however, they declared that the matter did not rise to the level of a federal constitutional violation. Instead, the dissenters felt that the issue should remain a matter of state policy.[31] In response, Justice Black asserted that while the case did raise a federal constitutional violation, it did not require that states pay for the transcripts for appeals for all indigents—instead, states can establish corrective rules "of affording adequate and

25. *Id.* at 17–18.
26. *Id.* at 18.
27. *Id.*
28. *Id.*
29. *Id.* at 18–19 (citing Note, *Reversals in Illinois Criminal Cases*, 42 HARV. L. REV. 566, 566–67 (1929)).
30. *Id.* at 19.
31. *Id.* at 28 (Burton and Minton, JJ., with Harlan and Reed, JJ., dissenting) (stating that the Constitution does not mandate that a state make "defendants economically equal before its bar of justice" even though it "may be a desirable social policy"). Similarly, in a separate dissenting opinion, Justice Harlan asserts, "[h]owever strong may be one's inclination to hasten the day when *in forma pauperis* criminal procedures will be universal among the States, I think it is beyond the province of this Court to tell Illinois that it must provide such procedures." *Id.* at 39 (Harlan, J., dissenting).

effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases."[32]

Justice Frankfurter concurred in the judgment. Like the Justices in the plurality opinion, he recognized that due process does not require appeals and that states may limit appeals to death penalty matters, but that states may not "shut off means of appellate review for indigent defendants" by requiring payment for a trial transcript.[33] According to Justice Frankfurter, if a state sets up an appellate process, "it cannot make lack of means an effective bar to the exercise of this opportunity."[34] He also agreed that the state should be able to establish requirements for appeal by indigents whether it be by providing the transcript or other means.[35]

His concurrence added two major concepts that relate to concerns about the expenses that a state may incur based on the Court's decision. First, he pointed out that states can establish procedures to prevent the public subsidy of frivolous appeals.[36] As he stated, the State should "neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."[37] Second, Justice Frankfurter asserted that the Court's pronouncement should only apply on a prospective basis.[38]

B. The *Griffin* Progeny—Spreading the Promise

Griffin provided the foundation for the Supreme Court to develop the law regarding the treatment of indigent defendants in the criminal justice system.[39] Since its publication in 1956, more than 3,380 cases have cited *Griffin*, and the Supreme Court has referred to it on at least 120 occasions.[40] This Part will briefly address the Supreme Court's application of the equal justice concepts from *Griffin* to criminal justice matters.[41]

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32. *Id.* at 20.
33. *Id.* at 22–23 (Frankfurter, J., concurring).
34. *Id.* at 24.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 25. The four dissenting Justices also sided with Justice Frankfurter's theory against retroactive application. *Id.* at 29 (Burton and Minton, JJ., with Harlan and Reed, JJ., dissenting).
39. *See, e.g.*, John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1217 (1999) (declaring that *Griffin* "marks the beginning of a new phase of the Court's equal protection jurisprudence").
40. Based on a Westlaw KeyCite review on December 31, 2019.
41. A detailed analysis of the individual cases discussed is beyond the scope of this Article. Many of them have already been the subject of substantial legal scholarship. Additionally, this

1. Transcript Fees

Griffin would become the "watershed" case for matters involving monetary charges for transcripts.[42] For example, in a per curiam opinion in *Eskridge v. Washington State Board of Prison Terms & Paroles*,[43] the Court relied on *Griffin* to find that the court's refusal to provide an indigent defendant a trial transcript based on the trial court's determination of no reversible error at trial violated the defendant's Fourteenth Amendment rights.[44] The Court found that the trial court's decision on the matter was not "an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript."[45] As with *Griffin*, the Court allowed for the possibility of states offering alternatives to free transcripts as long as states provide indigent defendants "as adequate appellate review as defendants who have money enough to buy transcripts."[46]

Similarly, in *Draper v. Washington*,[47] the Court applied *Griffin* and *Eskridge* to find that a trial court's denial of the requests by indigent defendants for free trial transcripts on the basis that their assignment of errors was frivolous violated their Fourteenth Amendment rights.[48] The Court found the determination that a case was frivolous was an "inadequate substitute for the full appellate review available to nonindigents in Washington, when the effect of that finding is to prevent an appellate examination based upon a sufficiently complete record of the trial proceedings themselves."[49]

Fifteen years after *Griffin*, the Court extended its holding from felony cases involving incarceration to matters where the sentences

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Article does not discuss the Court's use of *Griffin* in the civil context. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) (applying *Griffin* to civil proceeding involving the termination of parental rights); Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (applying *Griffin* to the state's system of denying welfare recipients the ability to divorce because they were unable to pay court fees and costs). *See also* Abascal, *supra* note 21, at 1376 (asserting *Griffin* should apply to the unequal provision of municipal services).

42. Mayer v. City of Chicago, 404 U.S. 189, 193 (1971); *see* 3 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 11.2(d) (4th ed. 2018) (stating that *Griffin* "spawned a long line of Supreme Court and lower court cases dealing with the indigent defendant's right to a transcript provided at state expense"). A related matter, beyond the scope of this Article, is how courts determine if an individual qualifies for the state's payment of a trial transcript. *See* Ronald A. Case, Annotation, *Determination of Indigency of Accused Entitling Him to Transcript or Similar Record for Purposes of Appeal*, 66 A.L.R.3D 954 (1975).

43. 357 U.S. 214 (1958) (per curiam).

44. *Id.* at 216.

45. *Id.*

46. *Id.* (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

47. 372 U.S. 487 (1963).

48. *Id.* at 499–500.

49. *Id.*

were limited to fines. In *Mayer v. City of Chicago*,[50] the Court reasoned that "[t]he size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case."[51]

Mayer arose from an incident that occurred at a 1969 demonstration in Chicago that was part of the Days of Rage organized by the Weathermen, an anti-war group.[52] Jack Mayer, a third-year medical student serving as a first-aid assistant, allegedly got into a skirmish with a police officer and prevented officers from moving an injured party.[53] Mayer was charged with and convicted of violating two city ordinances regarding disorderly conduct and interference with a police officer.[54] The maximum penalty for the violation of each ordinance was $500 and had no incarceration option.[55] The trial court assessed a $250 fine for each violation.[56] Although the trial court found that the defendant was indigent, the court denied his request for a free transcript for his appeal on the basis that the Illinois Supreme Court rule applied only to felonies.[57] The Illinois Supreme Court also denied the defendant's request.[58]

On appeal, the United States Supreme Court not only extended *Griffin* to non-felony matters but also identified current concerns relating to the abuses associated with criminal justice debt. For example, the Court referred to the collateral consequences associated with a conviction, including the inability to obtain a medical license:[59]

> The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when . . . the impecunious medical student finds himself barred from the

50. 404 U.S. 189 (1971).

51. *Id.* at 196.

52. For more information about the Weathermen and the Days of Rage, see BRYAN BURROUGH, DAYS OF RAGE: AMERICA'S RADICAL UNDERGROUND, THE FBI, AND THE FORGOTTEN AGE OF REVOLUTIONARY VIOLENCE (2015).

53. City of Chicago v. Mayer, 308 N.E.2d 601, 602–03 (Ill. 1974). Mayer refused to allow the officers to move the injured man claiming he "was paralyzed from the waist down and had a probable spine injury." *Id.* at 603.

54. *Mayer*, 404 U.S. at 190.

55. *Id.*

56. *Id.*

57. *Id.* at 190–91.

58. *Id.* at 193.

59. *Id.* at 197. *See infra* pt. III.B.2 (discussing the collateral consequences that indigent defendants currently face in the criminal justice system).

> practice of medicine because of a conviction he is unable to appeal for lack of funds.[60]

Similarly, the Court warned that the state's reliance on financial concerns could create tension in the relationships that citizens have with police and trial courts:[61]

> "[I]t is the police and the lower court Bench and Bar that convey the essence of our democracy to the people. . . ." Arbitrary denial of appellate review of proceedings of the State's lowest trial courts may save the State some dollars and cents, but only at the substantial risk of generating frustration and hostility toward its courts among the most numerous consumers of justice.[62]

2. Other Appellate Fees

A relatively small step from *Griffin*'s analysis of transcript fees for appeals was the extension of *Griffin*'s rationale to cases involving other types of appellate fees.[63] For example, in *Burns v. Ohio*,[64] the Court addressed "whether a State may constitutionally require that an indigent defendant in a criminal case pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts."[65] The State tried to distinguish *Griffin* because the defendant had already received an appeal at the intermediate court level so that the State did not have to also pay for an appeal to the Ohio Supreme Court. Writing for the majority and relying on *Griffin*, Chief Justice Warren denied the distinction:

> This is a distinction without a difference for, as *Griffin* holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. This principle is no less applicable where the State has afforded an indigent defendant access to the first phase

60. *Mayer*, 404 U.S. at 197.

61. *Id.* at 197–98.

62. *Id.* (quoting Patrick V. Murphy, *The Role of the Police in Our Modern Society*, *in* 26 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 292, 293 (1971)).

63. *See* Willcox & Bloustein, *supra* note 4, at 17; *see also* Frederick G. Hamley, *Impact of* Griffin v. Illinois *on State Court-Federal Court Relationships*, 24 F.R.D. 75, 78 (1958) (stating that the "principle there announced [in *Griffin*] would apply to any court costs necessarily incurred in taking an appeal" and *Griffin* would probably apply to other appellate fees or expenses required by court rules or legislation).

64. 360 U.S. 252 (1959).

65. *Id.* at 253.

> of its appellant procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.[66]

The Court found that the denial of defendant's leave to appeal based on inability to pay a filing fee was, in certain respects, "more final and disastrous" than the denial of the payment of the transcript fee in *Griffin*.[67] The Court reasoned that the defendant in *Griffin* at least could still raise trial errors, while the defendant in *Burns* could not obtain any review from the Ohio Supreme Court.[68] The Court declared that imposing "financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."[69]

The Court would extend its analysis from *Griffin* and *Burns* to habeas corpus proceedings in *Smith v. Bennett*,[70] where Iowa required payment of filing fees for an application of writ or appeal.[71] Finding the requirement unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, the Court stated: "We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws."[72] The Court refuted the State's claim that the $4 fee was "an extremely nominal sum" declaring that "if one does not have it and is unable to get it the fee might as well be $400."[73]

3. Appointed Counsel

Shortly after *Griffin*, commentators predicted that *Griffin* would become the basis for requiring states to provide counsel to indigent defendants.[74] Seven years later, in *Douglas v. California*,[75] the Court would require California to provide appellate counsel for an indigent defendant.[76] The Court's decision was limited to criminal appeals

66. *Id.* at 257.
67. *Id.* at 258.
68. *Id.*
69. *Id.*
70. 365 U.S. 708 (1961).
71. *Id.* at 708.
72. *Id.* at 709.
73. *Id.* at 712.
74. *See* Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 (1956); Willcox & Bloustein, *supra* note 4, at 23–24.
75. 372 U.S. 353 (1963).
76. *Id.* at 355–58.

granted under California law as a matter of right.[77] The state appellate court had denied counsel for indigent defendants based on its review of the record and determination that "'no good whatever could be served by appointment of counsel.'"[78] On appeal, the United States Supreme Court, relying on *Griffin*, declared that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."[79] The Court found that California's procedures of denying appellate counsel to indigents violated the Fourteenth Amendment and precluded meaningful appeals for the poor.[80]

On the same day that the Court issued *Douglas*, the Court would release *Gideon v. Wainwright*[81]—its most famous case in the *Griffin* progeny.[82] Interestingly, the only mention of *Griffin* in *Gideon* is in a footnote in Justice Clark's concurrence, identifying *Griffin* as one of the "portents" of *Gideon*.[83]

Justice Black, however, the author of the plurality opinion in *Griffin*, wrote the unanimous decision in *Gideon*.[84] Under *Gideon*, the Court held that the Sixth Amendment, as incorporated through the Fourteenth Amendment, requires states to provide counsel to indigent defendants in felony trials.[85] In rendering its decision, the Court overruled *Betts v. Brady*,[86] a case involving "nearly indistinguishable"[87] facts where the Court had found that the Sixth Amendment's guarantee of the right to counsel only applied in federal courts.[88] Interestingly, in *Betts*, Justice Black authored a dissent not only urging the majority to apply the Sixth Amendment to state court felony trials but also concluding that due process required that the state provide counsel to indigent defendants.[89]

77. *Id.* at 356 (citing CAL. PENAL CODE §§ 1235, 1237).
78. *Id.* at 355 (quoting State v. Douglas, 10 Cal. Rptr. 188, 195 (1960)).
79. *Id.* at 357.
80. *Id.* at 357–58 (stating "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal").
81. 372 U.S. 335 (1963).
82. Jerold H. Israel, Gideon v. Wainwright—*From a 1963 Perspective*, 99 IOWA L. REV. 2035, 2036 (2014) (recognizing *Gideon* as "an icon of the American justice system"). As of December 31, 2019, Westlaw's KeyCite function had over 29,000 citing references to *Gideon*. A detailed discussion of *Gideon* is beyond the scope of this Article. *See* Randy J. Sutton, Annotation, *Construction & Application of Sixth Amendment Right to Counsel—Supreme Court Cases*, 33 A.L.R. FED. 2D 1 (2009).
83. *Gideon*, 372 U.S. at 348 n.2 (Clark, J., concurring); Israel, *supra* note 82, at 2042.
84. 372 U.S. at 336.
85. *Id.* at 341–44.
86. 316 U.S. 455 (1942).
87. *Gideon*, 372 U.S. at 339.
88. *Id.* at 339–40.
89. 316 U.S. at 474–75.

Gideon would allow Justice Black to revisit the ideas he stated in his dissent in *Betts*. Although the Sixth Amendment served as the basis of the Court's decision, the opinion included language reminiscent of Justice Black's concerns in *Griffin* that a defendant's lack of financial resources should not impact the administration of justice.[90] For example, Justice Black commented:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[91]

On the other hand, in *Ross v. Moffitt*,[92] the Court found that neither the Equal Protection nor the Due Process Clause allowed for the extension of *Douglas* to require the appointment of counsel for indigent defendants in discretionary appeals.[93] In reaching its conclusion, the Court traced the history of the treatment of indigents in state court appeals, beginning with *Griffin* and ending with the *Douglas* requirement that indigent defendants be provided counsel in their "first appeal as of right."[94]

Reconciling *Douglas* and *Ross*, the Court in *Halbert v. Michigan*[95] addressed whether an appeal for an indigent convicted following a plea was more like an appeal as a matter of right under *Douglas* requiring the state to provide counsel or like a discretionary appeal under *Ross* where state-funded counsel was not required.[96] The Court, relying on *Griffin* and *Douglas*, found that due process and equal protection required the "appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review."[97]

In *Evitts v. Lucey*,[98] the Court would extend its holding from *Griffin*, *Douglas*, and *Gideon* to require not only that indigent defendants be

90. 372 U.S. at 344.
91. *Id.*
92. 417 U.S. 600 (1974).
93. *Id.* at 610–12.
94. *Id.* at 605–07.
95. 545 U.S. 605 (2005).
96. *Id.* at 616–17.
97. *Id.* at 610.
98. 469 U.S. 387 (1985).

entitled to counsel on first right of appeal but also that they have effective assistance of counsel.[99] As the Court declared, "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel."[100]

4. Incarceration

While the previous Parts dealt with the use of *Griffin* to address inequities that arise at trial or on appeal in determining a defendant's guilt, the Court has also extended *Griffin*'s rationale to the treatment of convicted defendants.[101] Specifically, the analysis from *Griffin* has played a significant role in the Court's decisions relating to the use of incarceration based on a convicted defendant's inability to pay criminal justice debt.

In *Williams v. Illinois*,[102] the Court would first confront the "[s]ystematic discrimination against indigents in the disposition of convicted criminals."[103] The issue was whether the state could incarcerate defendants unable to pay fines and fees beyond a state's statutory maximum sentence period.[104] The trial court assessed Williams $5 in costs and imposed the maximum sentence for petty theft—one year in prison and a $500 fine.[105] Because Williams was unable to pay the monetary charges, the court added 101 days of incarceration, applying Illinois law that set a rate of $5 per day to pay down the amounts owed.[106] The United States Supreme Court, applying *Griffin*, found the process unconstitutional, concluding "that an indigent criminal defendant may not be imprisoned in default of payment of a fine

99. *Id.* at 397.

100. *Id.* Similarly, in *Ake v. Oklahoma*, the Court required that the state provide an indigent defendant psychiatric assistance if the defendant "has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial." 470 U.S. 68, 74 (1985). In reaching its conclusion, the Court cited *Griffin* and used language reminiscent of Justice Black's equal justice quotation by stating "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id.* at 76.

101. *Fining the Indigent*, *supra* note 8, at 1281.

102. 399 U.S. 235 (1970).

103. *Fining the Indigent*, *supra* note 8, at 1282.

104. *Williams*, 399 U.S. at 236.

105. *Id.*

106. *Id.* at 236–37 (citing ILL. CRIM. CODE § 1–7(k) (1961)).

beyond the maximum authorized by the statute regulating the substantive offense."[107]

In its opinion, the Court recognized that the nonpayment of criminal justice debt had become "a major cause of incarceration"[108] and included an appendix providing a state-by-state description of statutory provisions relating to incarceration for failure to pay fines.[109] Moreover, the Court acknowledged that *Griffin* had created an obligation to continue to address the unequal treatment of indigent defendants:[110]

> In the years since the *Griffin* case the Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons. Subsequent decisions of this Court have pointedly demonstrated that the passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process.[111]

The Court also criticized the Illinois law for creating a two-tier system of justice based on a defendant's financial resources:[112]

> [T]he Illinois statute as applied to Williams works an invidious discrimination *solely* because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice. . . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.[113]

In *Tate v. Short*,[114] the Court extended the analysis of *Williams* to a Texas traffic-fine-only statute.[115] A municipal court had assessed fines of $425 for traffic offenses that were not punishable by incarceration.[116] Additionally, the court, relying on statutory provisions, ordered the defendant, who was unable to pay the fines, to remain in prison for

107. *Id.* at 241.
108. *Id.* at 240.
109. *Id.* at 246–59.
110. *Id.* at 241.
111. *Id.*
112. *Id.* at 241–42.
113. *Id.* at 242 (emphasis added).
114. 401 U.S. 395 (1971).
115. *Id.* at 398.
116. *Id.* at 396–97.

eighty-five days to satisfy the assessed fines at a rate of $5 per day.[117] The Supreme Court applied *Williams* to find the procedure unconstitutional:[118]

> [T]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.[119]

The opinion not only identified the two-tier system of justice but also acknowledged the inefficiency of using incarceration of indigents as a method of obtaining revenue for the state:

> Since Texas has legislated a "fines only" policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.[120]

While *Williams* and *Tate* dealt with the effect of the inability to pay at the time of sentencing, in *Bearden v. Georgia*,[121] the Court would face whether probation could be revoked and incarceration imposed based on a defendant's inability to pay criminal justice debt.[122] The trial court granted Bearden a three-year probated sentence and assessed $750 in

117. *Id.* at 396–97 nn.3–4 (citing TEX. CODE CRIM. PROC. Art. 45.53 (1966) and HOUSTON CODE § 35–8).

118. *Id.* at 397–98.

119. *Id.* at 398 (citing Morris v. Schoonfield, 399 U.S. 508, 509 (1970)).

120. *Id.* at 399.

121. 461 U.S. 660 (1983).

122. *Id.* at 665 (stating the issue as "whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate").

fines and restitution.[123] Bearden entered into an installment plan; however, within a month after release on probation, he lost his job and was unable to secure employment.[124] Based on his failure to pay, the court revoked probation and ordered that he serve the remainder of the probationary period in prison.[125] The Georgia appellate courts denied his appeal.[126]

More than twenty-five years after *Griffin*, the United States Supreme Court found in *Bearden* that fundamental fairness under the Fourteenth Amendment requires that, before revoking probation and incarcerating a defendant for failure to pay, a court must consider the ability to pay or alternative forms of punishment.[127] In writing for the majority, Justice O'Connor traced the development of "*Griffin*'s principle of 'equal justice.'"[128] She began with Justice Black's equal justice quotation from *Griffin* and discussed the convergence of the due process and equal protection concerns developed in *Mayer*, *Douglas*, *Williams*, and *Tate*.[129] She concluded, "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay."[130] Subsequent state court decisions, legislation, and court rules would recognize the need for determining a defendant's ability to pay in deciding whether to incarcerate for unpaid criminal justice debt.[131]

III. THE PROMISE UNFULFILLED: POVERTY AS INJUSTICE

> If you have two defendants who do the exact same thing on the exact same day and time, their experiences will be completely different based on whether or not they have money. . . . [I]f they're poor, they're gonna sit behind bars in jail and fight their case from behind bars, but if they have money, they are going to be able to fully enjoy that presumption of innocence that we're all supposed to have where they can pay and get out and return to their jobs, fight their case from

123. *Id.* at 662.
124. *Id.* at 662–63.
125. *Id.* at 663.
126. *Id.*
127. *Id.* at 672–73.
128. *Id.* at 664.
129. *Id.* at 664–68.
130. *Id.* at 672.
131. *See* Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 507 n.173 (2016) [hereinafter Sobol, *Charging the Poor*].

> the community and continue caring for their families, and they're going to have much better outcomes in their cases as well.[132]
>
> —Leslie Turner (2019)

While *Griffin* in 1956 and *Bearden* in 1983 appeared to promise a system where the ability to pay would not affect justice, Leslie Turner's comments in 2019 reflect that the two-tier system of criminal justice remains.[133] Turner became an advocate for criminal justice reform following her incarceration based on her inability to pay traffic ticket violations.[134] Turner, the nursing mother of a four-month-old child, spent five days in jail because she was unable to pay the $1,500 bail—an amount that was more than her monthly income.[135]

In practice, at all levels—federal, state, and local—authorities are not following the mandates and goals established and espoused by Justice Black's basic notion of equal justice.[136] The growing reliance on criminal justice debt has exacerbated the problems of inequality arising from a defendant's lack of financial resources. In March 2016, the Department of Justice sent materials to the court administrators and chief justices of every state addressing the illegal enforcement of fines and fees.[137] The materials included a "Dear Colleague" letter describing the impact of such practices, including how "[i]ndividuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape."[138] The letter relies on the *Griffin* progeny, including the requirements established by *Bearden*.[139]

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132. Brian Bahouth, *Nevada Could Largely Scrap Money Bail System, Activists Hopeful*, NEV. CAP. NEWS (Mar. 18, 2019), https://nevadacapitalnews.org/2019/03/18/nevada-could-scrap-money-bail-system-activists-hopeful/ (quoting Leslie Turner).

133. *Id.*

134. Jeniffer Solis, *Fines & Fees Sent Nursing Mother to Jail for Traffic Tickets*, NEV. CURRENT (June 5, 2018), https://www.nevadacurrent.com/2018/06/05/system-of-fines-and-fees-sent-nursing-mother-to-jail-for-traffic-tickets/.

135. *Id.*

136. As a practical matter, *Griffin* presents financial and logistical hurdles if the true goal is that all defendants have equal means. *See* POWE, *supra* note 4, at 107 (declaring that Justice "Black made *Griffin* an egalitarian delight to read but an enigma to apply in new circumstances").

137. *Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices*, U.S. DEP'T OF JUST. (Mar. 14, 2016), https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices.

138. Open Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to State and Local Courts, *Dear Colleague* 2 (Mar. 14, 2016), https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf.

139. *Id.* at 3. In 2017, the Department of Justice withdrew the Dear Colleague Letter as part of its regulatory reform program. *Attorney General Jeff Sessions Rescinds 25 Guidance Documents*, U.S.

This Part briefly discusses the expanding role of criminal justice debt in the modern American criminal justice system and how the failure to take into account ability to pay has created a two-tier system of justice.

A. The Growth of Criminal Justice Debt

Despite *Griffin*'s promise of a system where justice would be rendered independent of wealth, indigent defendants currently face a system where the imposition of criminal justice debt creates injustice. Criminal justice debt, also commonly referred to as legal financial obligations or LFOs, includes a wide range of monetary charges assessed in the criminal justice system.[140] While all jurisdictions assess LFOs, the terms they use vary.[141] Assessments, bail, costs, fees, fines, restitution, and surcharges are common examples.[142]

Since the 1980s, criminal justice debt in the United States has grown exponentially.[143] Defendants now face financial assessments at every stage in the process from pre-conviction to supervision after release.[144] Pre-conviction charges include fees for arrest, booking, lab tests, and bail.[145] Some jurisdictions also charge for pre-trial detention for defendants unable to make bail.[146] Defendants who seek a public defender will likely be charged an application fee.[147]

At sentencing, defendants are not only subject to fines and restitution but also face court costs, mandatory surcharges,

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DEP'T OF JUST. (Dec. 21, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents.

140. ABBY SHAFROTH & LARRY SCHWARTZOL, CONFRONTING CRIMINAL JUSTICE DEBT: THE URGENT NEED FOR COMPREHENSIVE REFORM, CRIM. JUST. POL'Y PROGRAM & NAT'L CONSUMER LAW CTR. 2 (Sept. 2016).

141. ALEXES HARRIS ET AL., MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 11 (Apr. 2017).

142. Fines, Fees, and Bail, COUNCIL OF ECON. ADVISERS ISSUE BRIEF 1 (Dec. 2015); SHAFROTH & SCHWARTZOL, *supra* note 140, at 2.

143. Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841, 855 (2017) [hereinafter Sobol, *Fighting Fines*]. A detailed discussion of the growth in criminal justice debt is beyond the scope of this Article. For more information, see Brittany Friedman & Mary Pattillo, *Statutory Inequality: The Logics of Monetary Sanctions in State Law*, 5(1) RUSSELL SAGE FOUND. J. OF THE SOC. SCI. 173, 177–78 (2019); *Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications*, U.S. COMM'N ON CIV. RIGHTS 7–14 (Sept. 2017),
https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

144. Sobol, *Charging the Poor*, *supra* note 131, at 499–504.

145. *Id.* at 502.

146. *See, e.g.*, RYAN GENTZLER, THE COST TRAP: HOW EXCESSIVE FEES LOCK OKLAHOMANS INTO THE CRIMINAL JUSTICE SYSTEM WITHOUT BOOSTING STATE REVENUE, OKLA. POL'Y INST. 6 (Feb. 2017) (identifying jail fees assessed in Oklahoma).

147. *Id.* at 4–5.

reimbursement charges, and discretionary fees.[148] For example, "[t]wo-thirds of states allow judges to require defendants to pay for a court-appointed public defender."[149] If incarcerated, the monetary charges continue to accrue as inmates are likely to be assessed charges for room and board, medical care, and telephone usage.[150] Convicted defendants on probation or parole also face fees for supervision, monitoring, and drug testing.[151]

Explanations for the expansion of criminal justice debt include the growth in correctional control, budgetary pressure on states and local municipalities, and the outsourcing of services to private companies.[152]

1. Expansion of Correctional Control

The United States leads the world with nearly 2.3 million people incarcerated and an incarceration "rate more than five times higher than most other nations."[153] Since 1980, mass incarceration developed as the number of people incarcerated increased more than fourfold.[154] Additionally, more than 4.4 million people are under probation or parole supervision in the United States.[155] As a result, nearly 7 million people are subject to correctional control in the United States.[156]

The move toward mass incarceration and supervision that began in the 1970s created increased costs to run a burgeoning system. In 2015, governmental expenditures on criminal justice represented $937 per capita—a significant increase over 1982's real per capita spending of $388.[157] Not surprisingly, an increase in monetary sanctions against criminal defendants has been associated with the increased spending by governmental authorities.[158]

148. HARRIS ET AL., *supra* note 141, at 11–12; Sobol, *Fighting Fines*, *supra* note 143, at 864.

149. ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 42 (2016).

150. Sobol, *Fighting Fines*, *supra* note 143, at 864–65.

151. *Id.* at 865.

152. HARRIS, *supra* note 149, at 10; Sobol, *Charging the Poor*, *supra* note 131, at 508–12.

153. *New Report,* Mass Incarceration: The Whole Pie 2019*, Provides Annual "Big Picture" View of Confinement in the U.S. with 7 New Infographics*, PRISON POLICY INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/blog/2019/03/19/whole-pie/ [hereinafter *New Report,* Mass Incarceration].

154. EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 3 (2016) (identifying "the incarcerated population is 4.5 times larger than in 1980").

155. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html.

156. *Id.*

157. PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, NINE FACTS ABOUT MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 5 (2019).

158. *Id.* at 5.

2. Budgetary Pressures

Budgetary concerns arising from increased criminal justice expenditures and the economic recession in 2008 created even more pressure for jurisdictions to collect fines and fees.[159] Relying on criminal justice debt as a means of funding activities—including activities unrelated to the charged offenses—has political advantages over increasing taxes.[160]

The problem is not a new one as municipalities have long used traffic stops as a means of collecting revenue; however, it has grown in scope with claims that states are using "'cash register justice,' 'policing for profit,'" and over-reliance on monetary charges as an enforcement tool, often without regard to public safety.[161]

For example, the 2015 Department of Justice investigation of the Ferguson Police Department found that the municipality, police, and court "worked in concert to maximize revenue at every stage of the enforcement process."[162] Focusing on funding the city's operating budget rather than public safety, the city created fine-able offenses, police were rewarded for issuing citations, and the court imposed fines and fees.[163] Attorney General Eric Holder categorized the Ferguson report as "searing" but also cautioned that the concerns were "not confined to any one city, state, or geographic region."[164]

Similar to the findings in Ferguson, jurisdictions have not only increased fines for offenses but have also established monetary penalties for new offenses.[165] The rise in new offenses such as loitering, panhandling, and camping in public has been criticized as criminalizing poverty and homelessness.[166]

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159. U.S. COMM'N ON CIV. RIGHTS, *supra* note 143, at 7.

160. Friedman & Pattillo, *supra* note 143, at 178 (stating that "[t]he anti-tax political climate ascendant since the 1970s has required legislators to look elsewhere for additional revenues").

161. U.S. COMM'N ON CIV. RIGHTS, *supra* note 143, at 2.

162. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 10 (2015). For a more detailed discussion of the Ferguson report, see Neil L. Sobol, *Lessons Learned from Ferguson: Ending Abusive Collection of Criminal Justice Debt*, 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 293 (2015).

163. U.S. COMM'N ON CIV. RIGHTS, *supra* note 143, at 12–13; U.S. DEP'T OF JUSTICE, *supra* note 162, at 2–4.

164. Eric Holder, *Attorney General Holder Delivers Update on Investigations in Ferguson, Missouri*, U.S. DEPT. OF JUST. (Mar. 4, 2015), https://www.justice.gov/opa/speech/attorney-general-holder-delivers-update-investigations-ferguson-missouri.

165. KAREN DOLAN & JODI L. CARR, THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 5 (2015).

166. *See id.* at 23–25 (describing how "[p]eople without homes are increasingly targeted, criminalized, and arrested"); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 17 (2014).

While fines have increased in amount and numbers, fees have seen the most dramatic increase among monetary charges assessed to defendants.[167] Often fees (including court costs and surcharges) exceed the fines and are unrelated to the underlying offenses.[168] For example, a study from Oklahoma comparing the relative increase in fines and fees from 1992 to 2016 resulted in "an odd dynamic" where the fees rather than the fine create "a financial burden that is far beyond many Oklahomans' ability to pay."[169] Similarly, a report from Texas found that the fees and court costs associated with a $100 traffic ticket can exceed $365.[170]

3. Outsourcing

Facing financial stress, jurisdictions have outsourced services to private companies.[171] Privatization includes not only the development of privately run prisons, but also the growing reliance on private companies for a "variety of services and processes within U.S. courthouses, jails, and prisons."[172] Although private prisons house only seven percent of inmates, nearly all inmates are subject to fees for services provided by private companies—including telephone usage, food, and medical care.[173] More than fifty percent of governmental expenditures for incarceration are paid to private vendors.[174] Private companies may be involved at all stages of a defendant's interaction with the justice system from pre-trial, including bail and testing services; to incarceration, including communication and food services; to supervision, including probation, monitoring, and drug testing services.[175] Additionally, many jurisdictions use private collectors for the collection of criminal justice debt.[176]

Private companies often provide "offender-funded" programs that are attractive to jurisdictions facing budgetary concerns. Under offender-funding, private companies offer their services without

167. HARRIS, *supra* note 149, at 23.
168. HARRIS ET AL., *supra* note 141, at 11–14.
169. GENTZLER, *supra* note 146, at 2–3.
170. TEX. APPLESEED & TEX. FAIR DEF. PROJECT, *supra* note 7, at 5.
171. HARRIS, *supra* note 149, at 10.
172. Alexes Harris, Tyler Smith & Emmi Obara, *Justice "Cost Points": Examination of Privatization Within Public Systems of Justice*, 18 CRIMINOLOGY & PUB. POL'Y 343, 344 (2019).
173. *New Report,* Mass Incarceration, *supra* note 153.
174. WORTH RISES, THE PRISON INDUSTRIAL COMPLEX: MAPPING PRIVATE SECTOR PLAYERS 1 (2019).
175. Harris, Smith & Obara, *supra* note 172, at 344–47; BRIAN HIGHSMITH, COMMERCIALIZED (IN)JUSTICE: CONSUMER ABUSES IN THE BAIL AND CORRECTIONS INDUSTRY 4–6 (2019).
176. *See, e.g.*, PAULINA MAQUEDA ESCAMILLA, UNHOLY ALLIANCE: CALIFORNIA COURTS' USE OF PRIVATE DEBT COLLECTORS 2–3 (2018).

charging jurisdictions any fees, instead relying on their funding solely through fees collected from defendants.[177] Some jurisdictions even receive "commissions," which critics have categorized as "kickbacks" from private companies.[178]

Critics of privatization in the criminal justice system raise concerns about the potential abuses arising from the profit-based motivation of private companies.[179] Often, the services that private companies provide and the charges they assess are subject to limited and, in some cases, no regulation.[180] For example, some private phone companies charge inmates exorbitant fees.[181] Similarly, private probation companies, when receiving money from probationers that should be allocated to court debt and probation supervision fees, may subtract their fees before the court debt so that individuals remain in default and subject to arrest warrants for the outstanding debt.[182] Additionally, commission arrangements with private collectors that provide a greater percentage on older debt encourage collectors to pursue older debt while letting other debt "age so that they can collect on it later and receive higher commission fees."[183]

B. Two-Tier System of Justice

The growth in criminal justice debt and the assessment of debt without taking into account the ability to pay has created a two-tier justice system. This differential treatment traps many indigent defendants and their families in a perpetual cycle of debt.[184]

177. HUMAN RIGHTS WATCH, "SET UP TO FAIL": THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR 18–19 (2018); U.S. COMM'N ON CIV. RIGHTS, *supra* note 143, at 14; Sobol, *Fighting Fines*, *supra* note 143, at 866.

178. HIGHSMITH, *supra* note 175, at 21–22; Tim Requarth, *How Private Equity Is Turning Public Prisons into Big Profits*, THE NATION (Apr. 30, 2019), https://www.thenation.com/article/prison-privatization-private-equity-hig/.

179. Requarth, *supra* note 178 (stating "a handful of privately held companies dominate the correctional-services market, many with troubling records of price gouging some of the poorest families and violating the human rights of prisoners"); *see also* HIGHSMITH, *supra* note 175, at 1–5; Sobol, *Charging the Poor*, *supra* note 131, at 523–24.

180. HIGHSMITH, *supra* note 175, at 13–16; *see, e.g.*, ESCAMILLA, *supra* note 176, at 2–3 (finding that collection of criminal justice debt was not subject to federal or California collection laws and that "[o]f the 17 counties studied [for use of private debt collectors], only one private collections agency was subject to a Code of Ethics in their service agreement").

181. HIGHSMITH, *supra* note 175, at 34–35; Neil L. Sobol, *Connecting the Disconnected: Communication Technologies for the Incarcerated*, 53 WAKE FOREST L. REV. 559, 581–84 (2018) [hereinafter Sobol, *Connecting the Disconnected*].

182. Harris, Smith & Obara, *supra* note 172, at 347.

183. ESCAMILLA, *supra* note 176, at 14.

184. ABBY SHAFROTH, CRIMINAL JUSTICE DEBT IN THE SOUTH: A PRIMER FOR THE SOUTHERN PARTNERSHIP TO REDUCE DEBT 3 (2018).

Additionally, the fear of arrest, incarceration, and additional monetary sanctions arising from outstanding criminal justice debt strains the relationship that defendants have with law enforcement and judicial authorities.[185] This Part will briefly identify how the system treats indigent defendants differently than those who have financial resources.

1. Poverty Penalties

When a defendant is unable to pay criminal justice debt, it is not uncommon for the defendant to face additional monetary charges. Critics label these charges "poverty penalties."[186] Those who can afford the initial debt are not subject to the additional fees. Examples of poverty penalties include charges for interest, late payments, payment plans, and collection services.[187]

Moreover, in some jurisdictions, if a defendant cannot pay bail, the court may allow installment payments but also require electronic monitoring. Such defendants may then be subject to additional charges, including fees for installation, calibration, monthly monitoring, and removal.[188]

2. Collateral Consequences

The collateral consequences that accompany unpaid debt compound the problems that indigent defendants face.[189] Similar to the concerns expressed in *Mayer* that a conviction could prevent a medical

185. *Id.* at 6. In *Mayer v. City of Chicago*, the Court had predicted frustration and hostility created by the imposition of criminal justice debt. 404 U.S. 189, 197–98 (1971). *See supra* text accompanying notes 61–62; *see also* U.S. COMM'N ON CIV. RIGHTS, *supra* note 143, at 11–12 (assessing and collecting monetary sanctions to fund governmental activities without regard to public safety turns police and the courts into tax collectors and creates distrust).

186. Rebecca Vallas & Roopal Patel, *Sentenced to a Life of Criminal Debt: A Barrier to Reentry and Climbing out of Poverty*, 46 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 131, 133 (2012). The Criminal Justice Policy Program at Harvard Law School maintains a searchable database of state laws regarding poverty penalties and poverty traps reflecting enforcement mechanisms that states use to collect criminal justice debt. *Criminal Justice Policy Program at Harvard Law School: 50-State Criminal Justice Debt Reform Builder*, CRIM. J. POL'Y PROGRAM, https://cjdebtreform.org/data-explorer/enforcement-mechanisms (last visited Apr. 8, 2020).

187. Vallas & Patel, *supra* note 186, at 133.

188. HIGHSMITH, *supra* note 175, at 30. Georgia also has a system of "pay only probation" where defendants are placed under supervision because of their inability to pay criminal justice debt, subjecting them to up to three months of supervision fees. HARRIS ET AL., *supra* note 141, at 15–16.

189. A full discussion of the collateral consequences that defendants may face is beyond the scope of this Article. For more information, see MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2018), Westlaw, COLLATC database. To access a searchable database of collateral consequences, see *Welcome to the NICCC*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.csgjusticecenter.org/ (last visited Apr. 8, 2020).

student from practicing medicine,[190] those with unpaid criminal debt may be denied occupational licenses.[191] Additionally, the debt may disqualify them from public assistance benefits[192] and the right to vote.[193]

Moreover, more than forty states suspend driver's licenses for failure to pay court debt.[194] Estimates are that "[m]ore than 7 million people nationwide may have had their driver's licenses suspended for failure to pay court or administrative debt."[195] Studies show that driver's license suspensions adversely impact the ability of defendants to retain and obtain employment.[196] The suspensions lead to recidivism and safety concerns as many defendants faced with the prospect of the loss of employment become unlicensed and uninsured drivers.[197] In one case, a driver's license was suspended because the defendant was unable to pay a $135 traffic fine.[198] Fearful of losing her job, which required that she drive, she continued to drive and received additional tickets for driving without a license.[199] She was also subject to increased insurance premiums, which resulted in the debt "spiral[ing] into more than $13,000 over four and half years."[200]

3. Incarceration

While additional charges and collateral consequences are difficult on indigent defendants, the loss of liberty has even more significant

190. *See supra* text accompanying notes 59–60.

191. Vallas & Patel, *supra* note 186, at 135.

192. AM. CIVIL LIBERTIES UNION OF N.C., AT ALL COSTS: THE CONSEQUENCES OF RISING COURT FINES AND FEES IN NORTH CAROLINA 17 (2019); Vallas & Patel, *supra* note 186, at 136.

193. *See* Colgan, *supra* note 21, at 65 (concluding that wealth-based penal disenfranchisement is authorized in forty-eight states and the District of Columbia); ALLYSON FREDERICKSEN & LINNEA LASSITER, DISENFRANCHISED BY DEBT: MILLIONS IMPOVERISHED BY PRISON, BLOCKED FROM VOTING 5 (2016).

194. Beth Schwartzapfel, *43 States Suspend Licenses for Unpaid Court Debt, But That Could Change*, MARSHALL PROJECT (Nov. 21, 2017, 12:47 PM), https://www.themarshallproject.org/2017/11/21/43-states-suspend-licenses-for-unpaid-court-debt-but-that-could-change.

195. Justin Wm. Moyer, *More than 7 Million People May Have Lost Driver's Licenses Because of Traffic Debt*, WASH. POST (May 19, 2018, 4:18 PM EDT), https://www.washingtonpost.com/local/public-safety/more-than-7-million-people-may-have-lost-drivers-licenses-because-of-traffic-debt/2018/05/19/97678c08-5785-11e8-b656-a5f8c2a9295d_story.html?noredirect=on&utm_term=.6885de9bacd3.

196. *See* MARIO SALAS & ANGELA CIOLFI, DRIVEN BY DOLLARS: A STATE-BY-STATE ANALYSIS OF DRIVER'S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT 3–5 (2017); U.S. COMM'N ON CIV. RIGHTS, *supra* note 143, at 35–37.

197. U.S. COMM'N ON CIV. RIGHTS, *supra* note 143, at 36–37.

198. Emily R. Dindial & Ronald J. Lampard, Opinion, *When a Traffic Ticket Costs $13,000: Suspending Driver's Licenses for Unpaid Fees Buries Poor People in Debt*, N.Y. TIMES, May 28, 2019, https://www.nytimes.com/2019/05/27/opinion/drivers-license-suspension-fees.html.

199. *Id.*

200. *Id.*

ramifications. On any given day, local jails hold more than 450,000 individuals who have not been convicted of any crime. Many of them remain incarcerated simply because they cannot afford bail.[201]

Cash bail inherently discriminates against those who lack financial resources. Moreover, the correlation between race and wealth leads to disproportionate harm for Black and Latinx defendants that "[i]mplicit and explicit racial biases" further exacerbate.[202] Studies show that pre-trial detainees are more likely to plead guilty and more likely to receive longer sentences than those who can afford bail.[203]

Just as they face detention based on inability to pay bail, indigent defendants may face incarceration if they cannot pay other criminal justice debt. Despite the Supreme Court's holding in *Bearden* in 1983, as well as subsequent legislation, rules, and case law, courts often do not hold meaningful ability to pay hearings before incarcerating individuals for failure to make payments.[204] Numerous reports indicate the prevalence of modern-day debtors' prisons.[205]

While incarcerated, defendants are subject to additional criminal justice debt for necessities, including food and health care.[206] If inmates want to communicate with their families, they may be assessed exorbitant fees for telephone and video services.[207] The increased fees

201. Sawyer & Wagner, *supra* note 155.

202. COLIN DOYLE ET AL., BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 7 (2019); *see also* Samantha Melamed, *In Philly, Your Race Predicts Whether You'll Be Locked Up or Go Free Until Trial, Study Says*, PHILA. INQUIRER (Apr. 29, 2019), https://www.philly.com/news/philly-money-bail-criminal-justice-community-bail-fund-20190429.html (describing a study in Philadelphia that black defendants remain "awaiting trial at a rate 25 percent higher than their white counterparts"); Lucius Couloute, *New Data Highlights Pre-Incarceration Disadvantages*, PRISON POL'Y INITIATIVE (Mar. 22, 2018), https://www.prisonpolicy.org/blog/2018/03/22/brookingsreport_2018/ (describing a study reflecting "that those who end up in prison disproportionately come from disadvantaged communities of color with high levels of poverty and unemployment").

203. DOYLE ET AL., *supra* note 202, at 8; Melamed, *supra* note 202.

204. *See, e.g.*, GENTZLER, *supra* note 146, at 8 (identifying that "[i]n practice, many—if not most—courts" do not follow the requirements of the Oklahoma statute requiring ability to pay hearings); PA. INTERBRANCH COMM'N FOR GENDER, RACIAL & ETHNIC FAIRNESS, ENDING DEBTORS' PRISONS IN PENNSYLVANIA 14 (2017) (declaring that "Pennsylvania courts routinely fail to assess a defendant's ability to pay before imposing incarceration").

205. *See, e.g.*, AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 5 (2010); AM. CIVIL LIBERTIES UNION OF LA., LOUISIANA'S DEBTORS PRISONS: AN APPEAL TO JUSTICE 9 (2015); AM. CIVIL LIBERTIES UNION OF NEB., UNEQUAL JUSTICE: BAIL AND MODERN DAY DEBTORS' PRISONS IN NEBRASKA 30 (2016); AM. CIVIL LIBERTIES UNION OF N.H., DEBTORS' PRISONS IN NEW HAMPSHIRE 1 (2015); AM. CIVIL LIBERTIES UNION OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES 9 (2013); AM. CIVIL LIBERTIES UNION OF TEX., NO EXIT, TEXAS: MODERN-DAY DEBTORS' PRISONS AND THE POVERTY TRAP 5–7 (2016); AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS' PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 3 (2014). For a detailed discussion of modern-day debtors' prisons, see Sobol, *Charging the Poor*, *supra* note 131.

206. Harris, Smith & Obara, *supra* note 172, at 346.

207. *Id.*

along with collateral consequences stemming from incarceration, including loss of employment and reduction in credit scores, make it even more difficult for indigent defendants to escape the debt cycle.[208]

IV. RESTORING THE PROMISE: REFORMS & RECOMMENDATIONS

Recognizing the failure to achieve Justice Black's ideal of equal justice, some jurisdictions have adopted proposals that aim to restore *Griffin*'s notion of equal justice. This Part will describe these reforms as well as suggest additional alternatives to help combat the injustice that defendants with limited financial resources face.[209] All reforms adopted should be subject to effective enforcement as well as continued study, review, and evaluation.[210]

A. Correctional Control Reforms

Incarceration and supervision have a disproportionate impact on low-income defendants.[211] Reforming correctional controls so that they are not based upon defendants' ability to pay has the potential to promote equal justice.

1. Incarceration

Bail reform is necessary to reduce the number of people who remain incarcerated solely because they cannot afford bail.[212] Several

208. Vallas & Patel, *supra* note 186, at 135–36.

209. Previously, I have addressed and developed in more detail several of these reforms. *See* Sobol, *Charging the Poor*, *supra* note 131, at 524–39 (developing a framework for reducing incarceration of indigents who fail to pay criminal justice debt); Sobol, *Fighting Fines*, *supra* note 143, at 896–98 (discussing a federal approach to addressing criminal justice debt issues). The American Bar Association and the National Task Force on Fines and Fees have also established guidelines and principles that reflect several of the suggested reforms. *See* AM. BAR ASS'N, ABA TEN GUIDELINES ON COURT FINES AND FEES (2018) [hereinafter GUIDELINES]; NAT'L TASK FORCE ON FINES, FEES, & BAIL PRACTICES, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES (2019) [hereinafter PRINCIPLES].

210. Sobol, *Charging the Poor*, *supra* note 131, at 538–39 (advocating establishing a complaint forum, monitoring, oversight, reporting, enforcement, and continual study); *see also* CRIM. JUST. POL'Y PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 32–38 (2016) (discussing legislative, judicial, and executive reforms to "enhance transparency and promote accountability"); GLENN A. GRANT, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 46 (2019) (recognizing the need for funding and continual review and study of New Jersey's criminal justice reform program).

211. Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018), https://www.prisonpolicy.org/reports/ correctionalcontrol2018.html; Sawyer & Wagner, *supra* note 155; *see also* Couloute, *supra* note 202 (describing a report finding that "boys born into families at the bottom 10% of the income distribution are 20 times more likely to experience prison in their 30s than their peers born into the top 10%").

212. PRINCIPLES, *supra* note 209, at 5–6; DOYLE ET AL., *supra* note 202, at 6–9 (discussing the need for bail reform and evaluating bail reform alternatives).

jurisdictions have implemented or are considering proposals for pre-trial alternatives to monetary bail.[213] For example, in 2017, New Jersey enacted reforms aimed at eliminating cash bail systems, and the results have been labeled as positive.[214] Under the new system, the basis for pre-trial detention is risk analysis rather than cash payments.[215] Early results seem promising as more than 94% of defendants were released pre-trial, the jail population decreased by 20%, and only forty-four defendants were subject to cash bail.[216] Additionally, more than 80% of release decisions were made within twenty-four hours of arrest, and only 0.5% of release decisions were made after forty-eight hours of arrest.[217] The reforms have not resulted in increased crime or increased rates of non-appearance for trial.[218] A 2019 report to the New Jersey governor concluded:

> New Jersey's jail population looks very different today than it did when the idea of reforming the state's criminal justice system began to take hold in 2013. On any given day, there are thousands fewer defendants in jail, with only the highest-risk defendants and those charged with the most serious offenses detained.
>
> In all, CJR [criminal justice reform] has reduced the unnecessary detention of low-risk defendants, assured community safety, upheld constitutional principles, and preserved the integrity of the criminal justice process.[219]

While bail reform addresses incarceration before conviction, reforms are also necessary for post-conviction incarceration stemming from the inability to pay. Indigent defendants should not be incarcerated simply

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213. DOYLE ET AL., *supra* note 202, app. B at 33 (identifying bail reforms and innovations in thirteen jurisdictions).

214. *Id.* app. B at 44. *Study Finds New Jersey's Pretrial Reform Shows Early Signs of Wide-Reaching, Positive Impacts on Criminal Justice System*, ARNOLD VENTURES (Nov. 14, 2019), https://www.arnoldventures.org/newsroom/study-finds-new-jerseys-pretrial-reform-shows-early-signs-of-wide-reaching-positive-impacts-on-criminal-justice-system.

215. GRANT, *supra* note 210, at 3. A detailed discussion of the use of risk assessment programs is beyond the scope of this Article. For more information about pretrial risk assessment programs and the potential for racial bias in such algorithms, see SARAH PICARD ET AL., BEYOND THE ALGORITHM: PRETRIAL REFORM, RISK ASSESSMENT, AND RACIAL FAIRNESS (2019).

216. DOYLE ET AL., *supra* note 202, app. B at 49.

217. *Id.*

218. *New Jersey Reform Leader Says Better Data Strengthened Bail System*, PEW CHARITABLE TRUSTS (May 1, 2019), https://www.pewtrusts.org/en/research-and-analysis/articles/2019/05/01/ new-jersey-reform-leader-says-better-data-strengthened-bail-system.

219. GRANT, *supra* note 210, at 3. The New Jersey reform plan is the subject of continual review, including a series of reports conducted by the MDRC Center for Criminal Justice Research. *See* CHLOE ANDERSON ET AL., EVALUATION OF PRETRIAL JUSTICE SYSTEM REFORMS THAT USE THE PUBLIC SAFETY ASSESSMENT: EFFECTS OF NEW JERSEY'S CRIMINAL JUSTICE REFORM 2 (2019).

because they cannot pay criminal justice debt. Reforms to help achieve this goal include:

- Ending the practice of incarceration based on failure to pay fees.[220]
- Ending the practice of incarceration for inability to pay fine-only offenses.[221]
- Establishing standards to allow judges to determine whether defendants have the ability to pay criminal justice debt.[222]
- Providing notice and training to judges, prosecutors, defense counsel, and defendants about the standards.[223]
- Allowing incarceration for failure to pay criminal justice debt only if the court after a meaningful and recorded hearing (where an indigent defendant is provided counsel) determines that the defendant, based on the established standards, has the ability to pay the debt.[224]
- Establishing alternatives to incarceration for defendants whom the court determines do not have the current ability to pay the criminal justice debt.[225] For alternatives that may require services such as monitoring, fees should be reduced or waived based on the defendant's financial resources.[226]

220. *See* Sobol, *Charging the Poor*, *supra* note 131, at 534–35 (limiting remedies for failure to pay fees to civil remedies).

221. TEX. APPLESEED & TEX. FAIR DEF. PROJECT, *supra* note 7, at 36.

222. GUIDELINES, *supra* note 209, at 11; CRIM. JUST. POL'Y PROGRAM, *supra* note 210, at 26–32 (discussing legislative, judicial, and executive reforms to improve ability to pay determinations). Additionally, care should be taken to make sure that the standards established are not racially biased. *See* Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 176–81 (2019).

223. GUIDELINES, *supra* note 209, at 7; CRIM. JUST. POL'Y PROGRAM, *supra* note 210, at 27, 30–31; PRINCIPLES, *supra* note 209, at 6; Sobol, *Charging the Poor*, *supra* note 131, at 537.

224. GUIDELINES, *supra* note 209, at 3–8; MYESHA BRADEN ET AL., TOO POOR TO PAY: HOW ARKANSAS'S OFFENDER-FUNDED JUSTICE SYSTEM DRIVES POVERTY & MASS INCARCERATION 25–26 (2019); PRINCIPLES, *supra* note 209, at 6; Sobol, *Charging the Poor*, *supra* note 131, at 535; U.S. COMM'N ON CIV. RIGHTS, *supra* note 143, at 75.

225. GUIDELINES, *supra* note 209, at 10; HUMAN RIGHTS WATCH, *supra* note 177, at 8–9; PRINCIPLES, *supra* note 209, at 6; Sobol, *Charging the Poor*, *supra* note 131, at 536–37; U.S. COMM'N ON CIV. RIGHTS, *supra* note 143, at 75–76.

226. HIGHSMITH, *supra* note 175, at 42; PRINCIPLES, *supra* note 209, at 6–7.

2. Supervision

As with bail reform, evidence-based approaches focusing on risk and treatment needs should be adopted in the community supervision arena.[227] Studies demonstrate that while supervision can be effective for high-risk offenders, it can be counterproductive for low-risk offenders.[228] Community supervision reforms have demonstrated the potential for reducing community supervision while at the same time reducing recidivism and costs.[229]

B. Reforms in Assessing and Collecting Fines and Fees

Reforms aimed at eliminating, reducing, or waiving criminal justice debt can also promote equal justice. Such reforms include:

- Eliminating all fines and fees. Given budgetary concerns and the deterrence potential of fines, the adoption of this proposal is unlikely.[230]

- Establishing periodic review of fines and fees to determine whether charges should be modified because they are excessive.[231]

- Requiring state and local authorities to evaluate offenses that have fines to determine whether such offenses should be eliminated because they focus only on revenue generation or criminalizing poverty.[232]

- Eliminating the use of poverty penalties.[233]

- Establishing amnesty and debt-forgiveness programs.[234]

- Evaluating whether fees are appropriate.[235] In many situations, the efforts at collecting fees are counterproductive with

227. PEW CHARITABLE TRUSTS, PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 14–15 (2018).
228. *Id.* at 12.
229. *Id.* at 13–14.
230. Sobol, *Charging the Poor*, *supra* note 131, at 524–26.
231. PRINCIPLES, *supra* note 209, at 6.
232. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 166, at 10–11; Sobol, *Charging the Poor*, *supra* note 131, at 533.
233. CRIM. JUST. POL'Y PROGRAM, *supra* note 210, at 15–26 (discussing legislative, judicial, and executive reforms to address poverty penalties).
234. GENTZLER, *supra* note 146, at 19.
235. PRINCIPLES, *supra* note 209, at 3; Sobol, *Charging the Poor*, *supra* note 131, at 533–34.

jurisdictions spending more on collection efforts than they receive.[236] In 2018, San Francisco "became the first county in the nation to eliminate all locally administered fees charged to people leaving the criminal justice system."[237] Estimates are that the benefits from eliminating over 32 million dollars in fees for over twenty-one thousand, mostly low-income, defendants will exceed the expected one million dollar loss in revenue.[238] Alameda County has followed San Francisco's example, and legislation that would eliminate fees throughout California is pending.[239] Similarly, New York City has eliminated phone fees for jailed inmates.[240]

- Providing courts should have flexibility to modify or waive fines and fees or use alternatives to criminal justice debt based on defendants' financial resources.[241]

C. Reforms to Reduce Collateral Consequences

Just as jurisdictions should consider eliminating or reducing fines and fees, jurisdictions should examine laws, regulations, and practices that result in collateral consequences.[242] For example, ending programs that suspend driver's licenses for failure to pay fines and fees would

236. Sobol, *Charging the Poor*, *supra* note 131, at 533–34; Anne Stuhldreher, *Op-Ed: Counties Rarely Collect Fees Imposed on Those Formerly Jailed. So Why Keep Charging Them?*, L.A. TIMES, May 16, 2019, 3:05 AM, https://www.latimes.com/opinion/op-ed/la-oe-stuhldreher-fees-criminal-justice-reform-20190516-story.html; *see also* THERESA ZHEN & BRANDON GREENE, PAY OR PREY: HOW THE ALAMEDA COUNTY CRIMINAL JUSTICE SYSTEM EXTRACTS WEALTH FROM MARGINALIZED COMMUNITIES 14 (2018) (reporting an annual net loss in Alameda County from collections of criminal justice debt of 1.3 million dollars).

237. Stuhldreher, *supra* note 236, at 6.

238. OFFICE OF THE TREASURER & TAX COLLECTOR CITY & CTY. OF S.F., CRIMINAL JUSTICE ADMINISTRATIVE FEES: HIGH PAIN FOR PEOPLE, LOW GAIN FOR GOVERNMENT 6 (2019). This report was issued to provide guidance to other California counties considering the elimination of administrative fees. *Id.* at 1.

239. Stuhldreher, *supra* note 236, at 6. Senate Bill 144 eliminating administrative fees throughout California has passed the California Senate. *Senate OKs Holly J. Mitchell Bill to End Admin Fees for the Formerly Incarcerated*, EAST CTY. TODAY (June 1, 2019), https://eastcountytoday.net/senate-oks-holly-j-mitchell-bill-to-end-admin-fees-for-the-formerly-incarcerated/.

240. Karen Matthews, *NYC Makes Calls from Jail Free, 1st Major US City To Do So*, AP NEWS (May 1, 2019), https://apnews.com/55aecae91b2f41bcb2c3ff67186ffc6c.

241. GUIDELINES, *supra* note 209, at 1–2; CRIM. JUST. POL'Y PROGRAM, *supra* note 210, at 19–22; PRINCIPLES, *supra* note 209, at 6; SHAFROTH, *supra* note 184, at 8–9. An alternative that is beyond the scope of this Article is the use of day-fine systems such as those used by several European countries. Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017) (examining the limited experiences in the United States with day fines).

242. GENTZLER, *supra* note 146, at 19. For a more detailed discussion of reforms aimed at reducing collateral consequences, see MARGARET LOVE & DAVID SCHLUSSEL, REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018 (2019); MARGARET LOVE, JOSH GAINES & JENNY OSBORNE, FORGIVING & FORGETTING IN AMERICAN JUSTICE: A 50-STATE GUIDE TO EXPUNGEMENT AND RESTORATION OF RIGHTS (2018).

significantly help indigent defendants.[243] Recently, several jurisdictions have eliminated such programs—including California, Idaho, Mississippi, Montana, and Washington, D.C.[244] Even traditional political foes—the American Civil Liberties Union and the American Legislative Exchange Council—agree that license suspensions should focus on driver safety rather than debt collection.[245]

Similarly, modifying laws that restrict occupational licenses or deny public assistance due to unpaid criminal justice debt should be examined because they affect the ability of defendants and their families to escape the poverty debt cycle.[246] States should also eliminate laws that allow for voter disenfranchisement due to unpaid fines and fees.[247]

D. Regulation of Private Companies

Given the prevalence of private companies in the correctional control industry and the potential for abuse, regulating the role of private companies is also necessary. Regulations and contract provisions should minimize conflicts of interests in the selection, retention, and payment of private companies.[248] Oversight, transparency, accountability, and appropriate enforcement mechanisms are essential in monitoring the activities of private companies.[249]

Many of the private companies in the corrections industry provide technology services, including electronic monitoring, phone, banking, and computer services.[250] Although technology offers alternatives to help address some of the inequities associated with being poor,[251] technology can also exacerbate access and debt issues, especially when companies employ abusive fee arrangements.[252] Moreover, using services such as video visitation may also not be as effective as in-person

243. SALAS & CIOLFI, *supra* note 196, at 8–11.

244. Ted Alcorn, *Handcuffed and Arrested for Not Paying a Traffic Ticket*, N.Y. TIMES, May 8, 2019, https://www.nytimes.com/2019/05/08/nyregion/suspending-licenses-minor-offense-money.html; *Governor Bullock Signs HB 217 into Law*, AM. CIV. LIBERTIES UNION OF MONT. (May 8, 2019, 9:30 AM), https://www.aclumontana.org/en/news/governor-bullock-signs-hb-217-law-0.

245. Dindial & Lampard, *supra* note 198.

246. *See* Vallas & Patel, *supra* note 186, at 135–36.

247. GUIDELINES, *supra* note 209, at 5; SHAFROTH, *supra* note 184, at 16.

248. HIGHSMITH, *supra* note 175, at 41–42; HUMAN RIGHTS WATCH, *supra* note 177, at 7–8.

249. HIGHSMITH, *supra* note 175, at 41–42; HUMAN RIGHTS WATCH, *supra* note 177, at 7–8.

250. Harris, Smith & Obara, *supra* note 172, at 349–51; HIGHSMITH, *supra* note 175, at 30–36.

251. For example, technology is often looked at as an aid to help with access to justice. *See* Rebecca Kunkel, *Rationing Justice in the 21st Century: Technocracy and Technology in the Access to Justice Movement*, 18 U. MD. L.J. RACE RELIGION GENDER & CLASS 366, 380–88 (2018).

252. HIGHSMITH, *supra* note 175, at 30–36; *see, e.g.*, Sobol, *Connecting the Disconnected*, *supra* note 181, at 584–91 (discussing advantages and disadvantages to technology alternatives from communications between inmates and their families).

visitation—so complete displacement of traditional services may not be appropriate.[253] As such, regulation is necessary to address not only fees but also the quality and types of services provided.

E. Application of the Eighth Amendment

A recent Supreme Court case, *Timbs v. Indiana*,[254] provides another potential tool for attacking monetary sanctions in criminal cases. The Court held that the Eighth Amendment's Excessive Fines Clause applies in state court.[255] In its opinion, the Court recognized the growing concerns about jurisdictions improperly using criminal justice debt as a funding mechanism:[256]

> [F]ines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." This concern is scarcely hypothetical. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.").[257]

Whether the Eighth Amendment will be an effective method of policing criminal justice debt imposed by the states remains uncertain. *Timbs* dealt with civil forfeiture and did not establish a procedure for determining whether a fine is excessive.[258]

V. CONCLUSION

In an article, published a year after *Griffin*, the authors pondered the fate of the case, noting that the fabled Griffin "had the head and wings of an eagle, 'the bird of freedom,' while it had the more earthbound body of

253. Sobol, *Connecting the Disconnected*, *supra* note 181, at 589–91.
254. 139 S. Ct. 682 (2019).
255. U.S. CONST. amend. VIII; *Timbs*, 139 S. Ct. at 687.
256. *Timbs*, 139 S. Ct. at 689.
257. *Id.* (citation omitted).
258. *Id.* at 689–90. Scholars have also addressed the use of the Eighth Amendment regarding criminal justice debt. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 U.C.L.A. L. REV. 2 (2018); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014); Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 320–21 (2014).

a lion."[259] The authors accurately predicted that *Griffin* would face hurdles:

> It is of the very genius of our common law that a principle such as is embodied in the *Griffin* case can find fruition only in the work of thousands of individual judges and other lawmakers. To the extent that the principle of the *Griffin* case finds acceptance it will constitute a new charter of freedom for the poor. It will be years, perhaps decades, however, before we can know whether the *Griffin* "eagle" will fly or will remain earthbound. Some cases expand and grow; other cases wither and die. Griffin will meet vast obstacles: inertia, complacency, economy, bitter resentment.[260]

Now, more than six decades after *Griffin*, subsequent judicial decisions and legislation do reflect some flight; however, in practice, the predicted obstacles have grounded the aspirations of *Griffin* and its progeny. Reforms should be adopted to allow *Griffin*'s promise of equal justice to fly. As Bryan Stevenson recognizes, "[t]he true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned."[261]

259. Willcox & Bloustein, *supra* note 4, at 26.
260. *Id.*
261. STEVENSON, *supra* note 2, at 18.