
Fine Time Massachusetts:

Judges, Poor People, and Debtors' Prison in the 21st Century

Report of the Massachusetts Senate Post Audit and Oversight Committee



The special mission of the Massachusetts Senate Post Audit and Oversight Committee is to examine the performance of the Executive and Judicial branches and report back to the full Senate.

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Benjamin Downing, Vice Chair
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Michael Moore
Bruce Tarr
James Welch

Staff to the Committee

Samuel Anderson
Brendan Berger
Cyntia Howard
Rosie Hunter
Edward Mason

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The Elected County Sheriffs of Massachusetts

Michael Ashe, Sheriff, Hampden County

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Thomas Hodgson, Sheriff, Bristol County

Peter Koutoujian, Sheriff, Middlesex County

Michael McCormack, Sheriff, Dukes County

Joseph McDonald Jr., Sheriff, Plymouth County

James Perelman, Sheriff, Nantucket County

Steven Tompkins, Sheriff, Suffolk County

Anthony Benedetti, Chief Counsel, Massachusetts Committee for Public Counsel Services

Cassandra Bensahih, Executive Director, Ex-Prisoners and Prisoners Organizing for Community Advancement

Leslie Walker, Executive Director, Prisoners' Legal Services of Massachusetts

Introduction

In December 2015, the Senate Committee on Post Audit and Oversight opened an inquiry into a little-noticed aspect of Massachusetts criminal justice – specifically, into the fines, fees, court costs, and other assessments imposed on defendants as they move through our courts and corrections systems. This inquiry is ongoing.

In preparing for an initial public hearing on the subject, Committee members and staff met and interviewed the individual identified in these pages as James K. At the hearing, held July 28, 2016, James K recounted his story to senators, staff, and others in attendance. The crux of it was an apparently aggressive effort by a judge to bring in revenue -- or else -- from a defendant who was obviously and desperately poor, an effort that ended with the judge's ordering the defendant -- James K -- to "work off" his obligations by going to jail.

His experience did not seem to be isolated, James told the Committee. Poor offenders he met during the 36 days he spent incarcerated at the Worcester County Jail referred to his situation by a popular local nickname: "fine time."

This report investigates "fine time" in Massachusetts.

The Story of James K

On April 8, 2015, a twenty-seven-year-old homeless man named James K¹ stood before a judge for all of forty-five seconds in a courtroom in Dudley, Massachusetts. James owed \$1,100 in fines and fees on an old criminal case. He had come almost a thousand miles to square things up. He succeeded, although not in the way he hoped. He told the judge he was poor, and the judge responded:

OK. All right, he's gonna be surrendered on the fines. He'll be incarcerated, surrendered on the fines. Thank you, sir. ... Thirty dollars a day they're gonna give you at the jail, OK?

James was now enmeshed in an obscure arrangement known informally as “fine time.” In Massachusetts, when a person fails to pay off his monetary obligations in a criminal case, a judge has the option of sending him to jail to “work off” what he owes at the rate of \$30 per day. James, who did not spend a single day in jail on the criminal charges that first brought him into the district court, ended up spending 36 days in jail on fine time.

Fine time is the extreme result of a byzantine structure of criminal fines, fees and assessments upon which the Massachusetts criminal justice system is financially dependent. Though doing so may entail significant hardship, most people who owe money to a court find a way to pay off the obligations without languishing in a jail cell. But some, like James, simply cannot come up with the money. The story that follows is his. Yet, as this investigation found, it is not unique.

A Troubled Past

In 2006, James, just eighteen years old, moved from New York City to the Worcester area. Lacking an education or job skills, he turned to selling drugs to survive. In February 2007, just four days after his nineteenth birthday, a Charlton police detective caught him with cocaine. He was arraigned in Dudley District Court on drug charges and, because he was indigent, was given a state-supplied lawyer and assessed a \$150 indigent counsel fee, which he paid. The following month, after James failed to show up for a court hearing, a judge issued a warrant for his arrest.

James, barely an adult but amply in trouble, had moved back to the New York City area. Three months after missing his court date in Dudley, he was arrested and jailed for a bank robbery in

¹ The Committee conducted several interviews with James K and checked his account against records maintained by the Massachusetts courts. He has asked that his last name not appear in this report.

Queens. He spent the next four years in federal custody, first for the bank robbery and then for an unrelated assault on a correctional officer.

Looking for a Fresh Start

While serving his federal time out of state, James decided to give up crime as a way of life. He took criminal justice courses through LaGuardia Community College and wrote to Dudley District Court to find out how to address the drug charges stemming from his Charlton arrest. He concluded he could progress no further while he was locked up.

Following his release from federal prison in November 2011, James appeared in Dudley District Court in June 2012 on the drug charges. Two months later, with the help of another state-supplied lawyer, for which he paid a second \$150 indigent counsel fee, he pleaded guilty to a single count of possession of cocaine with intent to distribute. The judge declined to sentence him to jail; he fined him \$800, then added on a \$200 “surfine” and a \$50 “victim/witness” fee, though James’ particular offense involved no victim and no witness.

As an ex-offender with no job skills, James struggled to earn a living. He moved several times, eventually ending up in Kentucky.

In February 2013, after James failed to pay his \$800 fine, his \$200 surfine, and his \$50 victim/witness fee, the Dudley court issued a warrant for his arrest and in connection with it tacked on a “default warrant” fee -- another \$50. The new arrest warrant was a problem; James could not get his Massachusetts driver’s license, and thus a better job, unless he took care of it and a second, older warrant in Worcester. Still in Kentucky, he decided to return to Massachusetts to clear up everything and move on with his life.

Fine Time

In early April 2015, James boarded a bus in Kentucky and made his way to Worcester via New York City and Boston. He paid \$200 -- nearly all the money in his pocket -- to resolve the old Worcester case, then spent the night in a homeless shelter. The next morning, he caught a bus to Webster and walked the last 2 ½ miles to Dudley District Court. To a clerk he explained that he wanted to work out his unpaid fines and fees, now totaling \$1,100. After a brief visit to the Probation Department, he went to Courtroom 1 and waited to be heard by the judge.

When the judge called the case, James explained he was poor. The judge cut him off, telling him he would be sent to the Worcester jail, where he would work off his debt at \$30 a day. James wasn’t asked whether he wished to have a lawyer or why he could not pay the \$1,100 on the spot. Had the judge asked the latter question, he would have learned that James had no job, had just spent his last \$200 paying off fines and fees in another case, had slept in a homeless shelter the previous night, and was willing to agree to a payment plan or do community service.

As James describes those forty-five seconds in front of the judge:

To play devil's advocate for the Judge and to present the case against the Judge as well, it was an old docket. ... So it's like, I'm tired. Just go to jail and pay your fine that way. ... His temperament was a little bad because he just dealt with a drug addict and he threw them in jail. So I come right before the drug addict and he's like everybody is going to jail. That's what it seemed like as well, he was just like fed up. ... He asked me if I had any money, I said no, he said you are going to jail. Thirty dollars a day, that's how it happened.

James was immediately taken into custody and sent to the Worcester County jail. He was released on May 14, 2015, after being confined to a cell twenty-three hours a day for thirty-six days. During his imprisonment, James learned from other inmates he was not the first person to be locked up for failing to pay money owed to the court:

They have a saying for the type of time I did and it's called "fine time." ... You don't have money, you're doing fine time. So people are very familiar with that. ... Almost everybody in jail owes the state money. So that's just the fact.

Contrast: Different Court, Different Result

James's experience in Dudley was not the end of his troubles, but his later difficulties were leavened by small acts of kindness on the part of others. After his release from the Worcester jail, he used the few dollars he had to get to Boston, where he spent a week at the Pine Street Inn. From the Inn he walked 25 miles to Framingham. Finding the local shelters full at the end of a long day, he settled down to sleep on the steps of a parking garage connected to an apartment complex. He was found there by two Framingham police officers, who arrested him and charged him with trespassing -- "a euphemism," James says, "for homelessness." An assistant district attorney agreed to a "continuance without a finding" -- continuation of the proceeding and, provided James stayed out of trouble, eventual dismissal of the charge -- so long as he paid another \$50 victim/witness fee.

James made his way back to Worcester, where he was accepted into the Salvation Army's Adult Rehabilitative Center (ARC). ARC gave him a job and a small stipend, but it was not enough to enable James to pay the victim/witness fee levied by the Framingham court. When he failed to do so, yet another warrant was issued for his arrest. James explains what happened next:

[M]y counselor at the Salvation Army, they grant me a day's grace out of work, so I go to court in Framingham. I believe I see a magistrate there, I don't go back before the judge that presided over the case originally. ... So I explain what's going on in my life now ... and she exercised discretion and she settled the debt with the amount I had at the moment.

James was able to clear up his trespass case for all the money he had in his pocket: \$31.

James returned to Worcester, completed the ARC program, and now rents a room in a Christian-run house in the city. He reports that he has stayed out of trouble. In possession of a valid driver's license, he is working and saving money, and hopes to attend truck-driving school.

Fine Time Massachusetts: The Data

As he moves through the Massachusetts courts, a criminal defendant runs a gauntlet of financial risk. He'll incur a fee for court-appointed counsel (even if he's indigent), a fine (if he's guilty of the underlying crime), a victim/witness assessment (even if the crime is victimless), a monthly supervision fee (if he's put on probation), a daily monitoring fee (if he has to wear a GPS device), court costs (because courts are expensive to run), a default fee (if he defaults on a court date), and so on.

If the defendant claims a lack of funds with which to meet these obligations, many judges will find an equitable way to proceed -- waiving some of the debt, extending the time for payment, ordering community service instead, and the like. But, as James K discovered, another option is to send the defendant to jail, where he or she pares down the debt by \$30 for each day served² -- Massachusetts' version of debtors' prison in the 21st Century.

Incarceration for failure to pay fines, fees or court costs is familiar enough to local offenders to have its own gloomy nickname: "fine time." A defendant ordered to do fine time goes free only if he works off the entire amount sitting in jail or someone pays the outstanding balance.

The Committee began this examination of fine time with a number of questions. What are the original allegations that bring James K and others before the judge? What financial obligations do they pick up along the way? What happens at hearings that end in a judge's order of incarceration? Once offenders are sent to jail, how long do they stay there?

Investigating, the Committee requested copies of Mittimuses for Unpaid Monies -- documents, issued by a judge to the elected sheriff in charge of a given county house of correction, stating the named defendant has "failed to pay court-ordered monies in this case in the unpaid amount shown above."³ Each Mittimus (Latin; literally "we send") orders the defendant "committed to the above institution in lieu of having paid such amount" and directs any authorized official "to convey and deliver the defendant safely to such institution," where he is to be kept "until such unpaid amount is paid as ordered, or the defendant is fully credited with such amount at the rate of \$30 per day ... or is otherwise legally discharged."

² M.G.L. c. 127, §144.

³ Mittimuses for Unpaid Monies can be addressed as well to the Commissioner of the Mass. Department of Corrections, but in the course of its work the Committee determined that almost all such documents are issued to county sheriffs and almost all fine time is served in county jails rather than in state prison. Women are the exception; female defendants served their fine time at MCI Framingham, the state prison for women.

Committee staff asked each sheriff's office to send us copies of all Mittimus for Unpaid Monies received from judges during 2015. Ten of the state's 14 elected sheriffs generated effective responses.⁴ Officials in three counties -- Essex, Plymouth, and Worcester -- were able to satisfy us that they had supplied all cases for which mittimus were issued to them in 2015.

The comprehensive three-county case total came to 105. Targeting this sample for intensive review, Committee staff examined each Mittimus to identify the court that had ordered the fine time. Staff then visited the relevant courthouse to review the hard-copy case file, including the docket sheet -- a document detailing information such as the criminal charges against the defendant and their disposition; arraignments, hearings and other major events; and the appointment, if any, of publicly-funded counsel.

As a check on the accuracy of the written record, the Committee requested, listened to and in some cases transcribed audio recordings of 72 of the 105 proceedings. These audios proved to be invaluable complements to the hard-copy files.

Findings: The Allegations That First Brought People into Court

Of the 105 cases that culminated in fine time, what offenses were alleged at the outset of the criminal proceedings, and what came of these allegations?

Initial Charges. Most of the precipitating events were relatively minor.⁵ In 42 of 105 cases (40% of the sample), the defendant had been charged with automobile-related violations unrelated to operating under the influence -- driving on a suspended license, driving an uninsured or unregistered motor vehicle, negligent operation of a motor vehicle, and so on. In 17 cases (16%), the trigger was public order offenses -- disorderly conduct, public drinking, or trespassing. Nine cases (9%) involved shoplifting. Just 17 cases were more serious; 12 of these were assault-related and five involved operating a vehicle under the influence. The remaining 20 cases, in the middle of the spectrum, involved property crimes and minor drug possession.

Outcomes. None of the 105 cases went to trial on the original alleged offenses. In 62 of the 105 (59% of the total sample), all charges were either dismissed, "continued without a finding," disposed of with pretrial probation, or treated as civil infractions. In another 42 instances (40%),⁶ the result was a guilty finding on at least one charge, yet only four of these individuals -- and thus four individuals out of the total sample of 105 -- ended up serving jail time for an

⁴ Four sheriffs maintained they could not identify relevant documents among their stores of otherwise unrelated mittimus, most of which direct them to take people into custody for reasons unrelated to an unpaid criminal fine, fee or court cost assessment.

⁵ The district courts have criminal jurisdiction over all misdemeanors, all violations of city and town ordinances and bylaws, felonies punishable by a sentence up to five years, and some specified felonies that carry greater potential penalties. G.L. c. 218, §26. Superior courts have criminal jurisdiction over more serious felonies. The Committee found no 2015 instances in which a superior court imposed fine time.

⁶ In one case of the 105, no disposition on the underlying offense had been reached at the time the Committee completed this analysis.

offense that brought them into court in the first place. In sharp contrast, all 105 served time for failure to pay fines or fees.

Findings: The Financial Obligations That Piled Up

Sources of Debt. In only 36 of 105 cases (34% of the sample) had the defendant been ordered to pay a fine as actual criminal punishment for an underlying offense; in another five cases (5%), the defendant had been ordered to pay restitution. Whereas in 99 out of 105 cases the defendant owed fees, court costs and other miscellaneous assessments.⁷ The most frequent of these:

- **Counsel fees.** In 53 of 105 cases (50% of the sample), the defendant had, at an earlier point in the proceedings against him, been found indigent, been assigned counsel, and incurred a \$150 fee to offset the expense of the lawyer.⁸
- **Court costs.** In 31 of 105 cases (30% of the sample), the defendant had been assessed court costs, ranging from \$50 to \$500, on charges that themselves were dismissed or continued without a finding.
- **Probation fees.** In 20 cases (19% of the sample), the defendant had been ordered to pay either \$65 or \$50 as a monthly supervision fee for the duration of his probation.
- **Victim/witness assessments.** In 39 cases (37% of the sample), the defendant had been ordered to pay a victim/witness assessment of either \$50 or \$90.
- **Default-related fees.** In 73 cases (70% of the sample), the defendant had been assessed fees for default warrants, default warrant removals or default warrant arrests. These are said to represent reimbursement to the trial court system for the expense of issuing and removing warrants for failure to appear in court (\$50) or to the municipality for the expense of making an arrest on default warrants (\$75). Such levies can add up; the defendant in one case we investigated had amassed \$550 in default-related fees alone.

As a consequence primarily of these exactions plus a random few others, defendants owed the court amounts ranging from \$30 to \$3,384. In 38 of 105 cases (36% of the sample), defendants owed more than \$500. In 12 cases (11%), the amount exceeded \$1,000. The distribution of total financial charges per defendant breaks down as follows:

⁷ The other six cases involved a fine or restitution only.

⁸ When a defendant qualifies for court-appointed counsel, the judge has the option of waiving the \$150. This happened in only seven instances; in three others, the defendant qualified for court-appointed counsel but declined the offer, avoiding the fee.

\$1-\$100	10
\$101-\$250	27
\$251-\$500	30
\$501-\$750	16
\$751-\$1,000	10
\$1,001-\$1,500	9
\$1,501-\$2,000	2
Over \$2,000	1

Findings: The Hearings That Culminated in Fine Time

In evaluating the hearings that ended in a judge’s order of fine time, the Committee asked four questions. *Did the judge inquire into inability to pay? Did he offer the defendant an alternative to incarceration? Had he or an earlier judge cautioned the defendant that he might go to jail for failure to pay these debts? Did the defendant have a lawyer or, alternatively, did he waive his right to counsel?*

In its intensive review of the three-county sample, the Committee found --

- ***Inquiries into inability to pay.*** The audios of the actual hearings suggest the judge conducted something of an inquiry into inability to pay in only six instances out of 105 (6% of the sample).⁹ This, despite recurring suggestions in the record of difficult finances: in ten cases, the defendant was described as unemployed; in five cases, as homeless. In 63 of 105 cases (60% of the sample), the defendant, on another day and at an earlier point in the proceeding, had been found indigent for the purposes of receiving court-appointed counsel.¹⁰
- ***Offers of alternatives to incarceration.*** Hard copy and audio records show that many defendants -- perhaps a majority -- had received prior extensions of time to pay their debts. But in only 17 of 105 cases (16% of the sample) do the records indicate that the judge, on

⁹ The Committee actually found only four such instances among the 72 cases for which we were able to obtain the audio as well as the hard-copy record. We extrapolated from the tally of four instances out of 72 to arrive at an estimated six instances out of 105.

¹⁰ In seven of these 63 cases, the judge waived the \$150 fee for indigent counsel. In three other cases, the defendant avoided the fee for other reasons. See footnote 8.

another day and an earlier point in the proceeding, had exercised his statutory power to waive or reduce the defendant's debts. In only 32 instances (31% of the sample) is there an indication that a judge, prior to ordering the defendant's incarceration, had at some time offered a less restrictive option such as community service.

- ***Assistance of counsel.*** Audios of the proceedings indicate the presence of an attorney or at least the offer of one in only 48 cases out of 105 (46% of the sample).¹¹
- ***Advance notice of the risk of incarceration.*** The Committee's review of the written and audio records gave rise, unexpectedly, to a fresh question about fundamental fairness -- specifically, about notice and due process. Neither the written nor the audio records confirm whether Massachusetts defendants in fine time situations had been warned by a judge, on an earlier occasion, that failure to pay might land them behind bars. But in at least a dozen instances -- see the example below from Newburyport District Court -- the audio of the proceeding captures the defendant's disbelief and bafflement as he's led away on the spot to jail.
- ***Tales from the audio records.*** As mentioned, the Committee supplemented its review of the hard-copy case files by obtaining and listening to the audio recordings of 72 of the 105 hearings. In addition to providing crucial information about judges' inquiries into inability to pay and offers of legal counsel, they reveal the real-life flavor of fine time proceedings:
 - In Newburyport District Court, a defendant, charged originally with three offenses that were dismissed, was ordered to serve 25 days in jail for failing to pay \$760. The defendant, who was not represented by counsel, asked, "Do I have any say on this? Like, any defense?" The judge replied, "Pay the money. ... We got to clean up the paperwork."
 - In Leominster District Court, in April of 2015, a defendant previously convicted of shoplifting was sent to jail for owing the court \$175. The judge asked, "Do you have the money sir? ... We've been waiting two years for it, right?" The defendant said, "I'll have it on the first, your honor." The judge said, "You don't have to worry about it anymore, you're committed on the fine." Given the audio record, it appears the defendant had no attorney representing him.
 - In Dudley District Court, a defendant for whom public counsel had just been appointed on an unrelated case was given fine time for failure to pay \$769 in accumulated obligations. "Do you have the money?" the judge asked. The defendant said he would "have a check next week." The judge responded, "Committed on the fine. You can work it off at \$30 a day." His court-appointed attorney, there for the

¹¹ The Committee actually found only 33 such instances among the 72 cases for which we were able to obtain the audio as well as the hard-copy record. We extrapolated from the tally of 33 cases out of 72 to arrive at an estimated 48 instances out of 105.

new charges, said nothing during the portion of the proceeding devoted to the debt and imposition of fine time.

- In Worcester District Court, a defendant was overdue on a \$50 obligation. “Do you have any money, sir?” the judge asked. “I have no money. I get paid tomorrow,” the defendant said. “Why does this always happen to me?” the judge replied. “I don’t have a current job so I get cash benefits --” the defendant began. “Why does it have to be tomorrow? Why not today?” the judge said. Pointing out the defendant had performed only four community service hours of twelve assigned, he continued, “So this is a \$50 fine. You got 50 bucks?” The defendant said, “I have nothing on me til tomorrow.” The judge replied, “I’m gonna put you in jail, OK? Because I’ve had enough.” The defendant responded, “I apologize, sir.” The judge said, “You don’t have to apologize. My feelings aren’t hurt. The only thing is, it seems foolish that I would incarcerate you for \$50. ... You’re here today, in front of me today. The tomorrow stuff doesn’t work for me.” After a brief concluding exchange, the defendant was led away. From the audio, it appears no defense attorney was present.

Findings: Fine Time Ordered and Fine Time Served

Here, the Committee inquired into two matters -- the duration of the confinements ordered and the duration of time actually served.

Judges’ Formal Commitments. By statute,¹² the judge may require the defendant to serve one day of fine time for every \$30 owed the court. Across the 105 cases of fine time we examined, the briefest period of confinement ordered was one day and the longest was 112 days. In 48 of 105 cases (46%), the defendant was ordered to serve at least two weeks.

Time Spent Incarcerated. For the purposes of measuring duration of fine time actually served, we removed from the sample 30 instances in which people did their fine time concurrently with longer sentences they were serving; in these instances, the duration of incarceration attributable to fine time alone was unknowable. This left a usable sample of 72 cases.¹³ In 60 of these 72 instances (83% of the sample), the defendant served three quarters or more of the jail time ordered. In 49 cases (68% of the total), the defendant served all of the jail time ordered. In only six cases (8% of the total) were the defendant’s obligations paid off within one day of incarceration.

¹² M.G.L. c. 127, §144.

¹³ In three instances the Committee was unable to determine the length of actual incarceration time.

Fine Time Massachusetts: Discussion and Recommendations

As we've reported, the Committee obtained extensive data on fine time in three populous counties -- Essex, Plymouth and Worcester.

The composite picture that emerges from the numbers is jarring. Most of the individuals who ended up incarcerated for failure to pay monetary obligations had come into court on relatively minor charges; 68 of the 105 cases in our sample involved motor vehicle violations, public order complaints, shoplifting, and the like. In contrast, only 12 cases were assault-related. Only four individuals out of 105 served time for the criminal offense that had brought him before the judge in the first place.

Nevertheless, all 105 people went to jail. In five instances, a precipitating factor was failure to pay restitution owed to a victim; in 36 instances, it was failure to pay a fine imposed for a crime. But almost every case -- 99 out of 105 -- had, as a precipitating factor, unpaid fees or unpaid court costs.

At the hearings that produced these results, defendants were largely on their own. In 54% of the proceedings, neither the audio nor the written record indicates the presence of an attorney or the offer of one.

Only six judges undertook an inquiry into whether failure to pay was a function not of willful contempt but of inability to pay. Inability was a possibility of which almost all the judges would have been aware; of the 105 defendants in our sample, 60% had been found indigent for the purposes of receiving court-appointed counsel in the earlier criminal proceeding that gave rise to the fines, fees and court costs. Indigency findings are recorded on the official written record -- the docket sheet -- for all to see, judges included.

Amid the state's disorderly welter of fines, fees, court costs and other assessments, several stood out as drivers of incarceration. While only 36 people had received fines as punishment for their original crimes, 73 incurred fees related to failure to appear in court (default warrants, default warrant removals or default warrant arrests); 53 incurred "indigent counsel" fees (as "co-payments" to partially reimburse the government for funding court-appointed lawyers); and 39

incurred “victim/witness” assessments (the proceeds of which go to neither victims nor witnesses but into the state’s general coffers).¹⁴

Defendants about to go to jail for failure to pay money have a strong incentive to come up with what they owe; if they’re already there, they have a strong incentive to produce the amount that will get them out. Yet most of the people in our sample stayed put. Median period of incarceration was nine days; 83% of defendants served three quarters or more of the original sentence before reaching a point at which they could afford to “buy out” the time remaining at a cost of \$30 a day.

Decision-making by Massachusetts district court judges is inconsistent enough to produce its own uneven justice. Yet responsibility rests, first and foremost, with elected officials. On the question of fines and fees, legislators and governors have put judges in a bind. Over the years we’ve raised “prices” on the “services” we charge to users of the criminal justice system. When these users are late in paying up, we direct judges to collect the money. By passing laws defining civil and criminal contempt of court, we set up the threat of jail, and the reality of jail, as special tools in the judge’s debt collection toolbox. But then we hedge, instructing him or her to waive the debt if the customer is poor. Unfortunately, at the district court level many people the judge sees are poor. Yet the system is expensive to run and the government depends on the revenue. While the defendant might receive an extension or two on the deadline for payment, in the end most judges seem intent on getting in the money.

While the problem starts with pressure from the Legislative and Executive branches, the Judiciary hasn’t managed to make things much better. Our investigation finds that district court hearings on whether to incarcerate for failure to pay fines, fees and court costs are flawed by a lack of consistency, lack of rigor, and lack of compassion.

Backed, ideally, by leaders of the Executive branch, the Legislature should ...

1) ... oppose increases in those exactions that have big negative effects on poor defendants.

If the test of a first-rate intelligence is the ability to hold two opposing ideas in the mind at the same time,¹⁵ we politicians are distinguished by our first-rate intelligence. Support for rolling back criminal penalties in general can co-exist with support for raising any number of penalties in particular. In other words, we’re not always consistent. Following a high-profile crime, elected officials are besieged by calls for longer sentences, stiffer fines and higher fees. We

¹⁴ It may well be that our 105 “pure” cases of fine time incarcerations are but the tip of a larger iceberg, albeit one that is difficult to investigate. The Committee expects that failures to pay fines, fees and court costs are important contributing factors in numerous instances in which offenders are found in violation of their conditions of probation and are incarcerated.

¹⁵ F. Scott Fitzgerald, “The Crack-Up” (1936).

recognize that one extreme case is a poor basis for enacting a law that will apply for years to a multitude of less extreme cases, and yet the pressures of the moment can be hard to resist. Members of the Committee respectfully observe that resistance may be what the times require.

2) ... double the per diem credit for fine time served to \$60. Massachusetts law says “[a] prisoner confined in a prison or place of confinement for non-payment of a fine or a fine and expenses shall be given a credit of thirty dollars on such fine or fine and expenses for each day during which he shall be so confined...”¹⁶ The per diem credit hasn’t changed since 1987, when the Legislature bumped it up from \$3 to the current \$30. This Committee urges our colleagues to increase it further to \$60. Provided that judicial behavior doesn’t change, doubling the per diem should reduce the duration of fine time commitments by half.

3) ... commit to a phase-out of excessive fines and fees, and to limits on court cost charges. Viewed from 50,000 feet, the problem with the Legislature’s willy-nilly imposition over the years of monetary exactions is that when they’re imposed on poor people -- which is very often -- they constitute a hugely regressive tax, not only on offenders but on their families. The obvious two-pronged solution is to scale down the financial impositions, gradually but persistently, and -- here’s the hard part -- to come up with alternative sources of funding for courts and corrections. We appreciate that this will take time. The Committee urges our colleagues to begin the process.

4) ... monitor for unanticipated consequences: don’t let fines rise as population declines. Ideally, the reforms proposed here, combined with sentencing reforms outside the scope of this inquiry, will bring down not only the number of people incarcerated but the number involved at every stage of the criminal justice process. In the event of such down-sizing, criminal justice professionals, consciously or not, may try to offset reductions in the overall volume of offenders by *increasing* per-offender revenue. The Legislature should help out in two ways: first, by setting court appropriations at levels sufficient to smooth out otherwise bumpy transitions, and, second, by using the Post Audit and Oversight function to monitor for the emergence of any counter-productive trends.

5) ... mandate the offer of an attorney, free of any indigent counsel fee, in fine time cases. In only 46% of our sample of 105 fine time cases did a defendant have what appeared to be the conventional assistance of an attorney. Even assuming that some number of additional defendants waived counsel while some others received a few minutes of advocacy from a duty lawyer who happened to be in the courthouse, it appears that Massachusetts trial court judges follow no consistent policy with respect to offering defendants legal representation in the face of possible fine time.

¹⁶ M.G.L. c. 127, §144.

The Committee is disappointed to note that a new 2016 *Sentencing Bench Book*, compiled for judges of the Massachusetts District Court and the Boston Municipal Court, is altogether silent on the advisability of offering a defendant counsel in such situations.¹⁷

Such reticence is puzzling in light of the teachings of *Commonwealth v. Gomes*, in which the Supreme Judicial Court ruled that Mr. Gomes had the right to be represented by counsel at a hearing before he could be incarcerated for missing his deadline for paying a fine.¹⁸ *Gomes* quotes approvingly from *Argersinger v. Hamlin*, a prominent U.S. Supreme Court decision on the right to counsel: “Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”¹⁹

Gomes’ situation was different than *Argersinger*’s -- instead of a trial without a lawyer Gomes was subject to a post-disposition proceeding without a lawyer, and rather than commission of a misdemeanor his offense was failure to pay a fine by a date set by the court -- but these differences did not stop the SJC from invoking *Argersinger* to support a finding that Gomes had a constitutional right to counsel. As guidance to district court judges on whether to offer a defendant the services of an attorney in a hearing on failure to pay a fee or court costs, *Gomes* is similarly imperfect -- it involved a failure to pay a fine -- but the SJC’s reasoning in the case suggests that this too is a distinction without a difference.²⁰

Ideally, a federal or state appellate court will resolve the various uncertainties surrounding the right to counsel in situations involving monetary exactions. But such a court needs an appropriate case to review. This could be a long time coming. The hearing in which a trial judge metes out fine time may last no more than a minute or two, during which the defendant may well be without legal counsel (thus raising the constitutional issue). No separate date is set for sentencing and no stays are issued pending appeal. The defendant goes directly from courtroom to jail, still without a lawyer to resist the loss of liberty before it’s all lost. Fast-moving situations like these are sources of frustration to the legal profession, in that a constitutional violation may arise that is capable of repetition even as it evades review.

Members of the Legislature operate under no such constraints. We may have constituents who should be formally evaluated for indigency before coming before the court on financial obligations and who, if found indigent, should be offered counsel. If we’re concerned about this, we can address the situation through legislation.

¹⁷ *Boston Municipal Court and District Court Sentencing Bench Book* (March 2016).

¹⁸ 407 Mass. 206 (1990).

¹⁹ 407 U.S. 25 (1972) at 37.

²⁰ The authors of the *Bench Book* could have taken inspiration as well from Mass. Criminal Procedure Rule 8: *Assignment of Counsel*, especially the Reporter’s Note: “The present state of the law is that counsel is required in all cases where the defendant faces possible imprisonment unless the defendant properly waives his right to the assistance of counsel.”

One option is to amend and update Mass. General Laws c. 127, §145, an oddly-worded statute with the straightforward title “Discharge of poor persons from jail.” Section 145 reads, “Justices of district courts shall discharge from jail persons confined for the nonpayment of fine [*sic*], or of fine and expenses, if they are of opinion [*sic*] that such persons are not able to pay the same or that it is otherwise expedient....”

Two great flaws in §145’s current wording are that it affords no relief until someone is already imprisoned, and, given the relative brevity of most fine and fee incarcerations, a defendant might find himself without a lawyer to draft a petition for relief. A revamped §145 could require a judge to (a) conduct a new indigency assessment of any defendant appearing before him who faces the risk of confinement for failure to pay a financial obligation stemming from a criminal proceeding; (b) offer the defendant both counsel and an appropriate period of time for the defendant and attorney to consult; and (c) waive the indigent counsel fee in situations involving possible incarceration for failure to pay monetary exactions.

The Judiciary, for its part, should ...

6) ... clarify how trial court judges should proceed before ordering fine time. In October 2014, in perhaps the most constructive recent policy step taken by a high-ranking Massachusetts official on criminal justice reform, the Chief Justice of the Supreme Judicial Court (SJC) directed “every trial court department with criminal jurisdiction to convene a working group comprised of judges, probation officers, prosecutors, and defense attorneys to recommend protocols in their department that will incorporate best practices to ensure individualized, evidence-based sentences.”²¹

The committee most responsible for thinking about fine time cases, the working group for the Massachusetts District Court and Boston Municipal Court, interpreted this call to action narrowly, equating the incorporation of best practices with a straightforward restatement of current requirements, an unfortunate choice if a topic needs constructive rethinking. In March 2016 the working group framed a short set of *Best Practice Principles*. Only one relates to monetary exactions. It states the obvious: “The judge should impose all statutorily mandated assessments, but may waive such assessments, consistent with statutory authority. Consistent with the prevailing law, a judge may impose community service as an alternative to statutorily mandated assessments.”²²

²¹ Ralph D. Gants, Chief Justice of the Mass. Supreme Judicial Court, *Annual Address: State of the Judiciary*, October 14, 2014. Transcript at <http://www.mass.gov/courts/docs/sjc/docs/speeches/sjc-chief-justice-gants-state-of-judiciary-speech-2014.pdf>.

²² *Boston Municipal Court and District Court Sentencing Best Practice Principles*, March 2016.

True enough, but the topic needs more attention than this. From everything the Committee has uncovered, **it appears trial court judges should --**

6 (a) ... inquire into inability to pay. In the 67-page *Boston Municipal Court and District Court Sentencing Bench Book*, referenced above, the working group attempted more specificity, for our purposes with mixed success. “Fees, Fines, and Court Costs,” a two-page section, opens with a welcome exhortation to judges to inquire into a defendant’s inability to pay versus willful disregard of an obligation -- but only with respect to fines.²³

Here, as elsewhere in the *Sentencing Bench Book*, the authors deploy language with what seems to be painstaking specificity. The two pages refer pointedly to fines (typically understood to mean monetary exactions imposed, like incarceration itself, as punishment for a crime) but seldom to fees (exactions to defray the cost of an ongoing service or activity) and never to court costs (exactions to cover the expense of prosecuting the defendant in particular).

Thus, with respect to inability to pay fees or court costs, the two-page section (and the rest of the *Bench Book*) is silent, as to constitutional requirements or recommended best practices. There is a limited exception in a paragraph on waivers, but here, inexplicably, the material covers only waivers of probation fees, and only to the extent of reciting the black-letter law laid down by the Legislature. The authors have nothing to say about the circumstances under which judges should consider granting waivers or other aspects of the process.²⁴

Still, at least probation fees get a mention. With regard to waivers of the indigent counsel fee, the victim/witness fee, court costs, and the OUI program surcharge -- each of which accounts for \$1 million or more in annual exactions upon defendants -- the *Bench Book*’s coverage is so slight as to be undetectable. The same goes for the many remaining statutory assessments.²⁵ If a busy judge were to look to the *Book* for a sense of how to think about inability to pay in connection with fees or court costs, he or she would come away with almost nothing.

The void is particularly disheartening given the availability of *Commonwealth v. Gomes* and *Commonwealth v. Henry*. In *Gomes* the SJC considered the appeal of an assessment of \$50 in court costs to cover the apparent expense of the court’s entering a default against the defendant. The Court ruled for the defendant; court costs could have been assessed only after the conduct of

²³ *Boston Municipal Court and District Court Sentencing Bench Book* (March 2016), at 22. In a separate section on restitution, the *Sentencing Bench Book* does not reiterate instructions to evaluate the defendant’s ability to pay and the availability of less restrictive alternatives to incarceration. *Bearden v. Georgia*, 461 U.S. 660 (1983), the U.S. Supreme Court’s most authoritative analysis of incarcerations and inability to pay court assessments, deals specifically with an instance of restitution, so the *Bench Book*’s omission is unfortunate.

²⁴ *Sentencing Bench Book* (March 2016) at 17, 22-24. The *Bench Book* does refer to “Potential Money Assessments in Criminal Cases,” a separate document that does an excellent job of detailing each fine and fee, including whether a waiver is an option authorized by law, but, other than citing inclusive language in *Bearden* and *Gomes*, makes no recommendations on when judges should collect, when they should waive, and when they should incarcerate.

²⁵ *Sentencing Bench Book* at 23.

a hearing into whether “the defendant’s default was willful”²⁶ rather than a function of inability to pay, something the district court judge had failed to do.

In *Commonwealth v. Henry*, decided just this year, the Court applied similar reasoning. There a criminal trial court judge ordered Ms. Henry to pay a dollar amount in restitution that was arrived at without taking into consideration her impoverished financial situation. Imposing a dollar amount she couldn’t pay exposed Ms. Henry to a number of potential consequences, including incarceration. The Court found, “Burdening a defendant with these risks by imposing restitution that the defendant will be unable to pay violates *the fundamental principle* (italics ours) that a defendant should not face additional punishment solely because of his or her poverty.”²⁷ The Court elaborated, “The payment of restitution, *like any court-imposed fee* (italics ours), should not cause a defendant substantial hardship.”²⁸

Support for more consistent inquiries into ability to pay is surfacing elsewhere. With respect to the indigent counsel fee, the SJC offers new Rule 3:10, in particular the portion that reads, “The indigent counsel fee shall be waived where a judge, after the indigency verification process, determines that the party is unable without substantial financial hardship to pay the indigent counsel fee within 180 days.”²⁹ As far as the Committee can tell, the current *Bench Book*, issued in March, 2016, has yet to be updated to take account of *Henry* and revised rule 3:10.

Even after revisions are made, what will remain an open question is the *Book’s* practical effect on the behavior of district court judges. Distressingly, many of the 105 orders of incarceration in our sample issued despite clear intimations of difficult finances: in ten instances, court records describe the defendant as unemployed; in five instances, as homeless. In 63 instances (60% of the sample), the defendant, on another day and at an earlier point in the proceeding, had been found indigent for the purposes of receiving court-appointed counsel.

Still more doubt about the fairness of inquiries into financial status stems from the fact that, of the 72 cases for which duration data is available, 60 defendants, or 83%, served three-quarters or more of fine time ordered. This suggests genuine inability to pay; it’s safe to assume that few people would choose to serve out their entire sentences if they had a realistic alternative. Only five defendants, or 7%, managed to purge fine time orders within a day of entering jail, and in most of these situations the money owed was minimal.

6 (b) ... offer alternatives to incarceration. While our analysis shows judges often gave defendants multiple extensions of time to pay, in only 47% of the cases is there evidence that, prior to ordering imprisonment, the judge either waived a portion of the debt or offered community service or another alternative to incarceration. It seems the majority of defendants

²⁶ 407 Mass. 206 (1990) at 209.

²⁷ *Commonwealth v. Henry*, 475 Mass. 117 (2016) at 122.

²⁸ *Ibid*, at 127.

²⁹ S.J.C. Rule 3:10, *Assignment of Counsel* at §10 (a).

were up against a bottom-line culture; they could get themselves breathing space on a debt, but in the end the judge wanted the money.

As for prospects for changes in district court culture, there is reason to be discouraged. The “Fees, Fines, and Court Costs” section of the recently issued *Bench Book* directs judges to inquire into alternatives to incarceration -- but with respect to fines only, to the total exclusion of fees and court costs.³⁰

Such minimalist attention to the advisability of considering alternatives compares unfavorably to the strong note sounded by the Civil Rights Division of the U.S. Department of Justice. In March of this year the Division urged, more as a matter of recommended best practice than of strict legal analysis, “Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees.”³¹ Specifically, “In some cases, it will be immediately apparent that a person is not and will not likely become able to pay Therefore, courts should consider providing alternatives to indigent defendants not only after a failure to pay, but also in lieu of imposing financial obligations in the first place.”³²

Boiled down, the Division’s message is *be flexible, and be willing to tailor*. In the Division’s view, “alternatives to incarceration” should mean more than community service. For people with demanding work schedules, demanding family responsibilities, mental or physical challenges, or transportation limitations, community service may not even be the best option. Since recidivism reduction and successful re-entry are the real priorities, it may be better to try a restorative justice program or a course in traffic safety or intimate partner violence reduction.

6 (c) ... ensure counsel in hearings that may result in incarceration for failure to pay. As we’ve remarked, the behavior of Massachusetts jurists on assistance of counsel is marked by pronounced inconsistencies; in only 48 proceedings out of the 105 in our sample did the defendant have the protection of a lawyer. Until and unless the Legislature mandates the offer of an attorney in fine time situations, preferably free of any indigent counsel fee (see recommendation #5, above), the Committee hopes the Judiciary will declare strongly that representation by counsel is a recommended best practice.

6 (d) ... ensure advance notice of the risk of imprisonment for failure to pay. With respect to the situations that concern us here, neither *Sentencing Best Practice Principles* nor the *Sentencing Bench Book* say anything about notice – about whether a judge, before ordering incarceration for failure to satisfy a monetary obligation growing out of a criminal proceeding, should determine that the defendant had notice, sufficiently in advance, that his failure to pay could land him in jail. The Committee hopes the Judiciary can remedy the lack of guidance on this point.

³⁰ *Boston Municipal Court and District Court Sentencing Bench Book* (March 2016) at 23.

³¹ U.S. Department of Justice, Civil Rights Division, *Dear Colleague* letter, March 14, 2016, at 2.

³² *Ibid* at 4.

On the division of responsibility for moving forward with reform

It is to be hoped that a state or federal appellate court, acting in either a jurisprudential or administrative capacity, will set effective new policy on the questions enumerated here. But the Committee reiterates the concern we expressed above, to the effect that, with respect to monetary exactions, courts might have trouble acting.

With respect to the available jurisprudence, the mere handful of appellate decisions to date deal with either fines or fees or court costs but never all three -- or with restitution, or with bail, or with defaults for failure to appear in court. While the holdings are sometimes tantalizing, in the end they don't apply clearly beyond the specific monetary exaction involved in the case. Nor do the holdings inform trial court judges or lawmakers or anyone else whether defendants have a general right to any of the four protections discussed here: inquiries into inability to pay, offers of alternatives to incarceration, offers of the assistance of counsel, and provision of advance notice of court proceedings that quite likely could result in incarceration.

There remains, in the opinion of the Committee, an unfilled need for a well-organized guide that Massachusetts trial court judges can consult as they deal with monetary exactions imposed on criminal defendants.

Perhaps the courts will act in their administrative capacities. Or perhaps the Legislature should step in.

New legislative language could require that a judge, before ordering a criminal defendant to be incarcerated for failure to pay fines, fees, court costs or other assessments, make findings, in writing,³³ that (a) the court inquired into, and made an intelligible record of conclusions regarding, the defendant's possible inability to pay versus his possible willful neglect of the debt; (b) the defendant had had previous opportunities to satisfy his or her obligations, through community service or other less restrictive alternative to incarceration, and had failed to do so; (c) the defendant either had the meaningful assistance of a court-appointed attorney at the hearing that resulted in incarceration or had waived representation (see recommendation #5, above); and (d) a judge had, on a prior date, given the defendant notice -- had informed him that continued failure to satisfy his financial obligation to the court could result in his incarceration.³⁴

³³ See, for example, Ohio Rules of Court Procedure 2947.14, *Hearing on ability to pay fine*: "... the determination shall be supported by findings of fact set forth in a judgment entry that indicates the offender's income, assets, and debts, as presented by the offender, and the offender's ability to pay."

³⁴ For a brief but useful discussion of these ideas and others, see U.S. Department of Justice, Civil Rights Division, *Dear Colleague* letter, March 14, 2016.

CONCLUSION

Fine time is alive and well in Massachusetts district courts, a function of unawareness at the top, unchallenged and sometimes arbitrary power at the bottom, and pressure for revenue throughout.

A one-time call for change will not alter the status quo. Needed is a larger plan that begins with high-profile communication, continues with discussion and training, and encompasses talk about finances with the Governor, the State Auditor, the Speaker of the House, the President of the Senate, and the House and Senate Committees on Ways and Means.

Imprisoning poor people for their inability to pay fines, fees and court costs -- essentially, for not having money -- is the logical consequence of the Legislature's designating the ground-level criminal courts as sources of serious revenue for the state. This is all about legislative levies on relatively low-level offenses, imposed regardless of personal income and increased when general tax collections threaten to be inadequate. The challenge now, as we retrench, is to adjust for the falloff in government income. This will likely require a multi-year phased-in effort by the Executive and Legislative branches, an exercise that should begin promptly.

After finances, a second major challenge awaits. If and when the courts de-emphasize incarceration as the ultimate response to a defendant's continuing failure, for whatever reason, to pay, they will require other options. At the outset, judges and probation officers will need access to quicker and more accurate information on the personal finances of a given defendant. Later, in any confrontations over a lack of payment, they will have to give closer attention to payment plans, waivers, course attendance, treatment programs, electronic monitoring, restorative justice experiments, and altogether new approaches that await inventing.

The current situation is fundamentally unfair. Justice requires reversing course. Let the process begin now.