

WORKING PAPER

**SENTENCING FOR DOLLARS:
THE FINANCIAL CONSEQUENCES OF
A CRIMINAL CONVICTION**

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EXECUTIVE SUMMARY

The financial penalties imposed, directly or indirectly, as a result of a criminal conviction, are among the least considered or analyzed of the collateral consequences. Driven by a combination of philosophical purposes – punishment, reparation, cost recovery, revenue production and cost shifting – local governments, states and the federal government have come to impose a vast array of fines, fees, costs, penalties, surcharges, forfeitures, assessments, reimbursements and restitutions that are levied against people convicted of criminal offenses.

Currently, these financial penalties are created and imposed in a vacuum with each new fee viewed as a solitary cost. The cumulative impact of piling on each new financial penalty is ignored and the roadblocks to reintegration are often unrecognized. When viewed in isolation, these penalties may appear to be a good source of revenue and a way to shift costs from the “taxpayer” to the “offender.” Financial sanctions may also give the appearance of being “tough on crime.” However, these penalties look quite different when considered in their totality and in the context of their impact on the person convicted and his or her family.

Over the past decade we have become increasingly aware of the challenges faced by people reentering the community from prison and the challenges faced by communities and families receiving formerly incarcerated people. We know that the numbers of people returning home are staggering and we also know that the challenges they face are daunting and include poverty, health and mental health problems, lack of education and employment experiences and collateral consequences that impede access to jobs and education. The hurdles to reintegration caused by the financial consequences of criminal convictions are among the least recognized but may have some of the most far reaching impacts as these debts become civil liabilities, and are entered onto credit records that are increasingly accessible to employers.

This paper looks at the current status of these penalties in New York State and provides examples of how these costs mount up for people who are unlikely to have the resources to pay these debts. In one example, we show how the various fines, fees and surcharges for a person convicted of a class E felony DWI can add up to more than \$7,500. In another example, someone convicted of a drug offense can face more than \$33,000 in surcharges, fees and child support upon their release from prison.

Financial penalties certainly have a place in a continuum of sanctions. Restitution for example, supports reparation to the victim, and also provides a way for a person convicted of a crime to take responsibility for one's actions. However, it makes little sense to develop and apply financial penalties in an ad hoc fashion without considering the cumulative impact on the people who will be required to pay. This paper offers several recommendations to counter the negative consequences of financial penalties including the development of a comprehensive inventory of what financial penalties exist and how they overlap, establishing and clarifying provisions that exempt indigent people from certain penalties, and prohibiting the enactment of local laws that impose additional financial obligations on individuals as a result of a criminal conviction.

There are profound policy issues that need careful consideration including the implications of allowing financial penalties to supplant tax revenues. Public safety is a community goal and a public good. As such, the cost should be borne by the public and not shifted to those who can least afford these financial burdens.

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Alan Rosenthal* and Marsha Weissman**

I. INTRODUCTION

The financial penalties imposed, directly or indirectly, as a result of a criminal conviction, are among the least considered or analyzed of the collateral consequences.¹ Driven by a combination of philosophical purposes – punishment, reparation, cost recovery, revenue production and cost shifting – local governments, states and the federal government have developed a vast array of fines, fees, costs, penalties, surcharges, forfeitures, assessments, reimbursements and restitutions that are levied against people convicted of criminal offenses.

The use of financial penalties (other than restitution) is fraught with contradictions. On the one hand, it allows government to defray some of the cost of maintaining the criminal justice system by imposing fees on people who have been convicted of a criminal offense. On the other hand, the imposition of these financial burdens threatens the successful reintegration of people returning to their communities from prison as self-supporting, law-abiding citizens. Currently, financial penalties are created and imposed in a legislative/political vacuum. Each new fee is viewed as a solitary cost. The cumulative impact of piling on each new financial penalty is ignored and the roadblocks to reintegration are unrecognized. This lack of attention to financial

* Alan Rosenthal, Esq. is the Director of Justice Strategies, the Center for Community Alternatives' research, policy and training division. I am grateful to the members of the New York State Bar Association Special Committee on Collateral Consequences of Criminal Proceedings who worked with me as co-authors on the Report, *Re-Entry and Reintegration: The Road to Public Safety*. The chapter in that Report that I co-authored on financial consequences served as a foundation for this working paper. In particular I would like to thank Peter J.W. Sherwin, Jennifer E. Burns and Joseph D. McCann.

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¹ See Center for Community Alternatives, *Sentencing for Dollars*, available at http://www.communityalternatives.org/articles/policy_consider.html. This was CCA's initial effort to undertake a policy analysis of financial penalties.

penalties obscures policy questions about how society ought to balance its interests in revenue generation, individual accountability, community reintegration, and public safety. This paper seeks to illuminate the impact of financial penalties. To do so we will place an inventory of such penalties in the context of who is being asked to shoulder these financial burdens and the policy issues at stake.

This paper uses practices in the State of New York to illustrate these largely invisible collateral consequences. We focus on the financial consequences that are in the nature of penalties, i.e., financial obligations imposed upon the criminal defendant as he or she proceeds through the criminal justice system as a result of a criminal conviction. Clearly there are many other financial consequences that are faced not only by defendants, but also their families, and even their communities. These “other” financial consequences, which are less in the nature of penalties, are no less compelling or consequential but are beyond the scope of this paper.²

II. FINANCIAL PENALTIES: THE ABILITY TO PAY AND PEOPLE IN THE CRIMINAL JUSTICE SYSTEM

An assessment of the efficacy of financial penalties must start with a look at who is asked to pay these various charges.

A plethora of data show that financial penalties are being imposed upon people with little if any means to pay these costs either directly or by reaching out to family members for assistance. State and national data reflect that people involved in the criminal justice system face extreme social and economic marginalization. For example, of the people released on parole in

² In addition to the direct financial penalties imposed judicially or administratively, a person with a criminal conviction faces many other collateral consequences that have financial implications. These include a diminished earning capacity, diminished employment prospects, loss of professional licenses, bars from bidding on public contracts, bars from some public and subsidized housing as well as difficulties in obtaining public benefits. Other financial consequences are mentioned here in order to acknowledge their significance: child support arrears, creation of civil liability, collateral estoppel, forfeiture, access to the courts and filing fees, MCI collect telephone calls, travel costs, participation fees, prison industries, up-front fees for indigent criminal defense, booking fees, and issues related to how people in prison are counted in the census.

the New York State, 49% were unemployed, 81% needed services for drug abuse, and 15% had only a grade school education.³ Data from the New York State Department of Correctional Services (DOCS) further demonstrate that people in the criminal justice system have very limited job prospects. Thirty-six percent (36%) of prisoners tested below an 8th grade reading level and more than half had not graduated from high school or received a GED.⁴ National data show that nearly one third of adults in prison were unemployed in the month before their arrest compared to 7% of the general population.⁵ National data also show a 60% unemployment rate for formerly incarcerated people one year following their release from prison.⁶ The U.S. Bureau of Justice Statistics reports that about 80% of all felony-charged defendants are represented by public defenders, a clear proxy for the indigency of the criminal justice population.⁷

Health and mental health problems of people with criminal records also pose significant barriers to gaining and maintaining gainful employment. Almost 8% of people returning from prison are HIV-positive.⁸ It has been estimated that almost one-half of all people who have been previously incarcerated carry with them so many medical problems that it is unrealistic to expect them to re-enter society as productive citizens without much greater assistance than is currently

³ See New York State Division of Parole, *Parolee Facts* (Mar. 2004), available at http://parole.state.ny.us/program_statistics.html.

⁴ See New York State Dep't of Correctional Services. *Hub System: Profile of Inmate Population Under Custody on January 1, 2003*.

⁵ Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 40 (2003).

⁶ Center for Employment Opportunities, *Issue Overview: Crime and Work*, at 1, available at http://www.ceoworks.org/Roundcrime_work012802.pdf (citing Petersilia at the Reentry Roundtable).

⁷ Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Bureau of Justice Statistics, Wash., D.C. 2000). The data was obtained from the Nation's 75 most populous counties. Indigence is based upon a determination that the defendant qualified for publicly financed counsel, either assigned counsel or public defender.

⁸ Laura Maruschak, *HIV in Prisons and Jails*, 2002 (Bureau of Justice Statistics, Wash., D.C. 2004).

available.⁹ Nearly 16% of all people in prison, jail, or on probation were identified as mentally ill by a Bureau of Justice Statistics study.¹⁰ The National Adult Literacy Survey has established that 11% of people in prison, compared with 3% of the general population, self-reported having a learning disability.¹¹

Empirical evidence demonstrates that people leaving prison will have an extremely difficult time finding employment after release. There is a serious stigma attached to a criminal history - particularly a prison record. Surveys of employers reveal a great reluctance to hire a person with a felony conviction.¹² A study by Holzer found that more than 60% of employers were unwilling to hire an applicant with a criminal record.¹³ Devah Pager's research showed that acknowledging a prison record cut a white man's chances of getting called back for a job interview in half, and decreased a black man's chances for an interview by two-thirds.¹⁴ Even when a person with a prison history was able to find a job, future earnings were lower by about 30%.¹⁵

⁹ Richard B. Freeman, *CAN WE CLOSE THE REVOLVING DOOR? RECIDIVISM VS. EMPLOYMENT OF EX-OFFENDERS IN THE U.S.* 11 (2003).

¹⁰ Paula M. Ditton, *Mental Illness and Treatment of Inmates and Probationers*, at 1 (Bureau of Justice Statistics, Wash., D.C. 1999).

¹¹ Stefan LoBuglio, *Time to Reframe Politics and Practices in Correctional Education*, ANNUAL REVIEW OF ADULT LEARNING AND LITERACY, Ch. 4. Vol 2 (National Center for the Study of Adult Learning and Literacy, Cambridge, MA 2001).

¹² Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 117 (2003).

¹³ Harry Holzer, *What Employers Want: Job Prospects for Less-Educated Workers* (Sage 1996).

¹⁴ Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 5, 937-75 (2003). Even more startling was her finding that a white man with a criminal record was still more likely to be called back for an interview than a black man with no criminal history.

¹⁵ Jeffrey Kling, *The Effect of Prison Sentence Length on the Subsequent Employment and Earnings of Criminal Defendants* (2002) (unpublished Manuscript, on file with Princeton University).

People leave prison typically with no savings or assets, and limited job training or work experience. They are discriminated against in their search for employment as a result of race, ethnicity, and the stigma of a criminal history, and subject to a host of formal and informal barriers to employment.¹⁶ For example, a 2001 survey by the Legal Action Center identified statutory restrictions that bar or impede the ability of individuals with criminal records to obtain over 100 state licenses in New York.¹⁷ As recently as April 1, 2005, New York State Department of Health amended its regulations to prohibit the employment of any person convicted of any felony in the preceding 10 years in the field of nursing homes or home care.¹⁸ The amendment of these regulations was followed by legislation in 2005 to the same effect.¹⁹

The expansion of legal barriers to employment has been accompanied by an increase in the ease of checking criminal records due to new technology and expanded public access to records. As discussed below, debt due to non-payment of financial penalties appears on one's credit history. A criminal past has become both more public and more exclusionary, limiting the universe of available work.²⁰ It is within this context of poverty and unemployability that the growing use of financial penalties must be evaluated.

III. FINANCIAL PENALTIES: PURPOSES AND LEGISLATIVE AUTHORITY

Financial penalties can be sorted into three categories: fines imposed as part of the sentence; surcharges, fees and civil penalties, and restitution as part of efforts to make the victim whole.

¹⁶ S.M. Dietrich, *Criminal Records in Employment*, in EVERY DOOR CLOSED (A.E. Hirsch et al. Eds., 2002).

¹⁷ See New York State Occupations License Survey, authored by the Legal Action Center (2001).

¹⁸ 10 NYCRR §§ 400.23, 763.13, 766.11 and 18 NYCRR § 505.14.

¹⁹ N.Y. PUB. HEALTH LAW §§ 2899. 2899-a; N.Y. EXEC. LAW § 845-b.

²⁰ Jeremy Travis, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 68 (2005).

Fines

Most directly connected to the punishment for the offense are the financial consequences of fines that are imposed as part of the sentence.²¹ A fine is a sentence to pay a fixed amount, and may be imposed in addition to a revocable sentence (conditional discharge, probation, or an intermittent sentence) or a sentence of imprisonment. If a sentence of imprisonment is mandated, or if imprisonment is not mandatory but the felony is one defined in Penal Law Article 220 (drugs), then a fine may only be imposed in addition to the sentence of imprisonment. Otherwise, it may be the sole sanction.²²

Surcharges, Fees and Civil Penalties

Every conviction in the State of New York carries with it a mandatory surcharge.²³ This surcharge is a fee that is imposed upon a defendant when he or she has been convicted of an offense. It is separate and distinct from any fine which the court may have imposed. The current surcharges, amounts, and statutory authority are listed below:

²¹ In New York State, the provisions for fines are primarily found in Penal Law Article 80 and Vehicle and Traffic Law Article 45.

²² See N.Y. PENAL LAW §§ 60.01(2)(c), 60.01(3)(b), 60.05(7).

²³ Provision for these surcharges is made by Penal Law § 60.35 and Vehicle and Traffic Law § 1809.

MANDATORY SURCHARGES (as of January 1, 2007)

AMOUNT	APPLIES TO	STATUTE
\$250	VEH. & TRAF. LAW § 1192 DWI felony	VEH. & TRAF. LAW § 1809(1)(b)(i)
\$140	VEH. & TRAF. LAW § 1192 DWI misdemeanor	VEH. & TRAF. LAW § 1809(1)(b)(ii)
\$25	VEH. & TRAF. LAW Article 9 infraction	VEH. & TRAF. LAW § 1809(1)(a)
\$45	Selected VEH. & TRAF. LAW offenses	VEH. & TRAF. LAW § 1809(1)(c)
\$25	Surcharge for any conviction under VEH. & TRAF. LAW § 1192	VEH. & TRAF. LAW § 1809-c
\$250	Felony surcharge	PENAL LAW § 60.35(1)(a)(i)
\$140	Misdemeanor surcharge	PENAL LAW § 60.35(1)(a)(ii)
\$75	Violation surcharge	PENAL LAW § 60.35(1)(a)(iii)
\$5	Proceeding in town or village	VEH. & TRAF. LAW § 1809(9)
5%-10% of total restitution	Designated surcharge paid to agency collecting restitution for collection and administration	PENAL LAW § 60.27(8)

In New York, there is an array of statutorily authorized fees including the crime victims' assistance fee, DNA Bank Fee, Sex Offender Registration Fee, termination of license revocation fee, termination of suspension fee, parole supervision fee, probation supervision fee for DWI offenses, supplemental sex offender victim fee, and incarceration fee. These fees are also distinct from any fines imposed by the court. These fees, amounts, and statutory authority are listed below:

FEES (as of January 1, 2007)

AMOUNT	APPLIES TO	STATUTE
\$20	Felony offense Crime Victims' Assistance Fee (CVAF)	PENAL LAW § 60.35(1)(a)(i)
\$20	Misdemeanor offense CVAF	PENAL LAW § 60.35(1)(a)(ii)
\$20	Violation CVAF	PENAL LAW § 60.35(1)(a)(iii)
\$20	For VEH. & TRAF. LAW § 1192 felony offense CVAF	VEH. & TRAF. LAW § 1809(1)(b)
\$20	For VEH. & TRAF. LAW § 1192 misdemeanor offense CVAF	VEH. & TRAF. LAW § 1809(1)(b)
\$5	For VEH. & TRAF. LAW Art 9 traffic infraction CVAF	VEH. & TRAF. LAW § 1809(1)(a)
\$5	VEH. & TRAF. LAW offenses covered by 1809(1)(c) CVAF	VEH. & TRAF. LAW § 1809(1)(c)
\$50	DNA Databank fee: a person convicted of a designated offense as defined in Executive Law § 995(7) shall, in addition to a mandatory surcharge and crime victim assistance fee, pay a DNA databank fee	PENAL LAW § 60.35(1)(a)(v)
\$50	Sex offender registration fee (SORA): a person convicted of a sex offense as defined in Correction Law § 168-a(2) or a sexually violent offense as defined in Correction Law § 168-a(3)	PENAL LAW § 60.35(1)(a)(iv)
\$10	SORA change of address fee	CORRECTION LAW § 168-b(8)
\$50	Termination of license revocation fee. If driver's license is revoked – application for re-issuance	VEH. & TRAF. LAW § 503(2)(h)
\$100	Termination of license revocation fee. If driver's license is revoked for an alcohol-related offense and driver is under 21	VEH. & TRAF. LAW § 503(2)(h)
\$25	Termination of license suspension fee	VEH. & TRAF. LAW § 503(2)(j)
\$100	Termination of license suspension fee – Zero Tolerance. If driver is under 21, license is suspended for an alcohol-related offense	VEH. & TRAF. LAW § 503(2)(j)
\$35	Termination of license suspension fee where suspension is for failure to appear, pay fine, penalty, or mandatory surcharge	VEH. & TRAF. LAW § 503(2) (j-1)(i)
\$30/month	Fee for parole supervision	EXEC. LAW § 259-a(9)(a)
\$30/month	Fee for probation supervision (DWI - related)	EXEC. LAW § 257-c
\$1/week	Incarceration Fee: The commissioner may collect from the compensation paid to a prisoner for work performed while housed in a general confinement facility an incarceration fee.	CORRECTION LAW § 189(2)
\$1,000	Supplemental Sex Offender Victim Fee	PENAL LAW § 60.35(1)(b)

Finally, as shown below, the Vehicle and Traffic Law provides for civil penalties for people convicted of certain alcohol or automobile insurance related offenses.

CIVIL PENALTIES (as of January 1, 2007)²⁴

AMOUNT	APPLIES TO	STATUTE
\$125	Zero Tolerance Law: For offenders under age 21 for alcohol-related offense	VEH. & TRAF. LAW § 1194-a(2)
\$750	Operating with no insurance or underinsured	VEH. & TRAF. LAW § 319(5)
\$500	Chemical test refusal	VEH. & TRAF. LAW § 1194(2)(d)(2)
\$550	Chemical test refusal – commercial vehicle	VEH. & TRAF. LAW § 1194(2)(d)(2)
\$750	Second Chemical test refusal with alcohol within 5 years	VEH. & TRAF. LAW § 1194(2)(d)(2)
\$750	Chemical test refusal with prior VEH. & TRAF. LAW § 1192 convictions within 5 years	VEH. & TRAF. LAW § 1194(2)(d)(2)

Restitution

Restitution is the financial consequence most directly related to the offense. Drawing upon one of the concepts of restorative justice, restitution and reparation in New York State are authorized by Penal Law § 60.27 as part of the sentence in addition to any other permissible disposition.

²⁴ Includes amendments implemented by the DWI Reform Act of 2006 which became effective on November 1, 2006.

Court-ordered restitution covers the victim's loss resulting from the crime.²⁵ If restitution is made prior to the imposition of the sentence, the defendant is not required to pay the mandatory surcharge or crime victims assistance fee.²⁶ If, however, the restitution is not made by the time the sentence is imposed, a court must impose an order for payment of the mandatory surcharge and crime victim assistance fee to go along with the order of restitution.²⁷

In all cases where restitution is imposed as part of the disposition, the court must also impose a designated surcharge of 5% of the entire amount of the restitution payable to the official or organization designated as the agent to collect the restitution pursuant to Criminal Procedure Law § 420.10(8).²⁸ Often the collection agent is the probation department. However, Penal Law § 60.27(8) authorizes the court to impose upon the defendant an additional surcharge of up to another 5%, upon application by the designated official, if they can show that the actual cost of collection exceeds the initial 5%.

IV. THE GROWING USE OF FINANCIAL PENALTIES

The use of financial penalties has flourished since the early 1990's.²⁹ New York State exemplifies this trend in the increased use of fees to generate revenue. New York has seen the

²⁵ Whenever the court requires restitution to be made, it must make a finding as to the dollar amount of the fruits of the offense and the actual out-of-pocket loss to the victim caused by the offense. N.Y. PENAL LAW § 60.27(2).

²⁶ N.Y. PENAL LAW § 60.35(6); N.Y. VEH. & TRAF. LAW § 1809(6).

²⁷ *People v. Quinones*, 95 N.Y.2d 349 (2000). The Court of Appeals has held that the Penal Law §60.35(4) provides a mechanism whereby a person can seek a refund of the mandatory surcharge and the crime victim assistance fee after the restitution is paid.

²⁸ See N.Y. PENAL LAW §60.27(8).

²⁹ The use of mandatory surcharges started in 1982. N.Y. Laws of 1982, Chapter 55. Initially, the mandatory surcharge for a felony was \$75.00 and \$25.00 for a misdemeanor. It has increased repeatedly over the years until it reached its current level of \$250.00 for a felony and \$140.00 for a misdemeanor.

initiation and/or increases of such imaginative fiscal penalties as mandatory surcharge, crime victim assistance fee, designated surcharge and additional designated surcharge, incarceration fee, DNA Databank fee, parole and probation supervision fees, sex offender registration fee, supplemental sex offender victim fee, driver responsibility assessment, reimbursements, and disciplinary surcharge to mention a few, along with repeated legislative efforts to add and increase other financial penalties. This expansion has taken place without any review of the cumulative effects the fines, fees, surcharges and penalties may have on the person convicted, and his or her family.

Defendants are often unaware of the financial obligations. With so many financial penalties scattered throughout different sections of the law, it is difficult for either a judge or defense counsel to locate and identify them all in order to review them with the defendant. The chaotic array of financial penalties undermines defense counsel's ability to adhere to professional standards that require defense counsel to be familiar with all of the collateral consequences of a sentence including fines, forfeiture, restitution, and court costs.³⁰ Defense counsel are also required by professional standards to advise the defendant, sufficiently in advance of the plea, as to these possible collateral consequences.³¹ Most defense counsel have difficulty keeping track of the ever-changing fees and surcharges.³²

³⁰ See National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation, Guideline 8.2 (3d printing, 2001).

³¹ See American Bar Association Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 14-3.2 (3d ed. 1993).

³² A pioneering effort to consolidate these financial penalties in one place as a useful tool for defense counsel was undertaken by the Center for Community Alternatives in 2004. See Center for Community Alternatives, *Sentencing for Dollars: Policy Considerations*, available at http://www.communityalternatives.org/articles/policy_consider.html.

States, including New York, have both increased the number and kinds of financial penalties and also exposed more people to these sanctions. For example, on November 18, 2004, New York introduced a new financial penalty known as the Driver Responsibility Assessment³³ that makes any person convicted of DWI or DWAI or any person found to have refused a chemical test³⁴ liable for payment of a Driving Responsibility Assessment in the amount of \$250.00 per year for each of three years. Vehicle and Traffic Law § 503(4) was also added to provide for an additional Driver Responsibility Assessment for any person who accumulates 6 or more points on his or her driving record within any 18 month period. The amount of the assessment is \$100.00 per year for each of 3 years for the first 6 points on a driver's record and an additional \$25.00 per year for each additional point on the driver's record.³⁵

The ensnaring of more people in the web of financial penalties is exemplified by changes in New York State's treatment of youthful offenders.³⁶ Until February 16, 2005, youthful offenders were exempt from financial penalties. However, the enactment of Penal Law §60.35(10) requires the imposition of fees and surcharges to "sentences imposed upon a youthful offender finding." The same change was made in Vehicle and Traffic Law § 1809(10).

Perhaps most disturbing has been the imposition of fees in the absence of statutory authority. In 1992, Executive Law § 257-c was enacted authorizing counties and New York City to pass local laws permitting the imposition of a \$30 probation supervision fee on individuals

³³ See N.Y. VEH. & TRAF. LAW §§ 1199 and 503(4).

³⁴ Chemical tests include breath, blood, urine, or saliva for the purpose of determining the alcohol and/or drug content of the blood.

³⁵ The Driver Responsibility Assessment is imposed by the Commissioner of the Department of Motor Vehicles.

³⁶ Youthful offenders are young people between the ages of 14 and 19 convicted of a crime and adjudicated a youthful offender (YO) pursuant to New York Criminal Procedure Law § 720.20. YO status provides certain sentencing and post-conviction benefits and protections.

sentenced to probation for a DWI conviction. These fees are not required to be turned over to New York State and can instead be kept by local probation departments. As this was a time of declining state aid to probation, many counties passed such local legislation. However, some counties went beyond fees authorized by the Executive Law and enacted local legislation authorizing the collection of administrative fees for supervising all probationers as well as fees for such “services” as drug testing, preparation of pre-sentence reports, electronic monitoring and victim impact panels. Despite an opinion by the New York State Attorney General (Opinion No. 2003-4, April 7, 2003) that a county may not enact local legislation permitting fees for probation services except as specifically authorized by statute, some counties have continued to collect probation fees that are not authorized by state law.³⁷

V. DOING THE MATH: THE CUMULATIVE BURDEN OF FINANCIAL PENALTIES

The appropriateness of each individual financial penalty notwithstanding, problems emerge when new penalties are enacted and old penalties are increased in a vacuum. There is seldom any analysis of their cumulative consequences and how the sum of all these financial penalties impact the typical person involved in the criminal justice system. By viewing each financial penalty in isolation, these penalties may appear to be a good source of revenue and a

³⁷ In both 2005 and 2006 legislation was proposed to authorize probation to collect additional user fees. Senate Bill S. 2842 and 2842-A proposed to amend Executive Law § 257-c to allow for the imposition of a \$30.00 per month probation administrative fee for any person convicted of any crime and sentenced to probation, and also for the imposition of an \$8.00 per test drug testing fee and an \$8.00 per day electronic monitoring fee. Governor Pataki’s Executive Budget for 2006 not only proposed to include the same amendments as Senate Bill S2842-A, but also proposed several additional fees including an amendment to Penal Law § 60.35 that added a new \$25.00 probation fee for any person on probation who is subject to a DNA bank fee. The new fee would have been paid to probation to compensate them for supervising and ensuring compliance with the payment of the \$50.00 DNA bank fee. Likewise, there was a proposed \$25.00 probation fee for any person on probation who is subject to a sex offender registration fee so that probation could ensure compliance with payment of that fee. The net result of these new fees would have required an individual to pay a fee totaling \$50.00 so that probation could supervise the payment of two other fees. See analysis by Center for Community Alternatives *available at* http://www.communityalternatives.org/justice_strategies/financial_penalties.htm. The proposed legislative expansion of the use of probation fees ultimately failed.

way to shift costs from the “taxpayer” to the “offender.”³⁸ Financial sanctions may also give the appearance of being “tough on crime.” However, these penalties look quite different when viewed in their totality, particularly given the poverty of the people who are expected to bear these costs.

Two examples of common felony convictions illustrate how fines and fees add up to a considerable sum for people with meager financial resources. In example 1, John, age 20, after refusing a chemical test, was convicted of Driving While Intoxicated, a class E felony, and Operating a Motor Vehicle with No Insurance, a misdemeanor. John was sentenced to 5 years probation. The financial consequences of his conviction included:

EXAMPLE 1

Mandatory fine of no less than	\$1,000.00
Mandatory Surcharge	\$250.00
DNA Bank Fee	50.00
Crime Victim Assistance Fee	\$20.00
Probation Supervision Fee (\$30.00/Month)	\$1,800.00
Fee for termination of license revocation	\$100.00
Surcharge for VEH. & TRAF. LAW § 1192 conviction	\$25.00
Civil Penalty for No Insurance	\$750.00
Civil Penalty for chemical test refusal with prior VEH. & TRAF. LAW § 1192 conviction within 5 years	\$750.00
Driver Responsibility Assessment	\$750.00
Court Ordered installation of ignition interlock devise (VEH. & TRAF. LAW § 1193(1-a)(c)(i))	<u>\$2,175.00</u>
	\$7,670.00

The sum of the financial penalties for this felony DWI conviction totaled \$7,670.00.

Example 2 is Jane, a 26 year old single mother of two children, convicted of a class A-II drug possession felony. She was sentenced to a 7 year determinate sentence and 5 years post-release supervision. Jane’s two children have been in the custody of her mother since her arrest.

³⁸ John Howard Society of Alberta, *Correctional User Fees* (2001), available at <http://www.johnhoward.ab.ca/docs/userfees/cover.html>.

Jane’s mother was on TANF (Public Assistance) and was required to petition for child support.

The financial consequences for Jane will be:

EXAMPLE 2

Mandatory Surcharge	\$250.00
Crime Victim Assistance Fee	\$20.00
DNA Bank Fee	\$50.00
Incarceration Fee	\$312.00
Parole Supervision Fee	\$1,800.00
Fee for termination of driver’s license suspension	\$25.00
Child Support (assuming a Court Order of \$100.00/week) (6 years)	<u>\$31,200.00</u>
	\$33,657.00

The sum of Jane’s financial consequences will be \$33,657.00

VI. THE COLLECTION BUSINESS: ENFORCEMENT OF FINANCIAL PENALTIES

New York’s Penal Law, Criminal Procedure Law, Vehicle and Traffic Law, and the Executive Law all provide for the collection of many of the financial penalties attendant to a criminal conviction and apply to people who are in jail, prison, on parole, or probation.

Paying in Prison

As required by Penal Law § 60.35(5), when a person who has been convicted of a crime or a violation and has been sentenced to a term of imprisonment has failed to pay the mandatory financial penalties prior to incarceration³⁹ the debt is collected from the “inmate’s funds” and/or money earned by the person in a work release program.⁴⁰ Inmates’ funds that are subject to garnishment include money that a person brings when he or she is admitted to the prison, money

³⁹ The penalties that are subject to collection while one is in prison include the mandatory surcharge, sex offender registration fee, DNA bank fee, crime victim assistance fee or supplemental sex offender fee. The clerk of the sentencing court is required to notify the superintendent or the municipal official of the facility where the person is confined who must then collect the debt.

⁴⁰ Vehicle and Traffic Law § 1809(5) makes the same procedure applicable for unpaid Vehicle and Traffic cases where the mandatory surcharge or crime victim assistance fee is unpaid.

earned during incarceration and money that is deposited on the person's behalf during his or incarceration.⁴¹

New York DOCS Directive Number 2788 establishes the procedure for the collection of money by prison officials to pay the obligations of the incarcerated person, including all of the financial penalties as well as judgments for child support payments, "gate money,"⁴² and work release room and board fees. When an encumbrance is established, all money in the "inmate's fund" is applied to collection. If there are insufficient funds available in the "inmate's fund" to pay off the encumbrance, the balance due is collected at a rate of 20% of any money earned while working inside the prison and 50% of any money sent into the "inmate's fund," including any money sent by family or friends for commissary. When two encumbrances are active at the same time, up to 40% of weekly earning and 100% of the money sent to the "inmate's fund" from outside the prison is collected. For people on work release, after room and board costs are deducted, 100% of their wages are garnished if they have two or more outstanding judgments, and 20% if they have one.⁴³

Through these procedures, DOCS collects more than \$2.5 million in fines, fees and surcharges annually from "inmates' funds," from prisoners earning an average of one dollar a day.⁴⁴ Between April 1995 and March 2003 a total of \$22 million was collected from "inmates' funds".⁴⁵ During this same time period, DOCS collected nearly \$15 million in fees that DOCS

⁴¹ See N.Y. CORRECT. LAW §§ 116, 500-c.

⁴² Gate money is the term used to describe the \$40.00 that is given by the superintendent of the correctional facility where the person was last confined to that person at the time of his or her release. This money is taken from the funds in the "inmate's account" that is earned while in prison or is sent in by family or friends. See N.Y. Correction Law § 125(2) and New York State Department of Correctional Services Directive 2788.

⁴³ *DOCS Today*, Vol. 13, No. 4 (Apr. 2004).

⁴⁴ *Id.*

⁴⁵ *Id.*

itself imposed on prisoners, including room and board fees for people on work release, fees for “day reporters” for people who live at home but report to work release prisons on a regularly scheduled basis, and fines from disciplinary infractions.⁴⁶ The fines from disciplinary infractions represent more than 3.5 million dollars of the 22 million dollar total. These “mandatory disciplinary surcharges” assess \$5.00 automatically every time one or more disciplinary infractions are affirmed at a hearing.⁴⁷ These disciplinary surcharges had their genesis in the early 1990’s when New York was undergoing a fiscal crisis. According to Anthony J. Annucci, Deputy Commissioner and Counsel of the New York State Department of Correctional Services they were conceived of as a revenue generating idea and were part of broader efforts to deter prisoners’ lawsuits.⁴⁸

Paying on Parole

The New York State Division of Parole is authorized by Executive Law § 259-a(9)(a) to charge a supervision fee of \$30.00 per month for each person on parole, conditional release, presumptive release and post-release supervision. These fees are waivable based upon a showing of indigence and unreasonable hardship.⁴⁹ The rate of collection of these fees has been low since the inception of the fee and has diminished over the years. The most recent data available shows that in 1993 the collection rate was 10% but by 2001 it had dropped to 1%. For the period

⁴⁶ *Id.*

⁴⁷ 7 NYCRR §§ 253.7(b), 254.7(b) (2004). This disciplinary surcharge is imposed for all but minor infractions known as Tier II and Tier III infractions.

⁴⁸ Anthony J. Annucci, *Anatomy of the Modern Prisoners’ Rights Suit: New York’s Expanded Son of Sam Law and Other Fiscal Measures to Deter Prisoners’ Suits While Satisfying Debts*, 24 PACE L. REV. 631, 635 (2005)

⁴⁹ N.Y. EXEC. LAW § 259-a (9) (a).

October 2000 to September 2001 \$179,498.00 was collected from the over 50,000 parolees statewide.⁵⁰

The low collection rate is likely due to the inability of parolees to pay. Yet, despite the high rates of unemployment among parolees, less than 1% of supervision fees were waived for indigence and thus remain as an unpaid obligation.⁵¹ Moreover, the failure to pay the supervision fee can be used as a reason to deny a person's application for a Certificate of Relief from Disabilities or a Certificate of Good Conduct⁵², documents that can be helpful to formerly incarcerated people seeking employment. In this way, financial penalties for people on parole actually can become an additional deterrent to their ability to achieve gainful employment.

Paying on Probation

In contrast to the low rate of collection of parole supervision fees, some counties have found the collection of probation supervision fees to be a "revenue enhancement" worthy of vigorous pursuit. For example, in 1999 alone, Onondaga County collected over \$356,000.00 in total probation fee revenues. Of that total, \$212,000.00 was collected for non-DWI probation supervision fees (\$171,072.00) and alcohol/drug testing (\$41,136.00).⁵³ Onondaga County started collecting these fees on December 1, 1996 based upon the passage of Local Law 10 of 1996 and continues collecting to this day.⁵⁴ In 2002, the Suffolk County Probation Department collected \$1,165,242.71 in administrative fees from probationers that included \$981,722.71 in

⁵⁰ Division of Parole Briefing Book FY 2000-01.

⁵¹ *Id.*

⁵² Form 6001 which is the Notice Regarding Supervision Fees is on file with the authors.

⁵³ See Onondaga County Probation Department 1999 Annual Report. As previously noted, New York State Law does not authorize the collection of such fees.

⁵⁴ If the rate of collection of fees remained constant between 1997 through 2006, Onondaga would have collected over \$2.1 million in unauthorized fees from its probationers.

supervision fees, \$59,999.00 for drug testing and \$123,530.00 from fees levied for pre-sentence investigation fees.⁵⁵

Paying from Bail Funds

In any case where cash bail has been posted by the defendant as the principal and is not forfeited or assigned, the court may order that the bail be applied towards payment of any order of restitution or reparation or fine.⁵⁶

VII. ENDURING LIABILITIES: CONSEQUENCES OF NON-PAYMENT

A defendant who fails to pay the mandatory surcharge, sex offender registration fee, or DNA databank fee,⁵⁷ or fails to pay a fine, restitution, or reparation⁵⁸ faces possible incarceration, or additional incarceration. However, provision is made in C.P.L. § 420.10(5) for a defendant to challenge the incarceration based upon the inability to pay and few people have been imprisoned for non-payment. The enduring consequences of non-payment are those associated with civil judgments and credit reports.

People sentenced to serve less than 60 days in jail face a court summons if they fail to pay certain financial penalties within 60 days of the date of their imposition.⁵⁹ The collection

⁵⁵ See Suffolk County Probation Department 2002 Annual Report. These collection of fees continued despite previously-cited 2003 opinion by the New York State Attorney General concluding that the state had preempted the collection of these fees and that a county may not collect such fees for probation services.

⁵⁶ N.Y. CRIM. PROC. LAW § 420.10(1)(e). Because the provisions of Criminal Procedure Law §420.10 are made applicable to a mandatory surcharge, sex offender fee, DNA databank fee, and crime victim assistance fee by C.P.L. §420.35(1), some courts have assumed that these charges can also be collected from the defendant's cash bail.

⁵⁷ *Id.* § 420.35(1).

⁵⁸ *Id.* § 420.10(3).

⁵⁹ These include the mandatory surcharge, sex offender registration fee, DNA databank fee, crime victim assistance fee, or supplemental sex offender victim fee. Town and village courts may, but are not obligated to issue a summons. All other courts are required to do so.

remedies the court may use upon the appearance required by the summons include garnishment of wages and seizure of bank accounts and property.⁶⁰ As described above, money from the “inmate’s fund” and earnings are collected from defendants sentenced to more than 60 days incarceration.⁶¹ Civil collection remedies may also be enforced against the amount owed for any fine, fees, surcharge or restitution order as they become judgments and subject to civil collection through application of C.P.L. § 420.10(6).⁶² So too are they enforceable against the probation supervision fee.⁶³

Payment of financial penalties may be deferred when a defendant can prove that he or she is unable to pay financial penalties due to indigence or proof that such payment will work an unreasonable hardship on the person or his or her immediate family.⁶⁴ However, even if deferred, the amount owed must be entered in an order, and becomes a judgment.⁶⁵

⁶⁰ The collection remedies that may be used by the court upon the appearance when payment has not been made for any of the fees, except, apparently the supplemental sex offender victim fee, are provided in C.P.L. §§ 420.10, 420.40 and 430.20 which are made applicable by C.P.L. § 420.35(1). The supplemental sex offender victim fee is not included in C.P.L. § 420.35(1).

⁶¹ N.Y. PENAL LAW § 60.35(5).

⁶² The procedures for reducing all of the above financial penalties to judgment are set forth in N.Y. Criminal Procedure Law § 420.10(6). The court issues an order containing the amount to be paid by the defendant. The court’s order must direct the district attorney to file a certified copy of such order with the county clerk. The order must then be entered by the county clerk in the same manner as a judgment in a civil case. The entered order is deemed to constitute a judgment-roll and immediately after entry of the order the county clerk must docket the entered order as a money judgment pursuant to CPLR § 5018. The amount owed for any mandatory surcharge, sex offender registration fee, DNA databank fee, and a crime victim assistance fee imposed pursuant to Penal Law § 60.35(1) (which would appear to exclude the new \$1,000.00 supplemental sex offender victim fee), Vehicle and Traffic Law § 385(20-a) and § 401(19-a), or a mandatory surcharge imposed pursuant to Vehicle and Traffic Law § 1809 or § 27.12 of the Parks, Recreational and Historic Preservation Law also become a judgment subject to civil collection. C.P.L. § 420.35(1) makes the provisions of C.P.L. § 420.10(6) applicable to create civil judgment status for these debts.

⁶³ N.Y. EXECUTIVE LAW § 257-c(2)

⁶⁴ N.Y. CRIM. PROC. LAW § 420.40

⁶⁵ This is required by a procedure set forth in C.P.L. § 420.40(5) that tracks the language of C.P.L. § 420.10(6).

As of 2004, by legislative prohibition, under no circumstances can the mandatory surcharge, sex offender registration fee, DNA databank fee, or the crime victim assistance fee be waived by the judge.⁶⁶

Bankruptcy, the means for people to start over with a clean financial slate, is not applicable to debts incurred through financial penalties.⁶⁷ These penalties will remain on their credit reports until they are able to make payment in full. Thus, the civil judgments that arise as a result of the imposition of fines, fees and surcharges may well have the most long-lasting effects of any portion of the sentence. Not only is such judgment subject to all civil collection remedies, but it will also be reported on any credit report, undermining a person's ability to apply for a credit card, loan or mortgage. These judgments are increasingly likely to adversely affect any prospects for employment. Employers are expanding the use of credit histories to screen out job applicants.⁶⁸ There are a wide range of jobs that now require credit checks including positions that involve access to money, from fast food cashiers to chief financial officers. Jobs with government contracts and jobs that permit people to enter homes, whether to exterminate bugs, shampoo rugs, or care for the elderly, increasingly use credit checks. Lewis Maltby, president of National Workrights Institute, sums up the effects of the proliferation of the use of credit reports. "The bottom line is that a bad credit report can cost you a job no matter how

⁶⁶ N.Y. CRIM. PROC. LAW § 420.35(2). The only exception that is made in that subdivision is that a court may waive the crime victim assistance fee if such defendant is eligible for youthful offender adjudication and the imposition of such fee would work an unreasonable hardship on the defendant, his or her family, or any other person who is dependent on such defendant for financial support.

⁶⁷ 11 U.S.C. §§ 523(a)(7), 523(a)(13).

⁶⁸ In 1996, 19 percent of employers ran credit checks, however, by 2003, that figured had increased to 35 percent. Susan R. Hobbs, *Daily Labor Report*, THE BUREAU OF NATIONAL AFFAIRS, INC., May 3, 2004, at No. 84, S-7-8.

qualified you are.”⁶⁹ Credit histories obtained from consumer reporting agencies contain information about civil judgments, unpaid debts and often contain information about the individual’s credit rating, criminal history, and employment history.⁷⁰

VIII. NEW YORK STATE AND BEYOND: THE EXPLOSION OF FINANCIAL PENALTIES

It is beyond argument that the allure of financial penalties is difficult to resist. They appear to promise a revenue bonanza. New and imaginative fees surface at all levels of government along with coercive collection methods that are counterproductive to reintegration.

In the State of Washington a bevy of fees await anyone convicted of a crime. Among the most imaginative is a fee to buy a \$15.00 a week insurance policy for any person sentenced to community service. More disturbing is the State of Washington’s efforts to condition the re-enfranchisement for those who have lost the right to vote on the payment of all legal financial obligations.⁷¹ On March 27, 2006 a Superior Court Judge for the State of Washington struck down that statute as violative of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.⁷² That case is now on appeal to the Supreme Court of the State of Washington. According to the Brennan Center for Justice at NYU School of Law the State of Washington is not alone in requiring the right to vote to payment of financial penalties. Ten states explicitly

⁶⁹ Jennifer Bayot, *Use of Credit Reports Grows in Screening Job Applicants*, N.Y. TIMES, Mar. 28, 2004, at 1.

⁷⁰ Consumer reporting agencies are regulated by the New York Fair Credit Reporting Act (N.Y. General Business Law § 380) and the Federal Fair Credit Reporting Act (15 U.S.C. § 1681). A consumer reporting agency is authorized to furnish a consumer report for employment to prospective employers.

⁷¹ Adam Liptak, *New York Times*, February 23, 2006.

⁷² *Madison v. State of Washington*, No. 04-2-33414-4 SEA, an unreported case.

condition the right to vote on the full payment of fines, fees, restitution, and other costs associated with a conviction.⁷³

The idea of charging people money for room and board during the time that they are in custody has taken hold all over the country. For years, the Sheriff of Clinch County Georgia had been charging room and board to people held in the jail awaiting trial without any statutory authority to do so. That practice was recently put to an end by a civil rights law suit brought by the Southern Center for Human Rights and the law firm of King & Spaulding. By a consent decree in that case the Sheriff will repay all fees collected during a four year period.⁷⁴

In Nassau County, New York we find the same practice of seeking reimbursement for “incarceration costs” from persons confined pre-trial or post-trial for room, board, medical expenses and educational expenses. Nassau County also requires reimbursement for “investigatory costs.”⁷⁵

On the federal level, a recent memo issued on May 24, 2006 from the Administrative Office of the United States Courts, including a chart of costs for imprisonment, community corrections centers, supervision by probation officers, supervision by pretrial services officers, and pretrial detention services, urged probation officers to begin to reference the updated costs in their presentence reports, to assist judges to impose fines that consider the expected costs to the government.⁷⁶

⁷³ See Brennan Center’s policy brief, *Restoring Voting Rights to People with Criminal Convictions*, available at http://www.brennancenter.org/dynamic/subpages/download_file_38482.pdf.

⁷⁴ *Williams v. Clinch County*, 7:04-CV-124-HL, filed in the United States District Court for the Middle District of Georgia.

⁷⁵ Nassau County Local Law Title 21 and 21-A. “Investigatory costs” are defined in the local law to mean all actual costs incurred by the County of Nassau, its agencies and departments in obtaining a conviction against a person for a violation of a Nassau County local law or ordinance.

⁷⁶ Memo on file with authors.

In 27 jurisdictions (24 states and 3 counties) in the U.S. up-front fees for indigent defense are imposed. These fees, which range from \$10.00 to over \$200.00, are part of an increasingly popular movement to require criminal defendants to defray the criminal justice system costs.⁷⁷ The fees are charged automatically to criminal defendants who, despite their demonstrated poverty, are expected to pay, often without regard for the outcome of their case.⁷⁸ In the State of Minnesota, the fees are subject to the Revenue Recapture Act, allowing the state to garnish wages, seize property, file adverse credit reports, and impound vehicles.⁷⁹

In Colorado we find the use of a “booking fee” and “house release program charge,”⁸⁰ and in Texas we find an array of unusual fees including an “arrest fee,” “warrant fee,” “failure to appear fee,” “time payment fee,” “restitution installment fee,” and “judicial fund court cost.”⁸¹

As recently as January 13, 2007 a new financial penalty surfaced. Massachusetts Governor Deval Patrick proposed a so-called “safety fee” to be imposed on every person convicted of a crime. Unrelated to any corrections or supervision purpose, the “safety fee” was proposed to help pay for half of the estimated \$20 million cost to hire an additional 250 police officers in the new fiscal year.⁸²

⁷⁷ Ronald W. Wright and Wayne A. Logan, *The Political Economy of Up-front Fees for Indigent Criminal Defense*, 47 WILLIAM AND MARY L. REV. 2045 (2006).

⁷⁸ *Id.*

⁷⁹ *Id.* at page 2053.

⁸⁰ Information available from the Alamosa County Jail at <http://www.alamosacounty.org/depts/Jail/index.html>.

⁸¹ See Sunset Advisory Commission, Texas Department of Criminal Justice, Staff Report, October 2006 available at <http://www.sunset.state.tx.us/80threports/tdcj/tdcj.pdf>.

⁸² Michael Levenson, *The Boston Globe*, January 14, 2007.

Government at all levels has found it extremely difficult to exercise restraint when it comes to the temptation to generate revenue through the use of financial penalties and fees. The need to exercise restraint in the creation and imposition of financial penalties was recognized by Justice Scalia when he expressed concern that financial penalties, uniquely of all punishments, would be imposed out of accord with appropriate penal goals. “Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.”⁸³

IX. POLICY CONSIDERATIONS AND RECOMMENDATIONS

There are multiple and sometimes conflicting public goals inherent in the use of financial penalties. On the one hand, revenues from these penalties are used to defray some of the cost of maintaining the criminal justice system by placing that burden on people who have been convicted of criminal offenses. On the other hand, there is public interest in developing policies and practices that promote the successful reintegration of people returning to their communities from prison. Striking a balance between these two goals can only be accomplished after careful consideration of the policy issues at stake and a clear understanding about who is being asked to shoulder this financial burden.

From a public policy perspective, the overwhelming financial burdens imposed by the cumulative range of financial penalties will undermine public safety if individuals burdened with these fees are induced to commit new crimes or simply abscond from supervision under the pressure of collection efforts. There are also public policy implications associated with the shifting of financial support for probation, parole, prisons, courts or other agencies from

⁸³ *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991)

government and the general taxpaying public to a small segment of the population. This becomes even more problematic when that segment has marginal political efficacy by virtue of statutes and regulations that disenfranchise people who have been convicted of felonies. Finally, the use of financial penalties to fill budget gaps produces an inducement to engage in net-widening. If tax levy revenue is not available to support the costs of the criminal justice system, state and local governments will become more dependent upon the financial penalties and will be enticed to pull more people into the web of financial penalties for longer periods of time⁸⁴ and expand the types of fees imposed.

Financial penalties certainly have a place in a continuum of sanctions. Few would argue with the value of restitution, not only as a means to make reparation to the victim, but also as a means for one to take responsibility for one's actions. However, it makes little sense to develop and apply financial penalties in an ad hoc fashion without considering the cumulative impact on the people who will be required to pay. While some of these penalties have provisions for indigency, there does not seem to be adequate oversight to ensure that defendants and formerly incarcerated people understand their rights or that the various administrative entities that are responsible for collection properly recognize indigent status.

There is a dire need to shift public policy regarding the use and abuse of financial penalties. In a report recently issued by the New York State Bar Association Special Committee on Collateral Consequences of Criminal Proceedings, *Re-Entry and Reintegration: The Road to Public Safety* three specific recommendations were made and ten additional issues were

⁸⁴ See American Probation and Parole Association Report, "Supervision Fees," available online at www.appa-net.org/about%20appa/supervis.htm.

addressed to give direction to this much needed change in policy.⁸⁵ These are attached to this paper as Appendix A.

We would add several recommendations to help introduce some rationality to the use of financial penalties:

- Jurisdictions should develop a comprehensive inventory of what financial penalties exist and how they overlap.
- Provisions that exempt indigent people from certain penalties and the implementation of these provisions should be reviewed and clarified.
- States should prohibit the enactment of local laws that impose additional financial obligations on individuals as a result of a criminal conviction.

Other reforms are more complex but are equally, if not more, important. There needs to be more careful consideration of the larger policy implications of allowing financial penalties to supplant tax revenues. There needs to be a careful investigation of what monies are collected and how they are used. There must also be a thoughtful debate about the unfettered access to credit ratings and arrest histories that appear to undermine privacy rights and offer a back door opportunity for employers to gain information about one's criminal history.

X. CONCLUSION

Over the past decade we have become increasing aware of the challenges faced by people reentering the community from prison and the challenges faced by communities and families receiving formerly incarcerated people. We know that the numbers of people returning home are

⁸⁵ See New York State Bar Association Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings, *Re-Entry and Reintegration: The Road to Public Safety* which can be reviewed at <http://www.nysba.org/MSTemplacte.cfm?MicrositeID=100>. The three specific recommendations are found at pages 415-417 and the discussion of the ten suggestions for possible reform is found at pages 211-214. At the November 4, 2006 meeting of the New York State Bar House of Delegates the Report was approved and the recommendations of the committee adopted, except for the recommendation relating to the accrual of child support.

staggering and we also know that the challenges they face are daunting.⁸⁶ The hurdles to reintegration caused by the financial consequences of criminal convictions are among the least recognized but may have some of the most far reaching impacts.

It is time to confront our attraction to financial penalties head on. We need to de-emphasize the goals of “revenue enhancement,” “cost-shifting” and “user-fees” and focus on stimulating, encouraging, and improving the chances for people returning from having served their sentence to live law-abiding, fulfilling and productive lives. Public safety is a community goal and a public good. As such, the cost should be borne by the public and not shifted to those who can least afford these financial burdens.

With its recent legislation that requires a court to take into consideration the goal of community reintegration when considering the appropriate sentence,⁸⁷ New York State is in a position to provide national leadership in halting the chaotic and counterproductive use of financial penalties. The rationale for doing so has been well articulated in terms of cost-benefit, public safety and in human terms.

Effective re-entry policies are also cost-effective. With incarceration costing more than \$30,000 per person per year, in Fiscal Year 2004-2005 New York State spent approximately 2.4 billion on corrections. Helping formerly incarcerated people become productive, law-abiding, tax-paying and gainfully employed citizens can yield significant, long-term cost-savings. Cost-savings would be evident across a wide range of government programs, including welfare and child support. A successfully reintegrated former offender would avoid entering the welfare system and be in a better position to meet child support obligations. For

⁸⁶ Jeremy Travis, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 87 (2005)

⁸⁷ The recent amendment to N.Y. PENAL LAW § 1.05(6) added “the promotion of their successful and productive reentry and reintegration back into society” as a sentencing goal, reflecting the growing awareness of reentry.

former offenders who successfully transition home, there is also an immeasurable benefit for the children and families with whom they reunite.⁸⁸

Clearly there are both personal and societal benefits for people to return home from prison unencumbered by financial penalties, as they begin to reintegrate into a productive life.

Promoting successful re-entry and reintegration will increase the chances that a person with a criminal record can become a productive member of society and will decrease recidivism rates, making us all safer.⁸⁹

It is simply not good public policy to impose financial penalties on people who live below the poverty line. With so many barriers to overcome in order to reintegrate back into the community, creating additional financial hurdles is neither cost-effective nor is it in society's best interest.⁹⁰ The limited and short-sighted revenue producing effects of financial penalties pale in comparison to the long-term cost savings and promotion of public safety that can be realized by smart reentry policies.

⁸⁸ Statement of Janet Fiore, Westchester County District Attorney, on the announcement of the Westchester County Reentry Task Force. Available at <http://www.da.westchester.ny.us/Reentry%20Task%20Force.doc>.

⁸⁹ See *supra* note 85 New York State Bar Special Committee Report, *Re-Entry and Reintegration: The Road to Public Safety* at 443. Available at <http://www.nysba.org/MSTemplacte.cfm?MicrositeID=100>

⁹⁰ *Id.* at 416, 417.

APPENDIX A

**RECOMMENDATIONS FROM REPORT AND RECOMMENDATIONS OF THE
SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL
PROCEEDINGS, *RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC
SAFETY***

I. FINANCIAL CONSEQUENCES

A. CONSOLIDATE ALL FINANCIAL PENALTIES INTO ONE FEE

There is a wide array of financial penalties imposed as a result of criminal convictions, including fines, fees, costs, penalties, surcharges, and assessments. The use of financial penalties has continued to grow over the years. New financial penalties are seemingly added at each legislative session. Many of these financial penalties have been increased several times over the years and are often viewed by the legislature in isolation from all other financial penalties that a person convicted of an offense must pay.

These financial penalties are scattered throughout various statutes and are not consolidated in any one place. Consequently it is difficult to assess the total impact of such financial penalties on an individual or his family. When such financial penalties are totaled, their sum is at times staggering.

In light of the fact that the vast majority of people who are processed through the criminal justice system are, as previously discussed, indigent, the impact of the penalties is all the more burdensome, and actual collection of such penalties is problematic at best.

The stated purposes of such financial penalties, be it punishment, reparation, cost recovery, revenue production, or cost shifting, are outweighed by the heavy financial burden

placed on the individual and his or her family as they try to reintegrate back into the community. Financial resources that could assist with the cost of housing, food, and family support are typically meager at the time of the individual's return from prison so that almost any financial penalty is a devastating setback to the re-entry process.

Consolidating all of the financial penalties into one moderate fee will serve several purposes. First, it will promote the efficiency of actual collection of such revenue. Second, it will ameliorate the impact that such financial penalties have on re-entry and reintegration and protect people from being overburdened, both directly and indirectly, by financial penalties. Third, it will make transparent for the legislature, the public, and the individual what financial penalties are actually being imposed. Further, it will increase the ability of judges, prosecutors, and defense counsel to review the financial consequences both in advising the defendant and in weighing the total effect of the penalties to be imposed at sentencing.

Although the decrease in total financial penalties implies a decrease in revenues, that may not be so. A portion of the financial penalties imposed are never collected. A moderation in fees would increase the likelihood of collection. Further, if reintegration is promoted by a moderation in financial penalties, the decrease in long-term costs that are related to recidivism would more than offset any decline in revenues. There would be no cost to implement this recommendation.

Thus, the Committee recommends that all of the financial penalties, including fines, fees, surcharges, penalties, assessments and costs, be consolidated into one moderate fee schedule. The schedule would set a separate fee for felonies, misdemeanors, and violations. To account for differing abilities to pay, the schedule would set one level of fees for defendants who financially qualify for public defense, and a second level of fees for those who have not.

Restitution, which serves a direct reparative purpose, is not included in the consolidated fee. However, in the event that the amount of restitution ordered to be paid by a judge exceeds the consolidated fee that would otherwise be imposed on the individual, the fee is waived.⁹¹

B. AMEND C.P.L. § 420.35(2) TO ALLOW FOR WAIVER OF CERTAIN FINANCIAL PENALTIES

Imposing financial penalties on people who live below the poverty level is simply not good public policy. As noted in the earlier discussion profiling who is subjected to these financial penalties, they are disproportionately black and Hispanic, poor, with serious social and medical problems, largely uneducated, unskilled, suffering mental illness, without solid family supports, they have minimal prospects for employment, and upon release from incarceration have the added stigma of a prison record and face the distrust and fear that it inevitably carries with it.

With so many barriers to overcome to reintegrate into the community, creating additional financial barriers is neither cost effective nor in society's best interest. In addition, there would be no cost to implement this change.

Thus, the Committee recommends that C.P.L. § 420.35 be amended to allow for the waiver of certain financial penalties based upon the inability of the individual to pay. Such an amendment would provide judicial discretion to waive the surcharges and all of the attendant fees that would otherwise be imposed at the time of sentencing for anyone sentenced to incarceration, and for any person who demonstrates to the Court's satisfaction, at the time of

⁹¹ Current law provides that if restitution is made, such person shall not be required to pay a mandatory surcharge or a crime victim fee. *See* N.Y. PENAL LAW § 60.35(6) and N.Y. VEH. & TRAF. LAW § 1809(6). This consolidated fee shall not affect or prevent forfeiture of assets.

sentencing, that such fees and surcharges would create a financial hardship on the individual or his or her family.⁹²

C. IMPOSE A MORATORIUM ON ALL NEW FINANCIAL PENALTIES AND THE INCREASE OF EXISTING PENALTIES, AND CONSIDER THE FILING OF A RE-ENTRY IMPACT STATEMENT FOR ANY NEW LEGISLATION IMPOSING FINANCIAL PENALTIES

The closer one looks at the issue of re-entry, the more one becomes aware of the obstacles, both visible and invisible, that are faced by people returning home after serving the penalty of imprisonment. Our current recidivism rate, which is, according to the Bureau of Justice Statistics, as high as 67%, serves as a reminder that wholesale reintegration presents a formidable challenge. If the lofty goal of reintegration is to be realized, we must, as a society, give more meticulous attention and thoughtful analysis to the impact that public policies have on re-entry.

The cost of careful analysis is quite minimal when weighed against the cost of human lives who suffer under the weight of the unintended consequences of our latest legislative initiatives designed to balance the budget and demonstrate a “tough on crime” posture.

Thus, the Committee recommends imposing a moratorium on all new financial penalties and also on the increase of existing financial penalties until the issue can be considered and studied by a legislative Committee. The requirement of filing a re-entry impact statement should be considered for any new legislation that imposes financial penalties.⁹³

⁹² This recommendation is offered for adoption both in conjunction with the preceding recommendation and as an independent recommendation.

⁹³ The requirement of the filing of a reentry impact statement for any new legislation that imposes financial penalties is related to the Committee’s general recommendation that all new legislation that may cause collateral consequences of a criminal conviction require the filing of a reentry impact statement.

Suggested Legislative Reform – From Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings, *Re-Entry and Reintegration: The Road to Public Safety*.

a. Consolidate all financial penalties into one fee

All of the financial fines, fees, surcharges, penalties and assessments should be consolidated into one fee schedule. That schedule should be based upon a sliding scale adjusted for an individual's ability to pay. The fee would be moderate, set with a realistic ability to pay in mind. Waivers for indigency would be made readily available.

b. Amend C.P.L. § 420.35(2) to allow for waiver of certain financial penalties

Amend Criminal Procedure Law § 420.35(2) to allow for the discretionary waiver of the mandatory surcharge, sex offender registration fee, DNA databank fee, and the crime victim assistance fee for anyone sentenced to incarceration, and for any defendant who demonstrates to the court's satisfaction, at the time of sentencing, that such fees and surcharges will create a financial hardship.

c. Impose a moratorium on all new financial penalties and the increase of existing ones

A moratorium on any new financial penalties or the increase of existing financial penalties should be imposed until the impact of the financial burden on re-entry can be studied.

d. Repeal the supervision fees imposed pursuant to Executive Law § 259-a (9) (a) and § 257-c

The parole supervision fees authorized by Executive Law § 259-a (9)(a) and the probation supervision fees authorized by Executive Law § 257-c could be repealed. In the alternative, a more effective and expanded use of waivers of supervision fees for indigency could

be implemented. Although these waivers already exist in New York for both parole and probation supervision fees, they are seldom used.

e. Prohibit the reference to any judgment that is the result of a financial penalty arising from a criminal conviction in a credit history report

The judgments that result from the non-payment of certain financial penalties arising from a criminal conviction including fines, restitution or reparation, mandatory surcharge, sex offender fee, DNA databank fee, and crime victim assistance fee unduly prejudice and inhibit employment efforts when employers review the credit histories of prospective employees and become aware of the judgments arising from criminal financial penalty. Limited purpose is served by allowing employers to screen out prospective employees based upon a judgment arising from a criminal financial penalty. Conversely, the additional barrier to employment that this practice creates runs contrary to the public policy of this state to encourage the employment of persons previously convicted of one or more criminal offenses.⁹⁴

f. Consider the filing of a re-entry impact statement for any new legislation imposing financial penalties

The legislature should engage in careful study and analysis before they impose new penalties. Because most new fines, fees, and surcharges are imposed in a vacuum, unrelated to all of the other consequences that may be imposed, a re-entry impact statement should be considered for any legislation proposing new financial penalties or the increase of existing penalties. Such an impact statement would require the legislature to look at all of the financial consequences that are already connected to this particular conviction before imposing any new or additional ones. It would also require an analysis of how the new or increased financial penalty would affect reintegration.

⁹⁴ See N.Y. CORRECT. LAW § 753(1)(a).

g. Prohibit retaliation for failure to pay financial penalty

Prohibit the use of a person's failure to pay a financial penalty, correctional user fee, or supervision fee, as a basis to deny the issuance of a Certificate of Relief from Disability, or a Certificate of Good Conduct, or to refuse discharge from supervision while on parole, conditional release, or post-release supervision when otherwise qualified, in those instances when such non-payment is due to indigence or a legitimate inability to pay.

h. Consolidate all financial penalties into one article in the Penal Law

Consolidating all financial penalties into one article in the Penal Law will serve two purposes. First, it will provide ease of access for defense counsel, prosecutors, and judges. No longer will they have to search through a scattered array of statutes in order to familiarize themselves with the financial penalties to be imposed in each case. This will also enhance the ability of defense counsel to be able to discuss the collateral consequences of the conviction with his or her client as required by professional standards.⁹⁵ Second, it will ensure that the legislature can efficiently be able to assess the sum of all penalties already imposed as a result of a criminal conviction, when considering the imposition of new or increased financial penalties.

This recommendation is consistent with the argument set forth by Jeremy Travis that these invisible punishments should be brought into open view. They should be made visible as critical elements of the sentence, and they should be openly included in our debates over

⁹⁵ See National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation, Guideline 8.2 and 6.2 (3d printing, 2001); American Bar Association Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 14-3.2 (3d ed. 1993); Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State, adopted by the Chief Defenders of New York State, Standard VII, Duties of Counsel (July 25, 2004).

punishment policy, incorporated in our sentencing jurisprudence, and subjected to rigorous research and evaluation.⁹⁶

i. Require disclosure to defendant prior to plea

Both defense counsel and the judge should review with the defendant, all of the financial penalties that will result from the conviction, prior to the time a plea of guilty is entered

j. Provide comprehensive training for defense counsel, judges, and prosecutors about the financial consequences of criminal convictions

It is not unusual for a defendant to find out after the plea has been entered and the sentence imposed, that there are many financial penalties for which he or she will be held responsible. Similarly, defense counsel, judges, and prosecutors rarely have a full appreciation of the extent of the financial penalties that will end up being part of the sentence. Training, in this regard, will serve the dual purpose of ensuring that both defense counsel and judges will be familiar with the financial consequences of a conviction so that they can explain them to the defendant. This training will also foster a much greater understanding and appreciation for the fact that the sentence needs to take into account the “invisible punishments” that a defendant faces in addition to the sentence placed on the record in the courtroom.

⁹⁶ See generally Marc Mauer & Meda Chesney-Lind, *INVISIBLE PUNISHMENT* (2002).