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**REPORT BY THE COMMITTEE ON CRIMINAL JUSTICE OPERATIONS,  
THE COMMITTEE ON CORRECTIONS AND COMMUNITY REENTRY,  
THE COMMITTEE ON CRIMINAL COURTS  
AND THE TASK FORCE ON MASS INCARCERATION**

**NEW YORK SHOULD RE-EXAMINE MANDATORY COURT FEES  
IMPOSED ON INDIVIDUALS CONVICTED OF CRIMINAL OFFENSES  
AND VIOLATIONS**

**I. INTRODUCTION**

The financial burden placed on criminal defendants and their families has come under increased scrutiny in recent years.<sup>1</sup> As government officials and reform advocates have examined the various challenges faced by indigent defendants, such as the difficulty in making monetary bail, they have also examined the variety of fines and fees faced by criminal defendants. In particular, the common practice of raising government revenue through fines and fees assessed by the criminal courts has been reconsidered in the wake of the Department of Justice’s scathing report concerning, among other issues, the revenue-generating practices of the courts and the police department in Ferguson, Missouri.<sup>2</sup> These fines and fees have been called a “regressive tax,” as they are a revenue-generating mechanism that has been disproportionately imposed upon those least able to pay.<sup>3</sup> States and cities have begun to re-examine these fees, including San Francisco, which recently eliminated numerous fees faced by criminal defendants.<sup>4</sup>

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<sup>1</sup> E.g. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, National Public Radio (May 19, 2014), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>; Alexes Harris, *Justice Shouldn’t Come with a \$250 Fine*, The New York Times (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/opinion/alternative-justice-fines-prosecutors.html>; Joanna Weiss & Brandon Holmes, *City Must Stop Using Incarcerated People as Revenue Source*, Gotham Gazette (Apr. 22, 2018), <http://www.gothamgazette.com/opinion/7628-city-must-stop-using-incarcerated-people-as-revenue-source>. (All websites cited in this report were last visited on May 7, 2019.)

<sup>2</sup> Dep’t of Justice, *Investigation of Ferguson Police Department* 9-15 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>3</sup> E.g. Suzy Khimm, *Will the Government Stop Using the Poor as a Piggy Bank?*, MSNBC (Sept. 9, 2014), <http://www.msnbc.com/msnbc/will-the-government-stop-using-the-poor-piggy-bank>; The Bronx Defenders, *The Hidden Tax: Economic Costs of Marijuana Enforcement in the Bronx and New York City* (2014), <https://www.bronxdefenders.org/wp-content/uploads/2014/12/The-Hidden-Tax-A-Bronx-Defenders-Report-Dec2014.pdf>.

<sup>4</sup> Joshua Sabatini, *SF Abolishes Criminal Justice Fees*, San Francisco Chronicle (May 22, 2018), <http://www.sfxaminer.com/sf-abolishes-criminal-justice-fines-fees/>; see also Courtney E. Martin, *I Served*

Similarly, the American Bar Association recently voted overwhelmingly to adopt the “Ten Guidelines on Court Fines and Fees,” which calls for consideration of a defendant’s ability to pay when imposing court fees.<sup>5</sup>

Though reform advocates have called for changes to the financial obligations imposed by criminal courts,<sup>6</sup> improvements have largely been confined to reforming protocols that led to people being imprisoned for failing to pay those debts.<sup>7</sup> However, even these small gains are in danger since the Trump administration has rolled back Department of Justice guidelines aimed at ending modern day debtors’ prisons.<sup>8</sup>

When any person in New York is convicted of a crime or violation, the law requires that a judge impose certain mandatory surcharges and fees, regardless of an individual’s ability to pay.<sup>9</sup> The system of mandatorily imposing hundreds of dollars of fees on every person convicted of an offense in New York disadvantages indigent<sup>10</sup> defendants in a variety of ways, from saddling them with civil judgments to depleting their commissary accounts if they are incarcerated. These burdens have far-reaching

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*My Prison Time, Why Do I Still Have to Pay?*, The New York Times (April 30, 2019), <https://www.nytimes.com/2019/04/30/opinion/i-served-my-prison-time-why-do-i-still-have-to-pay.html?action=click&module=Opinion&pgtype=Homepage>.

<sup>5</sup> Lorelei Laird, *ABA adopts guidelines aimed at preventing fines and fees that penalize poverty*, ABA Journal (August 6, 2018), [http://www.abajournal.com/news/article/aba\\_adopts\\_guidelines\\_aimed\\_at\\_preventing\\_fines\\_and\\_fees\\_from\\_penalizing\\_po](http://www.abajournal.com/news/article/aba_adopts_guidelines_aimed_at_preventing_fines_and_fees_from_penalizing_po). The first of the ten guidelines states, “If a state or local legislature or court imposes fees in connection with a conviction for a criminal offense or civil infraction, those fees must be related to the justice system and the services provided to the individual. The amount imposed, if any, should never be greater than an individual’s ability to pay or more than the actual cost of the service provided. No law or rule should limit or prohibit a judge’s ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause a substantial hardship.” Resolution 114. American Bar Association. August 2018. <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/114.pdf>

<sup>6</sup> E.g. Alicia Bannon et al, Brennan Center for Justice, *Criminal Justice Dept: A Barrier for Re-entry 6* (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; Abby Shafroth & Larry Schwartzol. Criminal Justice Policy Program. *Confronting Criminal Justice Debt: The Urgent Need for Reform* (2016). <http://cjpp.law.harvard.edu/assets/Confronting-Criminal-Justice-Debt-The-Urgent-Need-for-Comprehensive-Reform.pdf>.

<sup>7</sup> E.g. Suzy Khimm, *Will the Government Stop Using the Poor as a Piggy Bank?*, MSNBC (Sept. 9, 2014), <http://www.msnbc.com/msnbc/will-the-government-stop-using-the-poor-piggy-bank>.

<sup>8</sup> Chiraag Bains, *Sessions Says to Courts: Go Ahead, Jail People Because They’re Poor*, The New York Times (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/opinion/sessions-says-to-courts-go-ahead-jail-people-because-theyre-poor.html>.

<sup>9</sup> This report and the recommendations contained within it relate specifically to the mandatory surcharge, crime victim assistance fee and DNA database fee outlined in New York Penal Law 65.35. New York law allows for a variety of discretionary fines that can be imposed by a judge pursuant to sentencing, and certain specified crimes involve other fees (such as sex offenses, or vehicle and traffic law offenses) and/or fines; however, these fines and fees are not the subject of this report.

<sup>10</sup> Throughout this report, we use the term “indigent” as it is traditionally used in the criminal justice system, i.e. a person who does not have sufficient income to afford a lawyer for their defense. For most indigent defendants, paying these surcharges and fees also imposes an undue hardship.

consequences that endanger individuals' attempts to avoid recidivism and secure stable housing and employment. The Legislature has exacerbated the problem by steadily increasing the amounts of fees and surcharges and, in 1995, removing discretion from judges to waive them.

The Legislature has not attempted to justify these mandatory surcharges and fees as anything other than a form of taxation.<sup>11</sup> They are not levied in an attempt at punishment, but only to raise revenue for the State.<sup>12</sup> Mandatory surcharges and fees are a fundamentally unfair burden often directly at odds with the aims of the criminal justice system -- they tend to make reentry more difficult and recidivism more likely, particularly for those whose crimes stem from poverty. These harms also disproportionately fall upon people of color. As the co-directors of the Fines and Fees Justice Center noted in a recent op-ed, "Communities of color are most likely to suffer from abusive fines and fees practices because of overpolicing, the demographics of poverty (a majority of people living in poverty in the United States are people of color) and racism. A recent study found a 'clear positive relationship' between revenue from fines and fees and the proportion of black residents in a city."<sup>13</sup>

Thus, along with other measures aimed at making the criminal justice system fairer for those who are most vulnerable, the City Bar recommends that the New York State Legislature re-examine the mandatory court fees imposed on individuals convicted of criminal offenses and violations. Given that the aims of the criminal justice system are in no way advanced by these mandatory surcharges and fees, and that the revenue does not enhance the court budget, the Legislature should simply abolish them for all those convicted of a crime or violation, or, at a minimum, restructure them to be imposed on a sliding scale consistent with an individual defendant's ability to pay.<sup>14</sup> If the Legislature is unwilling to make these changes, the law should at least be amended in various ways to make it more equitable for indigent defendants. The Legislature should allow sentencing courts to waive fees which would result in hardship, and simplify the process by which courts can defer fees until after incarceratory terms are served.<sup>15</sup> The law should also be

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<sup>11</sup> *People v. Guerrero*, 12 N.Y.3d 45, 48-49 (2009) (quoting Legislative Mem in Support, Bill Jacket, L. 1982, ch. 55, at 6) ("Section 60.35 was originally enacted as part of a massive revenue-raising bill meant to 'avert the loss of an estimated \$100 million in state tax revenues.'")

<sup>12</sup> *Id.* at 48-49 (2009) (internal quotation marks and citations omitted) ("[T]he Legislature did not intend the surcharge or fee to be an additional punishment component of a sentence").

<sup>13</sup> Joanna Weiss & Lisa Foster, *San Francisco's Justice System Gets a Little More Just*, Washington Post (June 13, 2018), [https://www.washingtonpost.com/opinions/san-franciscos-justice-system-gets-a-little-more-just/2018/06/13/a4ca28a6-6f13-11e8-bf86-a2351b5ece99\\_story.html?utm\\_term=.3e46ceacf81](https://www.washingtonpost.com/opinions/san-franciscos-justice-system-gets-a-little-more-just/2018/06/13/a4ca28a6-6f13-11e8-bf86-a2351b5ece99_story.html?utm_term=.3e46ceacf81) (citing Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, <https://hyeyoungyou.files.wordpress.com/2015/08/fines.pdf>).

<sup>14</sup> *E.g.* Alec Schierenbeck, *A Billionaire and a Nurse Shouldn't Pay the Same Fine for Speeding*, New York Times (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/opinion/flat-fines-wealthy-poor.html>.

<sup>15</sup> Others have also suggested that the process for deferral be simplified, *e.g.* Richard Allman, *Report of the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the Courts of the State of New York* 11-14 (2017), <https://www.nycourts.gov/LegacyPDFS/IP/judiciary/legislative/pdfs/2017-CriminalLaw&Procedure-ADV-Report.pdf>.

amended so that youthful offenders and those convicted only of violations would not be assessed any mandatory court fees, and individuals taking a single plea on multiple crimes would not face double or triple mandatory fees. New York lawmakers should ameliorate the inequitable financial burdens placed upon indigent criminal defendants and their families, and put New York at the forefront of an important but often overlooked area of needed criminal justice reform.

## II. THE CURRENT STATUS OF MANDATORY FEES IN NEW YORK

Mandatory surcharges are set forth in several interconnected provisions of the Penal Law and the Criminal Procedure Law.<sup>16</sup> They have been characterized as “poorly drafted and difficult to follow.”<sup>17</sup> Before 1995, courts had the authority to waive the surcharges, and often did so for indigent defendants.<sup>18</sup> In 1992, during a wave of “tough-on-crime” legislation, the Legislature amended CPL § 420.30, including language that courts be “mindful” that the surcharge was “mandatory,” and of “the important criminal justice and victim services” funded by the surcharge and other fees.<sup>19</sup> In 1995, the Legislature enacted the Sentencing Reform Act. As amended, CPL § 420.35 (2) states that “under no circumstances shall the mandatory surcharge . . . be waived.” The Sentencing Reform Act was an omnibus bill that eliminated parole and created determinate sentencing with increased prison time for violent felony offenders with a previous felony conviction. 1995 was the first year of the Governor Pataki administration; Pataki had made “enacting more punitive criminal justice policies the centerpiece of his legislative efforts.”<sup>20</sup>

As a result, those convicted of crimes or offenses in New York face a vast array of mandatory fees and surcharges. Every person convicted of an offense in New York is assessed a “mandatory surcharge”: \$300 for felony convictions; \$175 for misdemeanors; and \$95 for violations.<sup>21</sup> These offenses also carry an additional mandatory “crime victim

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<sup>16</sup> Penal Law § 60.35; Criminal Procedure Law §§ 420.10, 420.35, 420.40.

<sup>17</sup> Preiser, Practice Commentaries, McKinney’s Cons Laws of NY, Criminal Procedure Law § 420.40; *People v. Jones*, 26 N.Y.3d 730, 733 (2016).

<sup>18</sup> *Jones*, 26 N.Y.3d at 734.

<sup>19</sup> *Id.* at 734-35.

<sup>20</sup> *People v. Tookes*, 52 Misc.3d 956, 975 (Sup. Ct. N.Y. Cty. 2016 (Conviser, J.)) (noting that 1995 may have seen the “most punitive criminal justice enactments in modern New York history”).

<sup>21</sup> Penal Law § 60.35(1)(a). The Legislature has steadily increased the amounts of the mandatory surcharge since it was first imposed in 1982, more than tripling the amount since the 1980s. In 1982, the surcharge was \$75 for a felony, \$40 for a misdemeanor, and \$15 for a violation. The surcharge was increased in 1985, 1990, 2000, 2003, and 2008. Donnino, Practice Commentary, McKinney’s Cons Laws of NY, Penal Law §60.35. Moreover, the Legislature has increased the crime victim assistance fee from \$2 when it was first imposed to \$25 now. *Id.* Besides these increases there have been few substantial changes to the mandatory surcharges statutes since 1995, although in 2003 and 2004, they were amended to add additional surcharges in the case of sex crimes, including a \$1000 fee for certain sex offenses. P.L. § 60.35(1)(b). In 2005, the statute was amended so that the fees and surcharges apply to a youthful offender adjudication (prior to that, they could not be imposed on those not convicted of a “crime”). P.L. § 60.35(10), *see* Preiser, Practice Commentaries, McKinney’s Cons Laws of NY, Penal Law 60.35. In 2014, an amendment was passed

assistance fee” of \$25.<sup>22</sup> The mandatory surcharge and crime victim assistance fee are imposed after youthful offender adjudications, as well as convictions.<sup>23</sup> Convictions for any felony or Penal Law misdemeanor<sup>24</sup> are also accompanied by a “DNA databank fee” of \$50.<sup>25</sup>

The sentencing court has no discretion to waive the fees or surcharges, even upon a showing of financial hardship,<sup>26</sup> and they are imposed by operation of law, whether or not the sentencing court pronounces them.<sup>27</sup> If the defendant is convicted of multiple offenses arising out of a single act or omission, or where that act or omission constituted one offense and an element of another, the court must impose the mandatory surcharge and DNA fee only for the offense that carries the highest classification.<sup>28</sup> Otherwise, the fees must be imposed for each offense. Thus, if a defendant is convicted of two felony offenses for different criminal acts, and is sentenced on the same day, he is required to pay \$750 in mandatory fees and surcharges.

If a defendant does not pay the fees or surcharges, the C.P.L. authorizes the court to issue a bench warrant and sentence the defendant to imprisonment.<sup>29</sup> Alternatively, the court may direct that the surcharges be entered, and collected in the same manner as a civil judgment under the civil practice law and rules.<sup>30</sup>

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permitting waiver of the surcharge in cases where the defendant is a victim of sex trafficking. *See* CPL 420.35(2).

<sup>22</sup> Penal Law § 60.35(1)(a).

<sup>23</sup> Penal Law §60.35(10).

<sup>24</sup> Except for convictions for fifth degree marijuana possession under Penal Law §221.10, with some exceptions. Executive Law § 995(7).

<sup>25</sup> Penal Law § 60.35(1)(a)(v). In addition to these mandatory surcharges, there are a variety of other fines and fees which are imposed after a conviction for various specified offenses. The Vehicle and Traffic Law includes surcharges and fees as well. Individuals are assessed \$300 for § 1192 DWI felony convictions; \$275 for § 1192 DWI misdemeanors; \$55 for certain specified offenses; and \$25 for Article 9 infractions and all other VTL convictions. N.Y. Vehicle and Traffic Law § 1108. Myriad additional fees are imposed upon individuals convicted of sex offenses. These include a “sex offender registration fee” of \$50, Penal Law § 60.35(1)(a)(iv), a \$10 “change of address” fee, Executive Law § 168-b(8), and a \$1,000 “supplemental sex offender victim fee.” Penal Law § 60.35(1)(b).

<sup>26</sup> C.P.L. §420.35. This is so unless the defendant is adjudicated a youthful offender, in which case a financial hardship waiver is available. C.P.L. § 420.35(2). Although anecdotal evidence suggests that many judges continued to grant waivers after 1995, now that the Court of Appeals has spoken on this subject in *People v. Jones*, 26 N.Y. 3d 730 (2016) there should be no ambiguity; surcharges cannot be waived. Recent decisions suggest that the lower courts have taken heed, *e.g.*, *People v. Parkinson*, 151 A.D.3d 1647 (4th Dept 2017); *People v. McMahan*, 149 A.D.3d 402 (2d Dept 2017).

<sup>27</sup> *People v. Guerrero*, 12 N.Y.3d 45 (2009).

<sup>28</sup> Penal Law §60.35(2).

<sup>29</sup> C.P.L. § 420.35 (making C.P.L. §§ 420.10 and 420.40 applicable to the collection of fees and surcharges); C.P.L. § 420.10(3) (establishing that that the court may provide that a bench warrant issue and the defendant be imprisoned after failure to pay a fine).

<sup>30</sup> C.P.L. § 420.10(6).

If the defendant is facing an incarceratory sentence and does not pay the fees and surcharge at the time of sentence, the court must direct the prison to collect them from the individual during incarceration.<sup>31</sup> The official goal of these surcharges and fees is to generate revenue, not to impose punishment.<sup>32</sup> The proceeds from the mandatory surcharges are deposited in the state treasury.<sup>33</sup> In 2016, the criminal court of New York City obtained revenue of \$5,254,294 from mandatory court surcharges. In the State Fiscal Year for 2015 to 2016, New York State raised a total revenue of \$153.2 billion.<sup>34</sup> Thus, the surcharges collected from New York City constituted approximately .003% of the total revenue of the state of New York.

Approximately 41% (\$2,167,076) of the surcharge revenue came from guilty pleas to violations in criminal court, a total that does not include guilty pleas to traffic infractions. Approximately 33% (\$1,728,858) of surcharge revenue came from violations of the Vehicle and Traffic Law (VTL), not including DWI violations or additional fines

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<sup>31</sup> Penal Law § 60.35(5)(a). However, as discussed later, at least one judge has managed to creatively circumnavigate the Penal Law to allow for the immediate filing of and docketing of a defendant's motion to defer imposition of the fee. The Advisory Committee on Criminal Law and Procedure has proposed an amendment to CPL 420.40 which would permit a defendant to move for deferral on the date of sentence. Richard Allman, *Report of the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the Courts of the State of New York* 11-14 (2017), <https://www.nycourts.gov/LegacyPDFS/IP/judiciary/legislative/pdfs/2017-CriminalLaw&Procedure-ADV-Report.pdf>.

<sup>32</sup> *People v. Guerrero*, 12 N.Y.3d 45, 49 (N.Y. 2009) (“[T]he Legislature did not intend the surcharge or fee to be an additional punishment component of a sentence.”). Penal Law § 60.35, which imposes these surcharges and fees, was “originally enacted as part of a massive revenue-raising bill.” *Id.* (emphasizing § 60.35’s “nonpunitive nature”).

<sup>33</sup> Mandatory surcharges and the crime victim assistance fee are both deposited in the State’s “criminal justice improvement account.” P.L. § 60.35(3). The DNA databank fee is credited to the State’s General Fund. *Id.* “Monies of the criminal justice improvement account, following appropriation by the legislature and allocation by the director of the budget shall be made available for local assistance services and expenses of programs to provide services to crime victims and witnesses.” State Finance Law § 97-BB. Thus, the DNA fee goes directly into the state fund, and the mandatory surcharge and crime victim assistance fee goes into a fund theoretically earmarked for crime victim assistance, but which can be reallocated by the Legislature. In a report on court fines and fees, the Office of the State Comptroller listed several accounts funded by various fines and fees associated with the criminal justice system, including the criminal justice improvement account, and explained, “The fact that certain revenues are earmarked to fund these programs does not mean the revenues are used only for those purposes. Under certain circumstances, the State may elect to ‘sweep’ revenue from these funds into the General Fund.” Office of the State Comptroller. *Report on the Justice Court Fund* (2010), <https://osc.state.ny.us/localgov/pubs/research/justicecourtreport2010.pdf>. It appears that this routinely occurs. For example, in fiscal year 2017, the state swept over \$8.8 million from the criminal justice improvement account into the general fund. New York. *FY 2018 Enacted Budget Financial Plan*, T-210 (2017). The enacted budget for fiscal year 2019 states that over \$8.5 million was swept from the criminal justice improvement account into the general fund in 2018, and a similar amount is projected to be swept into the general fund annually through 2022. New York. *FY 2019 Enacted Budget Financial Plan*. T-198 (2018). Thus, it is clear that, in practice, these mandatory surcharges and fees are regularly subsumed into the general fund though purportedly earmarked for expenses related to the criminal justice system.

<sup>34</sup> Office of the New York State Comptroller. *Report on the State Fiscal Year 2016-2017* (2016), [https://www.osc.state.ny.us/reports/budget/2016/2016\\_17\\_enacted\\_budget\\_report.pdf](https://www.osc.state.ny.us/reports/budget/2016/2016_17_enacted_budget_report.pdf).

that are imposed on violations of the VTL. While there are some unclassified misdemeanors in the VTL, the majority of VTL violations are traffic infractions. In 2016, New York City Supreme Courts collected \$938,482 in surcharge revenue for felony offenses.<sup>35</sup> Thus, the vast majority of mandatory surcharge revenue from criminal court derives from those who have resolved their case with a non-criminal disposition.

In 2016, of the 281,321 criminal cases arraigned in New York City, approximately 84% were non-felonies, including misdemeanors, violations, and traffic infractions.<sup>36</sup> The most common charges were for quality of life offenses such as P.L. § 165.15, Theft of Services (most commonly charged for not paying the subway fare), P.L. § 221.10, Criminal Possession of Marijuana, P.L. § 220.03, Criminal Possession of a Controlled Substance, and V.T.L. § 511, Driving with a Suspended License.<sup>37</sup> As a result, much of the revenue generated in criminal court from mandatory surcharges derives from the less serious quality of life offenses which are often themselves the results of poverty. As can be seen from these figures and the stated goals of the Legislature in enacting these fees, the mandatory surcharges and fees function as a regressive tax most frequently imposed upon those least able to pay, which causes harm wholly disproportionate to the small effect on the state budget it supports.

### **III. THE IMPACT OF MANDATORY SURCHARGES ON INDIGENT DEFENDANTS**

#### **a. Civil Judgment**

Where an individual is unable to pay the mandatory surcharges, a court may defer all or part of the surcharge pursuant to C.P.L. § 420.40 (4). However, such an order does not excuse payment, but is filed and entered as a civil judgment, in accordance with C.P.L.R. § 5016, and subject to collection “in the same manner as a civil judgment.”<sup>38</sup> Additionally, when a defendant does not make timely payments, a court will often “enter judgment.” Again, this will result in the entry of a civil judgment.

A civil judgment can have long-term negative consequences, including its appearance on a credit report.<sup>39</sup> A civil judgment is subject to collection remedies such

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<sup>35</sup> Communication with Karen Kane of Office of Court Administration on May 11, 2018.

<sup>36</sup> Lisa Lindsay, Criminal Court of the City of New York 2016 Annual Report, Office of the Chief Clerk of New York City Criminal Court (August 2017) page 17, <https://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf>

<sup>37</sup> *Id.* at 30

<sup>38</sup> C.P.L. § 420.40 (5).

<sup>39</sup> It is unclear how consistently these judgments appear on credit reports. In an interview with the authors, an employee with the New York County Clerk’s Office explained that while the judgments are not routinely reported to credit agencies, if an individual’s judgment docketed at the office is searched by a private company, such as a title insurance company, the private parties will sometimes report the civil judgments to the credit reporting companies. Thus, at least in New York County, it is certainly possible that a civil judgment will be reported to a credit agency, and an individual’s credit could be unexpectedly adversely affected by the civil judgment appearing on their credit report. Furthermore, these reporting

as garnishment of wages and the seizure of bank accounts and property.<sup>40</sup> Such a judgment cannot be excused through bankruptcy. Should the judgment appear on one's credit report, it will remain there unless it is paid in full, thus affecting a person's ability to attain housing, a loan or mortgage, and increasingly, employment.<sup>41</sup>

The harms done to individuals against whom civil judgments are entered may be far-reaching and long-lasting. Indeed, the New York State Bar Association's Special Committee on Collateral Consequences of Criminal Proceedings has recognized that "[t]he civil judgment that arises as a result of the application of C.P.L. § 420.10(6) and § 420.40(4) may well have the most long lasting effects of any portion of the sentence."<sup>42</sup> Despite these potentially debilitating long-term effects which could potentially harm individuals' attempts to avoid committing new crimes, the entering of civil judgments against indigent defendants is frequently treated as a routine and unremarkable event in Criminal or Supreme Court, as currently the courts have no other alternative to assist individuals who cannot afford to pay the surcharges.

### **b. Incarceration and Mandatory Surcharges**

For those who are incarcerated after conviction, mandatory surcharges and fees are collected from their commissary accounts at the prison, which incarcerated persons typically use to pay for phone calls and purchases from the commissary store, such as basic personal hygiene items or food.<sup>43</sup> These fees are known as "encumbrances." The mandatory surcharge, crime victim assistance fee and DNA fees are each considered a separate encumbrance; thus, often incarcerated persons have three or more encumbrances on their account upon entering the prison system. There are a variety of other encumbrances that can be attached to an incarcerated person's account, including "gate money,"<sup>44</sup> court ordered restitution, sex offender registration fees, and court filing fees.

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practices could vary county to county. Recent changes to credit report rules have resulted in fewer civil judgments appearing on credit reports, but if courts change their reporting practices these judgments could once again appear consistently on credit reports. *E.g. Stacy Cowley, Your Credit Score May Soon Look Better*, New York Times (June 26, 2017), <https://www.nytimes.com/2017/06/26/business/dealbook/your-credit-score-may-soon-look-better.html>.

<sup>40</sup> Alan Rosenthal, Center for Community Alternatives, *Sentencing for Dollars: The Financial Consequences of a Criminal Conviction*, (2007), <http://www.communityalternatives.org/pdf/financial%20consequences.pdf>.

<sup>41</sup> *Id.* at 24; Gary Rivlin, *The Long Shadow of Bad Credit in a Job Search*, New York Times (May 11, 2013), <http://www.nytimes.com/2013/05/12/business/employers-pull-applicants-credit-reports.html> (documenting the experiences of several applicants who were turned away from jobs for which they were otherwise qualified due to their poor credit histories).

<sup>42</sup> N.Y. State Bar Assoc. Special Comm. on Collateral Consequences of Criminal Proceedings, *Reentry and Reintegration: The Road to Public Safety* 177 (2006), <http://www.nysba.org/workarea/DownloadAsset.aspx?id=26857>.

<sup>43</sup> Collection & Repayment of Inmate Advances & Obligations, NYS Dept. of Corrections and Community Supervision, Directive 2788 (April 18, 2017), <http://www.doccs.ny.gov/Directives/2788.pdf>.

<sup>44</sup> Gate money is the \$40 incarcerated persons are given upon release, which is collected from their accounts and saved until they are released. *Id.*



In the case of mandatory court fees, the encumbrances for such fees are taken out of incarcerated persons' accounts at a rate of 25% of outside receipts (typically money given to incarcerated persons by family members or friends), and 20% of money earned while incarcerated. If an incarcerated person has more than one encumbrance, they will be garnished at twice this rate. Thus, until the incarcerated person has all but one of their fees and other encumbrances paid off, they will be able to keep only 50% of what they receive from outside receipts and 60% of their wages, with the rest going to pay mandatory fees.

The majority of jobs for incarcerated persons pay between \$0.17 and \$0.39 per hour.<sup>45</sup> To have this already small wage reduced by 40% for what could be years has an enormous impact on incarcerated person's quality of life, making it difficult for incarcerated persons to purchase even basic hygiene supplies.<sup>46</sup> It may also discourage incarcerated persons from working as they would receive so little pay in return for the hours they put in on various jobs. The encumbrances from surcharges and fees can also create friction with family members of incarcerated persons, who may give money to incarcerated persons to fund phone calls home or for the purchase of basic supplies, only to have 50% of that money taken to pay off hundreds of dollars in fees imposed by the courts.<sup>47</sup>

Furthermore, when a new encumbrance is established, the *entirety* of the funds from an incarcerated person's account are paid towards the new encumbrance, regardless of what other encumbrances might exist. This means, for example, if, while serving a sentence for one crime, an incarcerated person is convicted of a new crime, the entirety of the money in the incarcerated person's account will be paid towards any fees imposed due to the new conviction, zeroing out the incarcerated person's account.<sup>48</sup> Since courts cannot, under current law, defer fees at the time of sentencing, it is impossible for a court to prevent such a payment of all of an incarcerated person's money towards court fees.<sup>49</sup>

Surcharges and fees may be deferred only under certain circumstances. In *People v. Jones*, 26 N.Y.3d 730 (2016), the Court of Appeals explained the procedure governing

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<sup>45</sup> Collection & Repayment of Inmate Advances & Obligations, NYS Dept. of Corrections and Community Supervision, Directive 2788 (April 18, 2017), <http://www.doccs.ny.gov/Directives/2788.pdf>; also *Tookes*, 52 Misc.3d at 961-2.

<sup>46</sup> Assuming an incarcerated person was able to work 40 hours per week making the top end of skilled labor wages offered at prisons, it would take twenty-four weeks to pay off the DNA fee and Crime Victim Assistance Fee and ninety-six weeks to pay off the mandatory surcharge for a single felony conviction. Thus, even in the absence of other financial obligations that could lead to other encumbrances, an incarcerated person's wages could be garnished for years to pay off the surcharges and fees imposed by the current laws.

<sup>47</sup> *Tookes*, 52 Misc.3d at 961-63.

<sup>48</sup> Collection & Repayment of Inmate Advances & Obligations, NYS Dept. of Corrections and Community Supervision, Directive 2788(VI)(B)(3) (April 18, 2017), <http://www.doccs.ny.gov/Directives/2788.pdf>.

<sup>49</sup> As stated in Footnote 64 *infra*, anecdotal evidence suggests that some judges have found ways to thwart this system, putting the case on the calendar immediately after sentencing and supplying defendants with form motions they can fill out and file on the same day as sentencing. Also *Tookes*, 52 Misc.3d at 968-70.

deferral applications.<sup>50</sup> “A person subject to a mandatory surcharge may seek to defer payment at any time *after sentencing*, by way of a motion to resentence under C.P.L. § 420.10(5).”<sup>51</sup> Individuals sentenced to 60 days’ incarceration, or less, may instead seek to defer payment at the appearance date set forth on a summons issued under Penal Law § 60.35(8).<sup>52</sup> A defendant may *not*, however, seek a deferral at the time of sentence.<sup>53</sup>

Granting a deferral request “is neither routine nor common, certainly not for persons in confinement.”<sup>54</sup> In order to defer the surcharge, the court must set forth its reasons on the record and issue a written order, upon a showing that the defendant is not able to pay.<sup>55</sup> The court may not, however, grant a deferral where the defendant is unable to pay “solely because of defendant’s incarceration.”<sup>56</sup> Deferral of a surcharge for an incarcerated individual should not be granted “except in the most unusual and exceptional of circumstances.”<sup>57</sup>

At least one court has suggested that the Court of Appeals has interpreted the deferral standard far more restrictively than the actual statutory language demands.<sup>58</sup> The Legislature provided that a deferral could be granted where the surcharge works an “unreasonable hardship,” while the *Jones* court held that a deferral may not be granted except in the “most unusual and exceptional of circumstances.”

#### IV. PROPOSED LEGISLATIVE CHANGES

##### a. Eliminate Mandatory Surcharges or Impose on a Sliding Scale

As outlined above, mandatory surcharges and fees place an enormous burden on criminal defendants and their families purely in order to raise state revenue. Fees and surcharges are unnecessary to meet the State’s goals; restitution, criminal forfeiture and fines pursuant to sentencing provide sufficient financial punishment and deterrence. The mandatory surcharges, which are imposed uniformly and without consideration of the circumstances of an individual defendant, are not a tool of the criminal justice system, but

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<sup>50</sup> *Tookes*, 52 Misc.3d at 958 (“[*Jones*] imposed significant new restrictions on the authority of trial courts to deter surcharges and fees.”).

<sup>51</sup> *Jones*, 26 N.Y.3d at 732-33 (emphasis added).

<sup>52</sup> *Id.* at 733.

<sup>53</sup> *Infra* note 64.

<sup>54</sup> *Jones*, 26 N.Y.3d at 740.

<sup>55</sup> *Id.* at 736 (citing C.P.L. § 420.4).

<sup>56</sup> *Id.* at 737 (quoting C.P.L. § 420.10(5)). *Jones*’ resentencing requirement left open numerous questions. *Tookes*, 52 Misc.3d at 897-98 (observing that it was not clear whether defense counsel could make a motion for resentencing by making an application immediately after the imposition of sentencing, or whether an entirely new proceeding, where counsel would have to be appointed, would have to be brought, and what the scope of such a resentencing would be).

<sup>57</sup> *Id.* at 740.

<sup>58</sup> *Tookes*, 52 Misc.3d at 972.

a tool of the revenue-raising branches of the state government. The annual state budget in New York in 2016 was over \$150 billion, and the collection from mandatory surcharges from New York City was less than \$6.2 million. Thus, the total collected by the State via these surcharges and fees is extremely small compared to the overall state budget, and the harm these surcharges and fees cause is incalculable. There is simply no justification for continuing to raise revenue through the criminal justice system when such revenue raising is directly at odds with the goals of rehabilitation. Given the economic harm of decreased employment among people with criminal convictions, it is doubtful that imposing fees and surcharges even provides a net benefit to state coffers.<sup>59</sup> Alternatively, a sliding scale could be imposed in which fees would be calculated based upon an individual defendant's financial resources, rather than a flat fee applied to all regardless of ability to pay.<sup>60</sup>

If the Legislature is unprepared to make significant changes to the current status of mandatory surcharges and fees, there are a number of smaller changes that could decrease the harm done to indigent defendants and their families by the mandatory surcharges, including (1) reinstating courts' ability to waive the surcharges and fees; (2) eliminating mandatory surcharges for youthful offender adjudications; (3) eliminating mandatory surcharges for violations; (4) eliminating the imposition of multiple mandatory surcharges; and, (5) directing that incarcerated persons' commissary money not be used to pay mandatory surcharges and fees.

#### **b. Reinstatement of Waivers**

As *Jones* makes clear, the statute prohibits waivers of mandatory surcharges under any circumstances. As in other areas of criminal sentencing, judges would prefer to have some discretion in this area.<sup>61</sup> One judge has pointed out that the statutory scheme

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<sup>59</sup> Cherrie Bucknor & Alan Barber, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies*, at 2-3(2016), <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf> (“[I]n 2014 . . . the impediments to employment faced by former prisoners and people with felony convictions meant . . . a loss between \$78 and \$87 billion in GDP” nationwide); *see also* Martin *supra* note 11 (“Take San Francisco: The Financial Justice Project found that over the past six years, \$57 million in criminal justice administrative fees were charged and an average of only 17 percent were recouped. In other words, it was highly ineffective as a revenue source, and as a moral force it was downright depraved. . . . ‘We must find more fair and just ways to fund our courts and criminal justice system that do not balance the books on the backs of those who cannot afford it.’”).

<sup>60</sup> Alec Schierenbeck, *A Billionaire and a Nurse Shouldn't Pay the Same Fine for Speeding*, New York Times (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/opinion/flat-fines-wealthy-poor.html>

<sup>61</sup> *Tookes*, 52 Misc.3d at 972, 977 (noting that the Legislative standard permitted the courts to make discretionary determinations of “unreasonable hardship” while the Jones standard “significantly limits judicial discretion,” and concluding that judicial discretion is preferable and consistent with Penal Law and ABA standards on dealing with assessment deferrals). *And* American Bar Association proposed Guidelines on Fines and Fees (“No law or rule should limit or prohibit a judge’s ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause a substantial hardship”); *see also* “Fines and Fees and Jail Time in New York Town and Village Justice Courts: The Unseen Violation of Constitutional and State Law,” The Fund for Modern Courts (April 3, 2019), at 20, <http://moderncourts.org/wp-content/uploads/2019/04/Fines-and-Fees-and-Jail-Time-in-New-York-Town->

as interpreted in *Jones* results, ironically, in extra expense and waste of judicial resources by requiring defendants to make a separate motion for resentencing in order to defer payment of the surcharge.<sup>62</sup> Defendants presumably should be entitled to assigned counsel at these resentencing proceedings, particularly because the statute allows for an incarceratory penalty for failure to pay the surcharge, at least on its face.<sup>63</sup> The *Jones* court acknowledged the critique that its resentencing rule “would be a waste of judicial resources” but said policy concerns were beyond its authority and best left to the Legislature.<sup>64</sup>

Anecdotal evidence suggests that in New York counties outside the city, warrants are issued when surcharges remain unpaid.<sup>65</sup> County clerks may insist that defendants’ payments be credited toward mandatory surcharges and fees before they may pay down any other court mandated fines imposed as a sentence, escalating the chances that the defendant will be unable to pay the fines and be incarcerated. It is unknown what becomes of unpaid surcharges in counties where warrants are not issued. As one judge put it: “I assume they go into the ether.” Evidence suggests the court system does not track or attempt to pursue these debts through collection, after the sentence is otherwise completed. As the matter has not been studied by the court system, it may be that the expense to the State of these practices outweighs the financial benefit of using convicted defendants as a funding source.

### **c. Eliminate Mandatory Surcharges for Youthful Offenders**

As long recognized by the New York Legislature and state and federal courts, young people must be dealt with differently in the criminal justice system—both in how courts assess their culpability and in assigning collateral consequences that follow from that culpability. Youthful defendants should not be saddled with excessive, long-term financial consequences when accepting responsibility for youthful mistakes. Accordingly, the statute should exempt all offenders under twenty-one years old from the imposition of a mandatory surcharge and crime victim assistance fee. Children with no prospect of paying will suffer financial ruin before even reaching the age of financial responsibility.

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[and-Village-Justice-Courts-The-Unseen-Violation-of-Constitutional-and-State-Law.pdf](#) (“we recommend amending CPL 420.10(5) to require all courts to address ability to pay both at the time when a fine is imposed and again at a later date if the defendant proves unable to pay. This will also require giving judges discretion to modify all elements of the monetary penalty, including not only fines and fees but also mandatory surcharges.”).

<sup>62</sup> *People v. Tookes*, 52 Misc.3d at 956.

<sup>63</sup> Criminal Procedure Law §420.35(1); *Jones*, 26 N.Y.3d at 740-741.

<sup>64</sup> *Tookes*, 52 Misc.3d at 17. To this point, at least one court has available a fill-in-the-blanks motion form to allow the defendant to make an instant application for resentencing and deferral of the surcharge directly after the sentence is pronounced. The form permits the prosecution to waive their time to respond, since they typically take no position on the question of deferral of the surcharge.

<sup>65</sup> There have been a number of challenges to the practice of imprisoning debtors, the most widely reported one being *Fant v. The City of Ferguson*, No. 4:15-cv-00253 (E.D. Mo. 2015); see generally *The Fund for Modern Courts*, *supra* note 61.

This could have far-reaching disastrous consequences, such as interfering with their plans to go to college, moving into their own apartment or seeking future employment.

If the youthful defendant cannot pay the surcharges, a civil judgment must be entered. If that judgment appears on a youthful offender's credit report, it can have dire consequences, particularly for youths who have had no opportunity to build good credit. Any civil judgment which appears on a defendant's credit report could remain there for seven years--even if the youth could find a way to pay the judgment.<sup>66</sup> A young person's fledgling credit score would be ruined before he or she even has a chance to develop it.<sup>67</sup> Court-imposed surcharges and fees have a disparate effect depending on income. Young, indigent defendants who have no means of paying the fee face a civil judgment that destroys their credit scores while wealthy or middle-class defendants face a mere inconvenience. Thus current New York State law results in these potential long-lasting collateral consequences affecting schooling, employment, and housing for an indigent young defendant.

Courts and legislatures now firmly recognize that children are different, and that youthful defendants should be treated differently from adult defendants in the criminal justice system. Accordingly, and consistent with modern policymaking and jurisprudence with respect to court-involved youth under twenty-one, New York should remove that portion of a youthful defendant's sentence imposing a surcharge and fee pursuant to C.P.L. § 420.10(5).

#### **d. Eliminate Mandatory Surcharges for Violations**

The Legislature should remove the mandatory surcharge for all non-criminal offenses, including violations and traffic infractions. Those individuals who are burdened by the mandatory surcharges are mostly low-income people of color.<sup>68</sup> Furthermore, the

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<sup>66</sup> Fair Isaac Corp., *Credit Report Q&A*, <https://www.myfico.com/credit-education/faq/negative-reasons/how-long-negative-information-remain-on-credit-report>.

<sup>67</sup> Should the civil judgment affect a youth's credit, the wide-ranging effects of bad credit pose insurmountable barriers to reentry. A bad credit score would affect a youth's ability to obtain further schooling or employment, stable housing, and healthcare. See Catherine Ruetschlin & Dedrick Asante-Muhammad, NAACP, *The Challenge of Credit Card Debt for the African American Middle Class* 18 (2013), [https://www.demos.org/sites/default/files/publications/CreditCardDebt-Demos\\_NAACP\\_0.pdf](https://www.demos.org/sites/default/files/publications/CreditCardDebt-Demos_NAACP_0.pdf). "Once a judgment is entered, a person may not be able to obtain loans to buy a car, to go to school, or to buy a house. Without schooling or private transportation, job opportunities are limited in a way that is not intended by any of the individuals standing in criminal court or the police officer exercising discretion in favor of making a misdemeanor arrest." See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. Rev. L. & SOC. CHANGE 271, at 297 (2009); also N.Y. State Bar Assoc. Special Comm. on Collateral Consequences of Criminal Proceedings, *Reentry and Reintegration: The Road to Public Safety*, at 177 (May 2006), <http://www.nysba.org/workarea/DownloadAsset.aspx?id=26857>.

<sup>68</sup> Sarah Ryley, *Minorities face disproportionate 'Broken Windows' enforcement everywhere — especially in predominantly white neighborhoods*, The Daily News, (September 8, 2014), <https://www.nydailynews.com/new-york/nyc-crime/broken-windows-disproportionately-enforced-white-neighborhoods-article-1.1931171>; New York Office of the Attorney General, *A Report on Arrests Arising from the New York City Police Department's Stop-and-Frisk Practices*, (November 2013),

vast majority of surcharge revenue derives from non-criminal pleas. Thus, the burden of the mandatory surcharge falls on the population least able to pay and facing the least serious cases.

Violations are disproportionately imposed upon people of color and indigent defendants.<sup>69</sup> They are frequently the direct results of poverty, since many so-called “quality of life crimes” are concluded with the imposition of a violation rather than a criminal conviction. Often criminal defendants plead guilty to violations in order to avoid the time-consuming and costly process necessary to defeat misdemeanor charges, but they are still burdened with the heavy surcharges and fees, as well as associated collateral consequences. Rather than continue to punish poverty by saddling those who cannot pay and who have not even been convicted of a crime with civil judgments, New York should not impose mandatory surcharges for violations.

**e. Eliminate Imposition of Multiple Surcharges**

The City Bar also recommends that multiple surcharges be eliminated. When a defendant pleads guilty to two indictments on the same date, the conviction is treated as one conviction for the purposes of a predicate finding.<sup>70</sup> Often any sentences imposed are run concurrently, while two sentences of probation are run concurrently by operation of law.<sup>71</sup> In contrast, two surcharges are imposed; thus in the case of felony convictions, an indigent individual will be assessed \$750 in mandatory surcharges. Courts have rejected incarcerated persons’ efforts to eliminate this doubling, at least in the case of DNA fees.<sup>72</sup> And for incarcerated individuals, the effects are particularly harsh.

Given the harsh effects of even a single mandatory surcharge assessment, the committee recommends that the imposition of multiple surcharges be eliminated. At a minimum, judges should be given the discretion to find mitigating circumstances in order to impose only a single surcharge.<sup>73</sup>

**f. Prohibit the Use of Commissary Money to Pay Mandatory Surcharges**

The Legislature should end the practice of requiring the New York State Department of Corrections and Community Supervision to use incarcerated persons’ commissary money to pay for mandatory surcharges and fees. If a defendant is to be

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[https://www.ag.ny.gov/pdfs/OAG\\_REPORT\\_ON\\_SQF\\_PRACTICES\\_NOV\\_2013.pdf](https://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf); Steven Zeidman, *Shut Down the Criminal Court*, The Gotham Gazette, (February 25, 2016), <http://www.gothamgazette.com/city/130-opinion/6190-shut-down-the-criminal-court>.

<sup>69</sup> *Id.*

<sup>70</sup> P.L. 70.10(1)(c).

<sup>71</sup> P.L. Section 60.15 (1).

<sup>72</sup> *E.g., People v. Cooper*, 88 A.D.3d 1009 (2d Dep’t 2011).

<sup>73</sup> *Cf.* P.L. 70.25 (2-c) (concurrent sentences permitted where consecutive sentences would normally be required where court finds mitigating circumstances).

incarcerated, does not qualify for a waiver, and is not able to pay the mandatory surcharge at the time of sentence, an automatic deferral of the surcharge should be granted until after the defendant is released. It is unnecessary to deprive incarcerated persons of the few commissary items which make their existence less miserable.<sup>74</sup> Arguably the administration of the prison suffers and becomes more expensive as incarcerated persons become increasingly unhappy. This was advanced as one reason for corrections officials' weak enforcement of the payments through commissary prior to the statutory change.<sup>75</sup> The rehabilitative goals of the criminal justice system would be much better served by ending this system of encumbering incarcerated persons' accounts to pay for mandatory surcharges and fees. As the *Tookes* court put it, "Justice must be tempered with humanity. . . . We are capable of balancing the human needs of prisoners with the financial imperatives of the state."<sup>76</sup>

## V. CONCLUSION

Many laws passed in the 1990s are now being reevaluated in light of a broader understanding of the goals for effective criminal justice. Reforming mandatory surcharges and fees should be a priority for lawmakers dedicated to improving criminal justice. New York's rigid requirement of mandatory surcharges without regard to ability to pay is unfair and unjust to low-income offenders, and it exacerbates the racial bias that exists in the criminal justice system. States are increasingly acting to provide greater re-entry opportunities, and the imposition of exorbitant mandatory surcharges impedes those efforts.<sup>77</sup>

Shifting the burden from the state to individual defendants to subsidize the state's criminal justice system may not be to the public's benefit. Confidence in the criminal justice system is eroded when defendants who "do their time" or comply with court imposed conditional sentences also face multiple court appearances and possible arrest because they cannot afford a fee.

With fairness norms evolving, it is time to reexamine the concept of a mandatory payment attaching to a criminal conviction—in the same amount for every defendant.<sup>78</sup> For individuals of modest means, these payments can be exorbitant; they are virtually

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<sup>74</sup> *Tookes*, 52 Misc.3d at 978.

<sup>75</sup> A. Annucci, *Prison Reform Revisited: The Unfinished Agenda*, 24 Pace L.Rev. 631 (2004).

<sup>76</sup> *Tookes*, 52 Misc.3d at 978.

<sup>77</sup> *Tookes*, 52 Misc.3d at 976-77 (citing Vera Institute of Justice, *Justice in Review: New Trends in State Sentencing and Corrections 2014-2015 at 2* (May 2016)).

<sup>78</sup> Joanna Weiss & Lisa Foster, *San Francisco's Justice System Gets a Little More Just*, Washington Post (June 13, 2018), [https://www.washingtonpost.com/opinions/san-franciscos-justice-system-gets-a-little-more-just/2018/06/13/a4ca28a6-6f13-11e8-bf86-a2351b5ece99\\_story.html?utm\\_term=.3e46eceacf81](https://www.washingtonpost.com/opinions/san-franciscos-justice-system-gets-a-little-more-just/2018/06/13/a4ca28a6-6f13-11e8-bf86-a2351b5ece99_story.html?utm_term=.3e46eceacf81); Alec Schierenbeck, *A Billionaire and a Nurse Shouldn't Pay the Same Fine for Speeding*, New York Times (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/opinion/flat-fines-wealthy-poor.html>; Alec Schierenbeck, *The Constitutionality of Income-Based Fines* (February 21, 2018). Uni. of Chicago L. Rev., Forthcoming. SSRN: <https://ssrn.com/abstract=3127949> or <http://dx.doi.org/10.2139/ssrn.3127949>.

impossible to pay and also cover basic needs such as food, housing and clothing.<sup>79</sup> While the surcharges and fees have little to no impact on wealthy and middle class individuals, they result in potentially devastating and long-lasting consequences on low-income individuals. For those unable to pay, these surcharges and fees can affect their job prospects and housing, perpetuating a cycle of poverty and possibly recidivism. Not surprisingly, the negative consequences of criminal debt have a disproportionate impact on people of color.<sup>80</sup> As the American Bar Association has recommended, courts should be aware of the “cumulative effect of financial obligations on a prisoner’s successful and law-abiding re-entry.”<sup>81</sup> Thus, the law should be changed to remove mandatory surcharges, or alternatively, to impose them on a sliding scale reflecting ability to pay.

As noted, the official purpose of mandatory surcharges is to raise revenue, not to protect public safety or impose punishment.<sup>82</sup> Courts should not prioritize revenue-raising over the successful re-integration of incarcerated persons back into society. A one size fits all mandatory surcharge is not only patently unfair when there is no regard for a defendant’s income, but also conflicts with the concept of fairness that animates the due process and equal protection provisions of the United States Constitution.<sup>83</sup> Coupled with the disproportionate representation of low-income people of color in the New York criminal justice system, mandatory surcharges amount to a tax imposed in a racially discriminatory manner on those least able to pay.

New York should be a leader in justice and fairness. Tying convictions to revenue raising is inherently problematic, conflating the purpose of the system, justice, with revenue-raising. Fines imposed by criminal courts should be imposed only when they are tied directly to the criminal act, such as for restitution or to deter future crimes.<sup>84</sup> Thus, the Bar Association recommends simply eliminating mandatory surcharges and fees.

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<sup>79</sup> J. Oberman & K. Johnson, *The Never Ending Tale: Racism and Inequality in the Era of Broken Windows*. 37 *Cardozo L.Rev.* 1075 (2016).

<sup>80</sup> A. Shafroth & L. Schwartzo. *Confronting Criminal Justice Debt*. National Consumer Law Center (Sept. 2016).

<sup>81</sup> Standard 23-8.8 Fees and Financial Obligations. *Standards on Treatment of Prisoners* (2017). American Bar Association.

<sup>82</sup> *Guerrero*, 12 N.Y.3d at 49; also Emily Jane Goodman, *On Top of Jail Time, Prisoners Now Face Fees and Surcharges*, *Alternet*, (September 6, 2008) (“‘It is fiscal gimmickry used to close budget gaps,’ says Brooklyn Assembly member Hakeem Jeffries. ‘No one thinks it’s anything but a barrier to successful reentry into society, because people with low or no income will owe significant amounts of money.’ Alan Rosenthal, director of justice strategies for the Center for Community Alternatives, adds, ‘It is not a public safety issue, and there are almost no proponents of these financial consequences for any reason other than the revenue streams.’”)

<sup>83</sup> Alec Schierenbeck, *A Billionaire and a Nurse Shouldn’t Pay the Same Fine for Speeding*, *New York Times* (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/opinion/flat-fines-wealthy-poor.html>; Alec Schierenbeck, *The Constitutionality of Income-Based Fines* (February 21, 2018). *Uni. of Chicago L. Rev.*, Forthcoming. SSRN: <https://ssrn.com/abstract=3127949> or <http://dx.doi.org/10.2139/ssrn.3127949>.

<sup>84</sup> The Penal Law already has provisions allowing a Court to impose various court fines and restitution. P.L. 60.27; P.L. 80.



At a minimum, legislators should re-institute judicial discretion to waive mandatory surcharges in cases of unreasonable hardship and prohibit the use of an incarcerated person's commissary money to pay surcharges and fees. Additionally, legislators should abolish mandatory surcharges for youthful offender adjudications, violations and traffic infractions. Finally, the Legislature should eliminate the imposition of multiple surcharges. The mandatory surcharge has become a practice that places the financial burden to create revenue on those who can least afford it, and the imposition of the mandatory surcharge serves no public safety purpose. "The job of the justice system is to do justice, not to raise revenue through hidden taxes imposed on those who can least afford them."<sup>85</sup>

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<sup>85</sup> Joanna Weiss & Lisa Foster, *San Francisco's Justice System Gets a Little More Just*, Washington Post (June 13, 2018), [https://www.washingtonpost.com/opinions/san-franciscos-justice-system-gets-a-little-more-just/2018/06/13/a4ca28a6-6f13-11e8-bf86-a2351b5ece99\\_story.html?utm\\_term=.3e46eceacf81](https://www.washingtonpost.com/opinions/san-franciscos-justice-system-gets-a-little-more-just/2018/06/13/a4ca28a6-6f13-11e8-bf86-a2351b5ece99_story.html?utm_term=.3e46eceacf81); see also Martin *supra* note 4 ("These fees are not meant to be punitive, but in reality they are. They add an additional layer of punishment to people who have already gone to jail, paid fines and may even be paying victim restitution.").