

4-1-2013

## Financial Conflicts of Interest and the Funding of New Orleans's Criminal Courts

Micah West

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### Recommended Citation

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Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol101/iss2/4>

### Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z381B9W>

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# Financial Conflicts of Interest and the Funding of New Orleans’s Criminal Courts

Micah West\*

*State and local government budget shortfalls have increased financial pressure on criminal courts. Many states are relying on fees and costs imposed on criminal defendants to help fund their criminal justice systems. This Comment highlights the constitutional and policy concerns raised by fines, fees, and costs in New Orleans’s adult criminal courts. New Orleans’s criminal courts are financially dependent on fines, fees, and costs (collectively “financial assessments”) imposed on criminal defendants to pay operating costs. This dependence creates a possible financial conflict of interest that violates defendants’ due process rights to impartial judges. This Comment provides several recommendations to reform the adult criminal court system’s funding structures, including abolishing judicial expense funds, separating court funding from financial assessments, consolidating the court system, and providing fee waivers for indigent defendants. These reforms would better protect citizens’ constitutional rights, preserve judicial independence, and improve local democracy and governance.*

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\* J.D. Candidate, University of California, Berkeley, School of Law, 2013. I am grateful to Professor Charles Weisselberg, who advised the Comment, and to Professor Jancy Hoeffel, Graymond Martin, Sarah Geraghty, and the editors of the *California Law Review*, who provided valuable feedback. Any mistakes are my own.

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#### INTRODUCTION

“I was as guilty of [funding the court on the backs of the poor] as any when I was on the bench, but you have to fund yourself in some fashion. And so you did it on the backs of the people who were least able to pay,” former New Orleans Criminal District Court Chief Judge Calvin Johnson told a reporter in 2010.<sup>1</sup>

Sean Matthews is one such example:

Sean Matthews, a temporary construction worker who lives with various family and friends because he has no home of his own, was arrested on February 9, 2007, and pled guilty to possession of marijuana on September 13. He was assessed a \$300 fee for the Judicial Expense Fund, \$148 in court costs, and a \$50 fee for the Law Enforcement Fund. He was unable to pay his fines and fees, and was arrested two years later on September 1, 2009 [for failure to pay]. When he was taken into custody, no one could tell Mr. Matthews when he would be brought to court; after a couple of weeks, he simply stopped asking. He was unable to get in touch with his family from jail, although he did once manage to reach his uncle, who “didn’t care” and hung up on him. Finally, on January 21, 2010, after spending

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1. Richard A. Webster, *Bail System Puts Court Costs on Backs of Poor*, NEW ORLEANS CITY BUS., Aug. 20, 2010, available at [http://www.projectjusticenola.org/wp-content/uploads/2010/08/Bail\\_System.pdf](http://www.projectjusticenola.org/wp-content/uploads/2010/08/Bail_System.pdf).

almost five months in jail, Mr. Matthews was brought to court, where the judge waived his fines and fees and ordered his release.<sup>2</sup>

Sean Matthews's story illustrates the danger of the funding structures in New Orleans's adult criminal courts. Not only was he denied due process, but he also landed in a modern day debtors' prison. This Comment traces how these funding structures create an unconstitutional financial conflict of interest, violate state budgetary laws, and contradict national best practices.

Although fees in civil courts raise their own concerns,<sup>3</sup> this Comment describes the distinct set of concerns in criminal courts (criminal district, municipal, and traffic courts) when state and local governments shift funding responsibility to defendants. First, a criminal defendant may face incarceration directly or indirectly for failing to pay financial assessments.<sup>4</sup> Second, financial assessments may create conflicts of interest that undermine defendants' rights to due process. The Supreme Court has described two types of conflicts of interest. First, a judge may have a personal financial conflict of interest if the financial assessment benefits the judge personally.<sup>5</sup> Second, a judge may have a structural conflict of interest if the judiciary has both judicial and executive responsibilities, the financial assessments make up a significant portion of the judiciary's budget, or the judiciary controls any financial assessments collected.<sup>6</sup> In New Orleans's adult criminal courts, judicial expense funds and other financial assessments create the possibility of both personal and structural conflicts of interest. While this Comment discusses both types of conflicts, structural conflicts of interest are discussed in depth.

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2. AM. CIVIL LIBERTIES UNION, IN FOR A PENNY, THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 19 (2010).

3. One of the primary concerns raised by civil court fees are barriers to the court system. For a description of concerns about access to justice and other concerns raised by civil court fees, see CONFERENCE OF STATE COURT ADM'RS, COURTS ARE NOT REVENUE CENTERS 2-5, 8 (2011-2012), available at <http://cosca nesc.dni.us/WhitePapers/CourtsAreNotRevenueCenters-Final.pdf>.

4. See LA. CODE CRIM. PROC. ANN. art. 25, art. 349.1, art. 885.1, art. 894.4 (2012); LA. REV. STAT. ANN. § 13:4611, § 47:299.1 (2012); *State v. Williams*, 598 So. 2d 708 (La. Ct. App. 1992); ALICE BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 23-24 (2010); ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 6 (2012); Katy Reckdahl, *Judges, Public Defenders Fighting over Who Pays for Indigent Defense*, TIMES-PICAYUNE (Dec. 5, 2010), available at [http://www.nola.com/crime/index.ssf/2010/12/judges\\_public\\_defenders\\_fight.html](http://www.nola.com/crime/index.ssf/2010/12/judges_public_defenders_fight.html); *City Council Budget Hearings on 2013 Proposed Budget*, at 16:00, CITY OF NEW ORLEANS (Nov. 9, 2012), [http://cityofno.granicus.com/MediaPlayer.php?view\\_id=3&clip\\_id=1382](http://cityofno.granicus.com/MediaPlayer.php?view_id=3&clip_id=1382) (last visited Jan. 15, 2013); see also MAYOR'S OFFICE OF COMMC'NS, *City of New Orleans 2013 Budget Proposal*, CITY OF NEW ORLEANS (Oct. 29, 2012), <http://new.nola.gov/getattachment/Mayor/Budget/2013-CAO-Budget-Presentation-Final.pdf>.

5. See, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927) (finding a due process violation where the mayor, who presided over cases in the mayor's court, was paid out of the fees and costs he imposed).

6. See *Ward v. Vill. of Monroeville*, 409 U.S. 57, 59 (1972) (finding a due process violation where a mayor had executive and judicial functions and presided over traffic cases that consisted of a substantial portion of village funds).

While New Orleans has received significant attention for high-profile impropriety, less attention has been paid to how money—and the pursuit of it—is embedded into the structure of the criminal justice system. In New Orleans, nearly every criminal justice agency depends at least partially on financial assessments to fund its operations. In recent years, about 80 percent of the traffic court’s revenue,<sup>7</sup> 40 percent of the municipal court’s revenue,<sup>8</sup> and 30 percent of the criminal district court’s revenue<sup>9</sup> came from financial assessments. Other criminal justice agencies, including the sheriff’s office<sup>10</sup> and public defender’s office,<sup>11</sup> also rely on financial assessments.

Various national legal organizations have cautioned against relying on financial assessments to fund courts. The National Center for State Courts has said, “The concept of the self-supporting court[] has ethical implications if the court in any way uses money it generates from judgments to pay its operational expenses. It is beyond dispute that this practice is not consistent with judicial

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7. In 2010, out of \$5,879,241 total revenue, \$4,796,714 was derived from financial assessments. See RONALD W. GARRITY, FINANCIAL STATEMENTS AND INDEPENDENT AUDITOR’S REPORT, NEW ORLEANS TRAFFIC COURT, NEW ORLEANS, LOUISIANA 12 (2011).

8. The city inspector general noted that in 2009, the municipal court’s budget was more than \$3 million. While the city appropriated \$1.8 million from its general revenue fund, the court retained and used \$1.2 million received from financial assessments. See ED QUATREVAUX, OFFICE OF INSPECTOR GEN., CITY OF NEW ORLEANS, A PERFORMANCE AUDIT OF THE MUNICIPAL COURT’S REMITTANCES TO THE CITY 2 (2011). In 2010, the court spent \$3.3 million dollars from its judicial expense fund, while the city provided \$2.8 million toward the court’s budget. See Matt Davis, *Many Courts Making Financial Decisions in Private, Despite State Law That Demands Openness and Public Hearings*, LENS (June 21, 2011), <http://thelensnola.org/2011/06/21/new-orleans-judicial-budgets/>.

9. In 2010, out of \$9,071,483 total revenue, \$2,954,022 came from “charges for services.” Charges for services include probation assessments, drug testing fees, intensive probation fees, indigent transcript and indigent defender fees, processing fees, bond fees, and contempt of court fines. See LUTHER SPEIGHT & CO., LLC, FINANCIAL STATEMENTS TOGETHER WITH INDEPENDENT AUDITOR’S REPORT FOR THE YEAR ENDED DECEMBER 31, 2010, CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, NEW ORLEANS, LOUISIANA 11, 19 (2011), available at [http://app1.la.state.la.us/PublicReports nsf/29AE477BA95DE54C8625790A007677CE/\\$FILE/00022022.pdf](http://app1.la.state.la.us/PublicReports nsf/29AE477BA95DE54C8625790A007677CE/$FILE/00022022.pdf).

10. The city, state, and federal government each pay the sheriff’s office per prisoner per day to hold inmates. In 2010, approximately 30 percent of the sheriff’s office’s income came from these per diem payments. Out of \$122,765,407 total revenue, \$35,216,162 came from charges for the “custody of inmates”: \$23,762,489 in charges to the city; \$9,866,429 in charges to the state; \$920,066 in charges to the federal government; and \$667,178 in other charges. The sheriff’s office also raised \$638,839 in release processing fees. See POSTLETHWAITE & NETTerville, ANNUAL FINANCIAL REPORT, ORLEANS PARISH SHERIFF’S OFFICE, NEW ORLEANS, LOUISIANA, FOR THE YEAR ENDED DECEMBER 31, 2011, at 22 (2012), available at [http://app1.la.state.la.us/PublicReports nsf/DF62A71EDC7A7A6D86257A38004E78C5/\\$FILE/0002B58C.pdf](http://app1.la.state.la.us/PublicReports nsf/DF62A71EDC7A7A6D86257A38004E78C5/$FILE/0002B58C.pdf).

11. In fiscal year 2011, out of \$9,151,794 total revenue, approximately 30 percent came from financial assessments (\$2,271,037 from “court costs on fines and forfeitures,” \$228,908 from “bond funds,” and \$243,241 from “reimbursements and attorney fees”). See BRUNO & TERVALON LLP, FINANCIAL AND COMPLIANCE AUDIT TOGETHER WITH INDEPENDENT AUDITORS’ REPORT FOR THE YEAR ENDED JUNE 30, 2011, ORLEANS PUBLIC DEFENDERS 10 (2012), available at [http://app1.la.state.la.us/PublicReports nsf/F690C29B45D91B7086257990004EB91F/\\$FILE/00025A11.pdf](http://app1.la.state.la.us/PublicReports nsf/F690C29B45D91B7086257990004EB91F/$FILE/00025A11.pdf).

ethics or the demands of due process.”<sup>12</sup> “The judiciary must guard against sending the message that courts are somehow responsible for funding themselves and generating revenue to support their own operations,” warned the Conference of State Court Administrators.<sup>13</sup> The American Bar Association recommended that courts have “a predictable general funding stream that is not tied to fee generation.”<sup>14</sup>

Criminal justice debt weighs most heavily on the poor. In a 2002 study, the Bureau of Justice Statistics reported that nearly 60 percent of inmates held in jail nationally earned less than \$1000 per month before their detention.<sup>15</sup> Fourteen percent reported living in a shelter or on the street in the year before their current admission to jail.<sup>16</sup> Although most criminal defendants in New Orleans are indigent,<sup>17</sup> Louisiana courts may assess fines and costs regardless of how much a defendant can afford to pay.<sup>18</sup> Several fees are mandatory regardless of indigence.<sup>19</sup> For example, a forty-five-dollar fee imposed to fund indigent defense<sup>20</sup> is “non-discretionary and shall be assessed . . . even if [defendants] have absolutely no means to pay the assessment.”<sup>21</sup>

12. ROBERT W. TOBIN, NAT'L CTR. FOR STATE COURTS, STATE JUSTICE INST., FUNDING THE STATE COURTS: ISSUES AND APPROACHES 50 (1996).

13. CONFERENCE OF STATE COURT ADM'RS, POSITION PAPER ON STATE JUDICIAL BRANCH BUDGETS IN TIMES OF FISCAL CRISIS 14 (2003), available at <http://cosca.ncsc.dni.us/WhitePapers/BudgetWhitePaper.pdf>; see also CONFERENCE OF STATE COURT ADM'RS, *supra* note 3, at 9 (lamenting that courts have been “recast” as a “collection agency for executive branch services”).

14. RICHARD N. BIEN & D. DUDLEY OLDHAM, ABA, JUDICIAL DIV., STANDING COMM. ON JUDICIAL INDEPENDENCE, BLACK LETTER RECOMMENDATIONS OF THE ABA COMMISSION ON STATE COURT FUNDING 7 (2004), available at [http://americanbar.org/content/dam/aba/migrated/committees/judind/PublicDocuments/blackletterreport\\_with\\_rec.authcheckdam.pdf](http://americanbar.org/content/dam/aba/migrated/committees/judind/PublicDocuments/blackletterreport_with_rec.authcheckdam.pdf).

15. DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES, 2002, at 9 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf>.

16. *Id.*

17. Orleans Public Defenders represents about 80 percent of criminal defendants in New Orleans. See John Simerman, *Public Defender Layoffs Could Gum Up the Works at New Orleans Criminal Court*, TIMES-PICAYUNE (Feb. 02, 2012), available at [http://www.nola.com/crime/index.ssf/2012/02/public\\_defender\\_layoffs\\_could.html](http://www.nola.com/crime/index.ssf/2012/02/public_defender_layoffs_could.html). A defendant must be determined indigent to receive a public defender. See LA. REV. STAT. ANN. § 15:175 (2012) (describing the criteria and procedures to determine whether a criminal defendant is indigent for purposes of appointed counsel).

18. See, e.g., *State v. Anderson*, 677 So. 2d 480, 486 (La. Ct. App. 1996) (“It is not unconstitutional to assess an indigent defendant a fine and costs as special conditions of probation, as long as jail time is not ordered in the event of default.”); *State v. Duncan*, 601 So. 2d 374, 375 (La. Ct. App. 1992) (same).

19. See, e.g., LA. CODE CRIM. PROC. ANN. art. 895.4 (2012) (crime stoppers fee may not be suspended).

20. LA. REV. STAT. ANN. § 15:168 (2012) (“The sum of forty-five dollars [to fund indigent defense] shall be assessed in cases in which a defendant is convicted after a trial, a plea of guilty or nolo contendere, or after forfeiting bond and shall be in addition to all other fines, costs, or forfeitures imposed.”).

21. *La. Pub. Defender Bd. v. Parker*, No. 597627 (19th Jud. Dist. Ct. La. Feb. 11, 2011), [http://lpdb.la.gov/Serving%20The%20Public/News/txtfiles/pdf/Mandamus%20Order\\_11%20FEB%202011.pdf](http://lpdb.la.gov/Serving%20The%20Public/News/txtfiles/pdf/Mandamus%20Order_11%20FEB%202011.pdf). In 2010, the Louisiana Public Defender Board and Orleans Public Defenders sued Orleans Parish Criminal District Court, Orleans Parish Juvenile Court, and the Municipal Court of

Studies demonstrate that criminal justice debt is a significant barrier to reentry and may lead to reincarceration for failure to pay.<sup>22</sup> In Louisiana, a court may imprison a nonindigent defendant for up to one year for failure to pay fines or costs.<sup>23</sup> If the offense is a misdemeanor punishable by six months or less in jail, the maximum imprisonment, including for failure to pay, may not exceed six months.<sup>24</sup> In 2007, the American Civil Liberties Union Foundation of Louisiana and Tulane Criminal Law Clinic sued the Municipal Court of New Orleans for operating a “pay or stay” system that required defendants to pay a fine immediately or serve twenty days in jail.<sup>25</sup> The plaintiffs dismissed the class-action lawsuit when the court agreed to offer community service sentences as an alternative.<sup>26</sup>

While indigent defendants may not face incarceration directly for failure to pay,<sup>27</sup> they may face incarceration indirectly. For example, if an indigent defendant fails to appear in court for a debt-related proceeding, a warrant may be issued for the defendant’s arrest.<sup>28</sup> This may result in the defendant’s incarceration before a judge can evaluate whether the nonpayment was a result of indigence.<sup>29</sup> As Municipal Court Judge Paul Sens told a reporter: “[U]npaid

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New Orleans for failing to impose a thirty-five-dollar (and now forty-five-dollar) special assessment to fund public defense. On February 11, 2011, Judge Todd W. Hernandez granted the request for a writ of mandamus and ordered the courts to assess the thirty-five-dollar cost in every case where a defendant is convicted after trial, enters a plea of guilty or nolo contendere, or forfeits his or her bond. The court held that the fee is “non-discretionary and shall be assessed . . . even if [defendants] have absolutely no means to pay the assessment.” *Id.*

22. See, e.g., AM. CIVIL LIBERTIES UNION, *supra* note 2; BANNON ET AL., *supra* note 4.

23. LA. CODE CRIM. PROC. ANN. art. 884 (2012) (authorizing imprisonment not to exceed one year in default of payment of fines or costs). *But see* State v. Mack, 715 So. 2d 126, 131 (La. Ct. App. 1998) (“An indigent defendant cannot be subjected to default time in lieu of the payment of a fine, costs or restitution.” (citing State v. Hughes, 587 So. 2d 31 (La. Ct. App. 1991))).

24. LA. CODE CRIM. PROC. ANN. art. 884 (“[W]here the maximum prison sentence which may be imposed as a penalty for a misdemeanor is six months or less, the total period of imprisonment upon conviction of the offense, including imprisonment for default in payment of a fine or costs, shall not exceed six months for that offense.”).

25. See *Dear v. Shea*, No. 07-1186 (E.D. La. March 6, 2007).

26. Recent reports continue to accuse the court of sentencing indigent defendants to prison for nonpayment of fines or fees. See AM. CIVIL LIBERTIES UNION, *supra* note 2, at 23–24.

27. *Mack*, 715 So. 2d at 131; *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (sentencing court may not imprison an indigent probationer for failure to pay a fine or restitution without evidence of the probationer’s responsibility for failing to pay); *Tate v. Short*, 401 U.S. 395, 398 (1971) (Equal Protection Clause prohibits the state from imposing a fine as a sentence and automatically converting it to a jail term solely because the defendant is indigent and cannot pay off the fine in full); *Williams v. Illinois*, 399 U.S. 235, 236–37 (1970) (indigent defendant may not be held in confinement beyond the maximum term specified by statute in order to pay off a fine or court costs).

28. See LA. CODE CRIM. PROC. ANN. art. 349.1 (“If at the time fixed for appearance the defendant fails to appear as required by the court, the judge may, or shall on motion of the prosecuting attorney, issue a warrant for the arrest of the defendant.”); see also BANNON ET AL., *supra* note 4, at 23–24.

29. See BANNON ET AL., *supra* note 4, at 23 (“The use of arrests as a collection mechanism raises serious concerns because in many jurisdictions, arrests and pre-hearing incarceration take place before a court has ever assessed whether the individual has the resources to make payments.”).

court fees [eventually] trigger warrants, which lead to arrests, which put indigent people in jail, where the city must pay \$22.39 per day to house them.”<sup>30</sup>

Municipal Court judges regularly issue attachments when criminal defendants fail to appear in court to pay court costs. At a hearing on the city council’s 2013 budget, Municipal Court Judge Joseph Landry explained to the city council:

[G]enerally a person [in municipal court] pleads guilty or is found guilty and is given thirty days to come back [to court to pay any outstanding court costs]. . . . Normally, most people do not come back. We have to issue an attachment. The police have to go arrest them. They have to transport them to jail and then bring them to court and, at that point, we either decide “do you do your time in jail or am I going to give you another thirty days [to pay]?” . . . That is the majority [of cases]. . . . It is unbelievable the number of attachments that this court issues for people not coming back to court to pay court costs . . . . [We’re] spending dollars to collect pennies is what we’re doing.<sup>31</sup>

This problem is not isolated to municipal court. In 2009, the Brennan Center for Justice reviewed one week’s felony docket in criminal district court in New Orleans and found that 6.15 percent of the docket related to debt collection.<sup>32</sup> The court had issued a warrant in 21.6 percent of those cases for a missed payment or failure to appear.<sup>33</sup>

A court may also revoke an indigent defendant’s probation if a court finds that the defendant willfully missed a payment.<sup>34</sup> If a defendant’s probation is revoked, he or she will no longer be eligible for Supplemental Security Income, low-income housing, Temporary Assistance to Needy Families (TANF), or food stamps.<sup>35</sup> A court may also hold a defendant in contempt for failing to pay.<sup>36</sup> A judge may incarcerate or fine a defendant held in contempt.<sup>37</sup> A court

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30. See Reckdahl, *supra* note 4.

31. While no official transcript of the hearings is available, the author transcribed the remarks from Judge Joseph Landry based on the video. *City Council Budget Hearings on 2013 Proposed Budget*, *supra* note 4, at 16:00.

32. See BANNON ET AL., *supra* note 4, at 24.

33. See *id.*

34. See *State v. Williams*, 598 So. 2d 708 (La. Ct. App. 1992) (holding that revocation of probation was proper because defendant failed to exert reasonable effort to secure employment or alternative means of paying fines and costs).

35. PATEL & PHILIP, *supra* note 4, at 6.

36. LA. REV. STAT. ANN. § 13:4611 (2012) (granting district and city courts the power to incarcerate an individual that deliberately refuses to perform an act “until he performs the act”); see also MAYOR’S OFFICE OF COMMC’NS, *City of New Orleans 2013 Budget Proposal*, *supra* note 4.

37. LA. CODE CRIM. PROC. ANN. art. 25 (2012) (“[A] court may punish a person adjudged guilty of contempt of court in connection with a criminal proceeding by a fine of not more than five hundred dollars, or by imprisonment for not more than six months, or both.”).

may also impose other sanctions for failing to pay, including suspending driver's licenses,<sup>38</sup> extending probation,<sup>39</sup> or intercepting tax returns.<sup>40</sup>

Part I describes the statutory authority that grants New Orleans's criminal courts the power to control judicial expense funds and other financial assessments. After describing this statutory authority, I describe how the courts have used these revenues to pay for court operations, personnel, and other expenses. Part II describes the legal framework available to challenge a judge's impartiality. Although financial assessments are permissible for some administrative expenses, the Supreme Court has limited their use when a judge has a potential personal or structural financial interest in the outcome of a case. Part III applies this framework to the adult criminal court system in New Orleans. I argue that the court system's reliance on particular financial assessments violates defendants' constitutional right to an impartial judge. Part IV offers recommendations to bring the court system's funding structures in line with both state and constitutional requirements and national best practices. Among other recommendations, I propose abolishing each court's judicial expense funds, consolidating the court system, separating the courts' funding from financial assessments, and providing fee waivers for indigent defendants. These reforms would improve justice, transparency, and political accountability in New Orleans.

## I.

### FINANCIAL ASSESSMENTS IN NEW ORLEANS'S ADULT CRIMINAL COURTS

The adult criminal courts in New Orleans depend on particular financial assessments to support operations. "We need crime to fund criminal justice in New Orleans. That's asinine. But it's the crux of the matter,"<sup>41</sup> said Judge Arthur Hunter, former Chief Judge of Criminal District Court. This Part will describe judges' broad statutory authority to collect judicial expense funds and other financial assessments. These funds are essential to the criminal court system and make up a large portion of each court's revenue. Judges have wide latitude over spending these funds, even if the expenditures are only incidental to court operations.

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38. *See id.* at art. 885.1 (courts may order defendants with outstanding fines to surrender their driver's licenses, leading to a suspended license if unpaid after 180 days).

39. *Id.* at art. 894.4 ("When a defendant has been sentenced to probation and has a monetary obligation, including but not limited to court costs, fines, costs of prosecution, and any other monetary costs associated with probation, the judge may extend the period of probation until the monetary obligation is extinguished.")

40. LA. REV. STAT. ANN. § 47:299.1 (2012) (establishing a system to permit state agencies to intercept income tax returns to pay debt owed by an individual to the agency).

41. Katy Reckdahl, *Judges, Defenders Battle over Money: Fees Often Waived in Orleans Parish*, TIMES-PICAYUNE, Dec. 15, 2010, at B1.

### A. Executive Authority

The adult criminal courts have significant responsibility for generating revenue to pay for court operations. The city government is guilty of “generational neglect” with respect to funding the court system.<sup>42</sup> “We have not done our part for many, many years,” Councilwoman Kristin Gisleson Palmer said at a city council hearing.<sup>43</sup> Consequently, courts have turned to financial assessments to supplement city and state funding.

In addition to adjudicating cases, criminal judges in New Orleans also raise funds to support court operations. This fundraising responsibility is reserved traditionally for the executive and legislative branches.<sup>44</sup> “We are expected to self-generate . . . the funds needed to operate,” Chief Traffic Court Judge Robert Jones reminded the city council at a hearing on the city council’s 2013 budget.<sup>45</sup> The city’s 2013 budget anticipates that the court will derive 96 percent of its revenue from financial assessments.<sup>46</sup> While the city increased the municipal court’s budget, the city also increased the municipal court’s reliance on “self generated funds.”<sup>47</sup> Of the municipal court’s \$3.3 million budget, the court will derive \$1.5 million or 45 percent from financial assessments.<sup>48</sup>

The criminal courts raise funds by convicting criminal defendants. At a hearing on the city’s 2013 budget, Judge Jones explained how the traffic court generates revenue from criminal defendants:

The city would give us an allocation at the beginning of the year. . . . Now, if we go back three or four years ago that allocation was approximately [\$950,000]. Prior to 2011, Traffic Court was allowed to assess \$10 in court costs. We’d adjudicate guilt in 50,000 cases, so we’d generate [\$500,000] in court costs . . . but we had a \$5.6 million budget . . . . The rest of it had to be generated by other sources,

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42. Frank Donze, *New Orleans City Council Grapples with Municipal Court Finances*, TIMES-PICAYUNE (Dec. 5, 2011), available at [http://www.nola.com/crime/index.ssf/2011/12/new\\_orleans\\_city\\_council\\_grapp.html](http://www.nola.com/crime/index.ssf/2011/12/new_orleans_city_council_grapp.html).

43. *Id.*

44. See *Hoag v. State ex rel. Kennedy*, 836 So. 2d 207, 228 (La. Ct. App. 2003) (“It is elementary that the ‘fiscal affairs of the state, the possession, control, administration, and disposition of the property, funds, and revenues of the state, are matters appertaining exclusively to the legislative department.’” (citing *State v. Duhe*, 9 So. 2d 517, 521 (La. 1942))).

45. See *City Council Budget Hearings on 2013 Proposed Budget*, *supra* note 4, at 1:43:00.

46. ANDREW D. KOPPLIN ET AL., CITY OF NEW ORLEANS, PROPOSED 2013 OPERATING BUDGET 519 (2012), available at [http://new.nola.gov/getattachment/Mayor/Budget/2013-NOLA-PROPOSED-Budget-Book\\_Final-10-29-2012.pdf](http://new.nola.gov/getattachment/Mayor/Budget/2013-NOLA-PROPOSED-Budget-Book_Final-10-29-2012.pdf). Of the court’s proposed \$4,050,000 budget, the city allocated \$389,640 from general revenue funds. The court must derive \$3,660,360 or approximately 96 percent of its budget from “court funds.” *Id.*

47. MAYOR’S OFFICE OF COMMC’NS, *City of New Orleans 2013 Budget Proposal*, *supra* note 4.

48. See *City Council Budget Hearings on 2013 Proposed Budget*, *supra* note 4; see also KOPPLIN ET AL., *supra* note 46, at 511. The city proposed a \$3,387,343 budget for the municipal court. *Id.* Of the total budget, \$1,867,343 will be derived from the city’s general revenue funds and \$1,520,000 will be derived from “court funds.” *Id.*

so we'd levy contempt[.] . . . We were probably pretty aggressive when it came to just levying . . . JEF [Judicial Expense Funds] costs.<sup>49</sup>

Criminal courts raise money for court operations from a variety of financial assessments. Although not every financial assessment raises constitutional concerns, assessments that the courts control—such as judicial expense funds—do. A judicial expense fund is a special cost imposed on criminal defendants in Louisiana to help fund the administration of the criminal justice system.<sup>50</sup> The municipal,<sup>51</sup> civil,<sup>52</sup> criminal,<sup>53</sup> traffic,<sup>54</sup> and juvenile<sup>55</sup> courts operate judicial expense funds.

Municipal, criminal district, and traffic court judges may impose costs payable to the judicial expense fund if a defendant is convicted after trial or pleads guilty or forfeits bond.<sup>56</sup> Criminal district court judges receive fees when a defendant posts bond with a commercial surety.<sup>57</sup> Until 2011, the municipal court also treated fines like judicial expense funds through a “tacit” agreement with the city, which recognized that the city underfunded the municipal court.<sup>58</sup>

49. *City Council Budget Hearings on 2013 Proposed Budget*, *supra* note 4, at 1:36:30.

50. LA. REV. STAT. ANN. § 13:1381.4 (2012) (“The judicial expense fund is established and may be used for any purpose connected with, incidental to, or related to the proper administration or function of the court . . .”); *id.* § 13:2496.4 (“There is hereby established the judicial expense fund for the Municipal Court of New Orleans, which shall be a special account for use in administration of the court.”); *id.* § 13:2507.1 (“There is hereby established the judicial expense fund for the Traffic Court of New Orleans, which shall be a special account for use in administration of the court.”).

51. *Id.* § 13:2496.4.

52. *Id.* § 13:1312.

53. *Id.* § 13:1381.4.

54. *Id.* § 13:2507.1.

55. *Id.* § 13:1595.2.

56. *Id.* § 13:1381.4A.(1) (requiring the traffic, municipal, and criminal district court judges to impose as costs payable to the criminal district court’s judicial expense fund a sum of five dollars upon any defendant who is convicted after trial or plea of guilty or nolo contendere or who forfeits his or her bond); *id.* § 13:1381.4A.(2) (granting the criminal district court discretion to impose as costs payable to the judicial expense fund a maximum of \$250 if a defendant is convicted of a misdemeanor and \$2000 if a defendant is convicted of a felony); *id.* § 13:2500.2 (requiring the municipal court to assess thirty dollars as costs for the court’s judicial expense fund against every defendant who is convicted after trial or after he or she pleads guilty or forfeits his bond); *id.* § 32:393 (requiring the traffic court to assess a ten-dollar fee for each traffic conviction or forfeiture of bail); *id.* § 13:2500.2 (requiring the traffic court to impose a five-dollar cost to defray the expenses of the municipal court); *id.* § 13:2501.1 (requiring the traffic court to impose in all traffic prosecutions, other than parking, thirty dollars as costs to be remitted to the traffic court’s judicial expense fund against every defendant who is convicted after trial or plea of guilty or nolo contendere or who forfeits his or her bond).

57. *Id.* § 22:822. The statute authorizes a three-dollar fee to commercial surety underwriters for every one hundred dollars of liability underwritten by a commercial surety for any criminal charge. *Id.* One dollar of the three dollars is allocated to the criminal district court and 40 percent of the remaining two dollars is deposited into the criminal district court’s Judicial Expense Fund. *Id.* The sheriff, district attorney, and public defender’s office each receive 20 percent of the funds collected. *Id.*

58. See QUATREVAUX, *supra* note 8, at 6. In response to the inspector general’s report, the municipal court admitted that it “has historically maintained all collections of fines, fees and court costs in its judicial expense fund. These funds were retained in order to ensure operation of the court and to provide for unfunded personnel and operating costs.” *Id.* Former Chief Municipal Court Judge Paul Sens said:

The judges also control various other financial assessments. Criminal district court controls court costs,<sup>59</sup> certain bail bond fees,<sup>60</sup> and fines.<sup>61</sup> Municipal court controls maintenance fees,<sup>62</sup> probation fees,<sup>63</sup> and certain bail fees.<sup>64</sup> If the city fails to provide traffic court with sufficient funding to pay for employee salaries, the judges may withhold sufficient money from financial assessments.<sup>65</sup>

This Comment describes the unconstitutional conflicts of interest created by the financial assessments that judges control, paying particular attention to the courts' judicial expense funds. Although the Louisiana Code of Judicial

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What has happened and transpired over 20 years has been that because we were never funded, the city said you guys just keep the money that you collect [from fines] until the end of the year and you use it to pay your personnel, because we're not giving you the money you need for your personnel.

*Fiesty Debate over Court's Judicial Expense Fund*, FOX8LIVE.COM (Dec. 5, 2011 11:08 AM), <http://www.fox8live.com/Global/story.asp?S=17224446>. A 2012 report indicated that the municipal court now remits all fines to the city in compliance with state law. See E.R. QUATREVAUX, OFFICE OF INSPECTOR GEN., CITY OF NEW ORLEANS, FOLLOW-UP REPORT: A PERFORMANCE AUDIT OF THE MUNICIPAL COURT'S REMITTANCES TO THE CITY 4 (2012).

59. The statute requires the court to assess costs not to exceed twenty-five dollars against anyone that pleads guilty or is convicted of an offense by the criminal district court. LA. REV. STAT. ANN. § 13:1377. The judges administer the costs upon collection to support the operation of the court. *Id.* A judge may disburse the funds upon signature. If a nonindigent defendant fails to pay the costs, the statute requires the court to sentence the defendant to thirty days in jail for default of payment. *Id.*

60. See *id.* § 22:822; § 13:1381.5. The statutes impose a 3 percent fee for each one-hundred-dollar commercial surety bond. The statutes grant the criminal district court 1.8 percent of every one-hundred-dollar commercial surety bond. The statutes grant the criminal district court 1 percent directly. A committee consisting of the chief judge of the criminal district court, sheriff, district attorney, and the director of the public defender's office administer the remaining 2 percent. *Id.* § 22:822; § 13:1381.5. The statute authorizes the criminal district court to receive 40 percent of the remaining 2 percent fee on commercial surety bonds. *Id.* § 13:1381.5. If any bail bond is forfeited in criminal district court, the surety is assessed a twenty-five-dollar cost. This cost is collected by the judicial administrator to support the operation of criminal district court. See *id.* § 13:1377.

61. "All fines and forfeitures, including forfeitures of criminal bail bonds . . . and any payments ordered as a condition of probation," that the judges impose in criminal cases are divided equally between the district attorney and criminal district court. *Id.* § 15:571.11(d). The judges of the criminal district court administer their portion, which may be used to defray the court's expenses. *Id.*

62. NEW ORLEANS, LA., CODE § 50-149 (2012) (authorizing a five-dollar maintenance fee for every defendant convicted on a charge in municipal court).

63. The statute mandates a fifteen-dollar cost on any defendant, other than an indigent, who pleads guilty or is convicted of an offense by the municipal court to support the Municipal Court Probation Department Fund. LA. REV. STAT. ANN. § 13:2500.1. If a nonindigent defendant fails to pay, the court must sentence the defendant to 30 days in jail. *Id.*

64. *Id.* § 15:85.1 (mandating a fifteen-dollar fee for every criminal bond in cases prosecuted in municipal court, of which two dollars is remitted to the clerk of the municipal court). A fifteen-dollar cost is assessed if a defendant forfeits bond in Municipal Court. These funds are deposited in the Municipal Court Probation Department Fund. *Id.* § 13:2500.1.

65. *Id.* § 13:2507 ("All salaries of the clerks, deputies, assistants and employees of the traffic court of New Orleans shall be paid by the city of New Orleans. In the event that the city shall refuse or fail to pay any such salaries, the judge, or judges, of the court shall withhold from the funds collected under the jurisdiction of the court sufficient money to pay any salaries not paid by the city . . ."). Proposed legislation would repeal this authority. See 2012 LA S.B. 722 (NS), 2012 Louisiana Senate Bill No. 722, Louisiana Thirty-Eighth Regular Session.

Conduct requires impartiality,<sup>66</sup> adult criminal court judges can only raise funds by convicting criminal defendants.<sup>67</sup> Financial assessments may not be imposed if a defendant is found not guilty or charges are dismissed.<sup>68</sup> This possible conflict of interest is not lost on judges. As Chief Municipal Court Judge Desiree Charbonnet told the city council:

The judges should not be in the business of . . . making money . . . . We're here to . . . dispense justice . . . . We're not even supposed to be placed in that extremely conflicting position, as to be concerned about how many fines and fees we take in so that we can operate. You cannot place that burden on us any longer. It's unfair . . . and it goes against the pledge we take when we take office.<sup>69</sup>

### *B. Control over Funds*

New Orleans's adult criminal courts exercise broad authority over certain financial assessments. For example, Louisiana state statutes give judges wide discretion over spending judicial expense funds. In criminal district court, for example, the judges may use the funds for "any purpose connected with" or even "incidental to" the court.<sup>70</sup> Similarly, state statutes grant municipal and traffic court judges "control over"<sup>71</sup> judicial expense funds and the municipal court judges "discretion" to use the funds for "any expense of the court."<sup>72</sup> Judicial expense funds in traffic and municipal court may be used for any operating expenses, "including salaries for court reporters, bailiffs, minute clerks, and other court personnel."<sup>73</sup> There are only two restrictions on the funds in municipal, traffic, and criminal district courts: (1) judges may not pay their own salaries from the funds; and (2) the funds must be audited yearly.<sup>74</sup>

Judges have sometimes used judicial expense funds to pay for luxury goods or items that violate state law. Between 2006 and 2010, criminal district judges purchased almost \$2 million in supplemental health insurance with

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66. See LA. SUP. CT. R. CODE OF JUDICIAL CONDUCT, Canon 2 ("A judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. As used in this Code, "impartiality" or "impartial" denotes absence of bias or prejudice . . . .").

67. See sources cited *supra* note 56.

68. See LA. CODE CRIM. PROC. ANN. art. 887 (2012) ("A defendant who is convicted of an offense or is the person owing a duty of support in a support proceeding shall be liable for all costs of the prosecution or proceeding, whether or not costs are assessed by the court, and such costs are recoverable by the party or parties who incurred the expense. However, such defendant or person shall not be liable for costs if acquitted or if the prosecution or proceeding is dismissed.")

69. *City Council Budget Hearings on 2013 Proposed Budget*, *supra* note 4, at 20:00.

70. LA. REV. STAT. ANN. § 13:1381.4 (2012).

71. *Id.* § 13:2496.4.

72. *Id.* § 13:2496.2.

73. *Id.* § 13:2496.4; *id.* § 13:2507.1.

74. *Id.* § 13:2496.4; see also *id.* § 13:2507.1; *id.* § 13:1381.4.

judicial expense funds.<sup>75</sup> The purchases violated state law, which limits the judges to the same health insurance coverage as other state employees.<sup>76</sup> In February 2012, after the attorney general and legislative auditor initiated an investigation, the judges agreed to “voluntarily suspend” the purchases.<sup>77</sup> This investigation began when Orleans Parish District Attorney Leon Cannizzaro asked the attorney general to investigate whether the judges conducted malfeasance in office by “(1) extracting money from defendants who have been convicted and ordering incarceration as the consequence of non-payment, (2) failing to account for the moneys so collected, and (3) using the money so collected for their own personal benefit.”<sup>78</sup> Civil<sup>79</sup> and appellate court<sup>80</sup> judges also improperly purchased supplemental health insurance using judicial expense funds.

Other courts have also used judicial expense funds to make unnecessary purchases. In 2008 and 2009, the New Orleans Municipal Court used money from judicial expense funds to purchase two Ford Expeditions<sup>81</sup> and, in 2009, a \$1,200 leather vehicle seat upgrade for a take-home vehicle.<sup>82</sup> Civil court judges used judicial expense funds to hire Gason Nelson, the personal chef for New Orleans Saints running back Reggie Bush, as a full-time private chef.<sup>83</sup> The payroll did not list Mr. Nelson as their chef, but as a member of the

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75. Mike Perlstein, *Orleans Judges Awarding Themselves Extra Health Care Benefits*, WWLTV.COM (July 31, 2001, 8:58 AM), <http://www.wwltv.com/news/eyewitness/4-Investigates-Orleans-judges-awarding-themselves-extra-health-care-benefits-124742344.html>.

76. *See id.* (quoting LA. REV. STAT. ANN. § 13:691) (Judges may only receive health insurance benefits “at the same rate as those paid by other state employees”). Between January 1, 2009, and December 31, 2011, the auditor found that the criminal district court judges improperly used public funds to purchase supplemental health insurance policies in violation of state law and the Louisiana Constitution. DARYL G. PURPERA, CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS INVESTIGATIVE AUDIT 4, 7 (2012). In 2010 alone, the judges collectively held 249 supplemental health insurance policies, including accident, cancer, dental, life, and vision. *Id.* at 7.

77. *See* Monica Hernandez, *Criminal Court Judges Drop Extra Insurance Benefits*, WWLTV.COM (Feb. 9, 2012, 10:22 PM), <http://www.wwltv.com/news/eyewitness/4-Investigates-Follow-Up-Criminal-Court-judges-drop-extra-insurance-benefits-139066139.html>.

78. Letter from Leon A. Cannizzaro, Jr., Orleans Parish District Attorney, to James D. “Buddy” Caldwell, La. Attorney Gen. (Aug. 4, 2011), *available at* <http://media.trb.com/media/acrobat/2011-11/268139020-02122459.pdf>. Cannizzaro asked the attorney general to conduct the investigation because he had served as an elected judge between 1986 and 2002 and may have participated in the conduct himself. *Id.*

79. Mike Perlstein, *Extra Insurance Policy Remains in Place for Judges*, WWLTV.COM (Sept. 22, 2011, 9:42 PM), <http://www.wwltv.com/news/eyewitness/Extra-insurance-policy-remains-in-place-for-judges-130400463.html>.

80. *Appellate Court Paying for Same Insurance as District Courts*, WWLTV.COM (Feb. 15, 2012, 6:23 PM), <http://www.wwltv.com/video?id=139403433&sec=615997>.

81. *Id.*

82. *See* QUATREVAUX, *supra* note 8, at 16.

83. Mike Perlstein, *Why Was High Profile Chef on Court Payroll as Custodian?* WWLTV.COM (Aug. 27, 2010, 10:13 PM), <http://www.wwltv.com/news/eyewitness/10pm-Perlstein-Chef-story-101689763.html>. Because the civil district court’s judicial expense fund is funded primarily through filing fees, expenditures do not raise concerns about judicial bias. However, they do raise significant concerns about financial transparency.

custodial staff.<sup>84</sup> In 2010, the city inspector general reported that traffic court directed \$1.3 million to its judicial expense fund from traffic tickets that should have been payable to other agencies such as the public defender.<sup>85</sup>

The misuse of funds may result from a lack of oversight. There is no single budgetary document that accounts for each court's revenue and expenditures.<sup>86</sup> Instead, revenue from judicial expense funds is allocated outside the city and state's budgetary process in closed en banc meetings.<sup>87</sup> As an alternative, the Conference of State Court Administrators recommends depositing financial assessments into the state or local government that provides court funding and prohibiting judges from directly or indirectly controlling the funds.<sup>88</sup> This helps preserve judges' impartiality and diminishes the appearance that judges have a personal or structural financial stake in the outcome of a case.

## II.

### CONSTITUTIONAL LIMITS ON FINANCIAL ASSESSMENTS

In *Tumey v. Ohio*,<sup>89</sup> *Dugan v. Ohio*,<sup>90</sup> and *Ward v. Village of Monroeville*<sup>91</sup> the Supreme Court held that financial assessments may violate the Due Process Clause if they create a "possible" financial "temptation" that undermines a defendant's right to an impartial judge.<sup>92</sup>

Due process may be violated because of a personal or structural conflict of interest. Proof of an actual conflict of interest is unnecessary.<sup>93</sup> Instead, the relevant question is "whether the economic realities make the design of the fee

84. *Id.*

85. See E.R. QUATREVAUX, OFFICE OF INSPECTOR GEN., CITY OF NEW ORLEANS, ASSESSMENT OF NEW ORLEANS' SYSTEM OF CITY COURTS AND PERFORMANCE REVIEW OF NEW ORLEANS TRAFFIC COURT 22 (2011); see also *Fiesty Debate over Court's Judicial Expense Fund*, *supra* note 58. In 2012, Chief Traffic Court Judge Robert Jones told a journalist:

[The city has] an obligation to fund us. They don't do that. So we've got to make sure to stay open. Sometimes we retain money [that should be remitted to the city, public defender, and other agencies from traffic tickets] to ensure we have sufficient revenue to pay our staff, to pay our security, to pay for paper, and so on . . . .

John Simerman, *Public Defender Sues New Orleans Traffic Court over Unpaid Fees*, TIMES-PICAYUNE (July 31, 2012), available at [http://www.nola.com/crime/index.ssf/2012/07/public\\_defender\\_sues\\_new\\_orlea.html](http://www.nola.com/crime/index.ssf/2012/07/public_defender_sues_new_orlea.html)

86. PFM GROUP, A 21ST CENTURY CRIMINAL JUSTICE SYSTEM FOR THE CITY OF NEW ORLEANS, PART I: OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM, ITS COSTS AND THE CASE FOR BETTER COORDINATION 15 (2012).

87. LA. REV. STAT. ANN. § 13:2496.4 (2012) ("The judges of the [municipal] court, en banc, shall have control over and administer the [judicial expense] funds . . . ."); *id.* § 13:2507.1 ("The judges of the [traffic] court, en banc, shall have control over and administer the [judicial expense] funds and all disbursements made therefrom.")

88. See CONFERENCE OF STATE COURT ADM'RS, *supra* note 3, at 11.

89. 273 U.S. 510 (1927).

90. 277 U.S. 61 (1928).

91. 409 U.S. 57 (1972).

92. *Tumey*, 273 U.S. at 532.

93. *Brown v. Vance*, 637 F.2d 272, 282 (5th Cir. 1981).

system vulnerable to a 'possible temptation' to the 'average man' as judge."<sup>94</sup> The test is "levelled at the system, not the individual judge."<sup>95</sup> Thus, the possibility of bias is sufficient to violate due process.<sup>96</sup>

This Part first describes how the Supreme Court defines when a financial conflict of interest violates the Due Process Clause. Next, it describes the law concerning personal conflicts of interest. Finally, this Part concludes with an analysis of cases addressing structural conflicts of interest.

#### A. *The Supreme Court and Financial Conflicts of Interest*

*Tumey*, *Dugan*, and *Ward* establish the Supreme Court's standard for evaluating when the possibility of a financial conflict of interest violates the Due Process Clause. In *Tumey v. Ohio*, the Supreme Court held that the Due Process Clause is violated if a judge has a "possible" pecuniary interest in a case's outcome.<sup>97</sup> In that case, the mayor presided as judge over individuals who were accused of violating the state's prohibition on alcoholic beverages.<sup>98</sup> The mayor's pecuniary interest was twofold. First, the prohibition statute created a "direct, personal, substantial" incentive for the mayor to convict defendants.<sup>99</sup> If the mayor convicted the defendant, he received twelve dollars in additional salary from the fees imposed on the defendant.<sup>100</sup> If the defendant was not convicted, the mayor did not receive anything.<sup>101</sup> Second, the statute created a structural incentive for the mayor to convict defendants in order to address the financial needs of the village.<sup>102</sup> The fees "substantially" increased the revenue of the village, which the mayor was responsible for managing.<sup>103</sup> The Court recognized that many mayors would not allow the fees to affect their judgment.<sup>104</sup> Nevertheless, the Court held that any procedure that offers "a possible temptation" to the "average man as judge" to "forget the burden of proof required to convict the defendant" or "not to hold the balance nice, clear, and true between the state and the accused" violates the Due Process Clause.<sup>105</sup> This standard continues to guide lower courts evaluating due process challenges to financial assessments.

The Supreme Court established the outer boundaries of *Tumey* the following year. In *Dugan v. Ohio*, the mayor had the power to convict

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94. *Id.* at 284.

95. *Id.*

96. *Id.* at 279.

97. 273 U.S. at 532.

98. *Id.* at 516–19.

99. *Id.* at 523.

100. *Id.*

101. *Id.*

102. *Id.* at 532–33.

103. *Id.* at 533.

104. *Id.* at 532.

105. *Id.*

individuals of possessing liquor and to impose fines, half of which were paid into the city treasury.<sup>106</sup> The mayor exercised only judicial functions and had no executive authority.<sup>107</sup> Additionally, the mayor's salary was fixed and he received no fees for his judicial work.<sup>108</sup> The Court held that the mayor's financial interest was too "remote" to create the possibility of a personal financial interest in the outcome of cases.<sup>109</sup>

In a more recent case, *Ward v. Village of Monroeville*, the Court held that a structural conflict of interest could violate due process.<sup>110</sup> The mayor presided over a court that provided a "substantial portion" of village funds by assessing fines, fees, costs, and forfeitures.<sup>111</sup> These financial assessments comprised a "major part" of village income, ranging from one-third to one-half of the village's revenue funds.<sup>112</sup> The mayor also had "wide executive powers."<sup>113</sup> He acted as the president of the village council, presided at all meetings, voted in cases of a tie, accounted for the village's finances, and filled vacancies in village offices.<sup>114</sup> The Court concluded that the possibility of a conflict of interest "plainly" exists when the mayor's executive responsibilities for village finances "may make him partisan to maintain the high level of contribution from the mayor's court."<sup>115</sup> Thus, due process could be violated, despite the absence of any direct financial benefits from financial assessments.<sup>116</sup>

### B. *Personal Financial Conflicts of Interest*

The Due Process Clause is violated if a judge has a personal financial interest in any fines, fees, or costs imposed. In *Connally v. Georgia*, the Supreme Court extended *Tumey* from mayors to magistrate judges.<sup>117</sup> The magistrate was paid five dollars for the issuance of a search warrant and nothing if the magistrate reviewed the application and denied the warrant.<sup>118</sup> The Court held that this compensation system violated due process because the magistrate's salary was "directly dependent on how many warrants he issued."<sup>119</sup>

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106. 277 U.S. 61, 62 (1928).

107. *Id.*

108. *Id.*

109. *Id.* at 65.

110. 409 U.S. 57 (1972).

111. *Id.* at 60.

112. *Id.* at 58.

113. *Id.*

114. *Id.*

115. *Id.* at 60.

116. *Id.*

117. 429 U.S. 245 (1977).

118. *Id.* at 247.

119. *Id.*

The Due Process Clause may be violated even if the financial interest is indirect.<sup>120</sup> In *Brown v. Vance*, the Fifth Circuit held that the compensation system for judges in two Mississippi counties created an incentive for judges to favor the State in criminal cases.<sup>121</sup> Each judge received six dollars for each criminal case, regardless of the disposition,<sup>122</sup> although law enforcement officers could choose which judge in the district would hear their case.<sup>123</sup> Officers were instructed to divide cases evenly between judges in the arresting jurisdiction, but highway patrolmen favored judges with a high conviction rate, leading to a wide disparity in the caseloads of judges and competition between judges for business.<sup>124</sup> The court noted that *Tumey* and *Ward* do not require proof of actual judicial prejudice or even a direct financial interest in the outcome of particular cases.<sup>125</sup> Instead, courts must examine “whether the economic realities make the design of the fee system vulnerable to a ‘possible temptation’ to the ‘average man’ as judge.”<sup>126</sup>

### C. Structural Financial Conflicts of Interest

Due process may also be violated because of the possibility of a structural financial conflict of interest. A structural conflict of interest may exist if there is a possibility that a judge, because of his or her institutional responsibilities, may rule in a way that will aid the institution that the judge represents. “The Supreme Court’s test does not call for proof of actual temptation. The mere possibility of temptation . . . is all that is required.”<sup>127</sup> Since *Tumey*, *Dugan*, and *Ward*, lower courts have found a structural conflict of interest when judges exercise both executive and judicial responsibilities, financial assessments constitute a substantial portion of court revenue, or judges directly control income from financial assessments.

#### 1. Executive Responsibility

Courts have found due process violations where a judge imposing financial assessments possesses both executive and judicial powers. The “mere union” of executive and judicial power does not violate due process.<sup>128</sup> However, a “possible temptation” may exist when a judge is responsible for

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120. *Gibson v. Berryhill*, 411 U.S. 564, 568 (1973) (holding that due process is violated if revoking a business’s permit would likely result in the adjudicator inheriting the defendant’s business).

121. 637 F.2d 272, 283–86 (5th Cir. 1981).

122. *Id.* at 275.

123. *Id.* at 281.

124. *Id.*

125. *Id.* at 282.

126. *Id.* at 284.

127. *DePiero v. City of Macedonia*, 180 F.3d 770, 782 (6th Cir. 1999).

128. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972).

generating court revenue.<sup>129</sup> Such responsibility may interfere with the obligation to impartially adjudicate cases.<sup>130</sup>

In *Rose v. Village of Peninsula*, a federal district court held that the mayor's exercise of both judicial and executive powers violated due process.<sup>131</sup> The mayor presided as a judge over contested traffic cases and served as the chief executive officer with responsibility for the village's finances.<sup>132</sup> The court held that the mayor could not wear both executive and judicial hats and still satisfy the "appearance of justice."<sup>133</sup> The court found an inadequate separation of powers: the mayor's executive responsibility for the village's financial condition undermined his judicial responsibility to adjudicate cases impartially.<sup>134</sup>

Where judges have no executive responsibilities, courts may find no violation of due process. For example, in *Northern Mariana Islands v. Kaipat*, the Ninth Circuit dismissed a due process challenge to a statute earmarking civil and criminal fines to support the construction of a new courthouse.<sup>135</sup> The court found the judiciary's interest too speculative to violate the Due Process Clause, given its lack of executive responsibilities.<sup>136</sup> The Ninth Circuit emphasized that the legislature had the duty to raise and appropriate funds for court operations and that the judiciary's sole responsibility was adjudicating cases.<sup>137</sup> The courts were funded "whether or not persons accused of traffic offenses are prosecuted, tried, convicted, sentenced, or fined."<sup>138</sup> Additionally, any fines were deposited into the Commonwealth Treasury, which the Governor controlled.<sup>139</sup>

In *Alpha Epsilon Phi Tau Chapter Housing Ass'n v. City of Berkeley*, the Ninth Circuit also rejected a due process challenge even though the Berkeley Rent Stabilization Board played both executive and judicial roles.<sup>140</sup> In its judicial capacity, the board adjudicated whether landlords were covered by the local rent control ordinance.<sup>141</sup> In its executive capacity, the board was responsible for raising funds and establishing its own budget.<sup>142</sup> Although this constituted "less than optimal design for due process purposes," the fact that the board could seek funding from the city, regularly waived penalties, and ran

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129. *Id.*

130. *Id.*

131. 875 F. Supp. 442, 453 (N.D. Ohio 1995).

132. *Id.* at 450.

133. *Id.* at 452.

134. *Id.* at 448, 453.

135. 94 F.3d 574, 582 (9th Cir. 1996).

136. *Id.* at 581.

137. *Id.*

138. *Id.*

139. *Id.*

140. 114 F.3d 840, 848 (9th Cir. 1997).

141. *Id.* at 842.

142. *Id.*

a budgetary surplus in recent years mitigated the Ninth Circuit's concerns.<sup>143</sup> The court concluded that the board lacked a "strong" enough "motive" to create the possibility of a structural conflict of interest.<sup>144</sup>

## 2. *Substantiality of Fees*

Courts' concerns about the separation of powers are magnified when the amount of financial assessments collected is substantial. Courts are likely to find a due process violation under these circumstances because the court financially depends on the assessments, which may undermine the judiciary's ability to impartially adjudicate cases. On the other hand, courts have upheld insubstantial financial assessments.

In *Rose*, the court held that an annual collection of fines that amounted to over 10 percent of the city's general revenue fund was "substantial."<sup>145</sup> The mayor collected this revenue by adjudicating contested traffic tickets in the mayor's court and imposing fines and court costs on anyone convicted.<sup>146</sup> The court rejected arguments that 10 percent was not substantial: "Certainly, any person suddenly deprived of 10% or more of his income would find the loss 'substantial.'"<sup>147</sup> Although the mayor acquitted 20 percent of defendants, the court held that the amount of fees collected by the court could lead a defendant to believe that she could not get a fair trial or a fair sentence.<sup>148</sup> Thus, the appearance of bias, not proof of actual bias, was dispositive.<sup>149</sup>

Conversely, in *Wolkenstein v. Reville*, the Second Circuit held that fees that are imposed "sporadic[ally]" or "occasional[ly]" and represent little more than 0.5 percent of the budget are not substantial.<sup>150</sup> Courts have characterized fees ranging from 2.7 to 5.5 percent of the budget as so "minuscule" as to preclude a finding of bias.<sup>151</sup> One state court found that "the *Ward* Court intimated that at some minimal level of collective fines due process would not

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143. *Id.* at 846–47.

144. *Id.* at 847.

145. *Rose v. Vill. of Peninsula*, 875 F. Supp. 442, 451 (N.D. Ohio 1995).

146. *Id.* at 450.

147. *Id.* at 451; *see also* *DePiero v. City of Macedonia*, 180 F.3d 770, 780, 782 (6th Cir. 1999) (finding due process violation because the mayor's level of executive authority was so broad as to impair his ability to serve as a neutral arbiter, despite the allegedly small amount of general fund revenue collected through the mayor's court).

148. *Rose*, 875 F. Supp. at 451.

149. *Id.* at 453.

150. 694 F.2d 35, 43 (2d Cir. 1982).

151. *See, e.g., Milliken & Michaels of Arizona, Inc. v. Houseworth*, 942 F. Supp. 454, 456 (D. Ariz. 1996) (finding that state bank proceedings did not violate due process because the fees generated, which the agency used to pay for some employee's salaries, were so minuscule as to preclude a finding of bias); *see also* *Emergency Treatment, S.C. v. Dep't of Emp't Sec.*, 917 N.E.2d 135, 150 (Ill. App. Ct. 2009) (income derived from interest and penalties equaling approximately 4 percent of the total budget did not present a temptation to ignore the burden of proof required to adjudicate cases).

be violated because their influence on the municipal court's decision-making process would be insubstantial."<sup>152</sup>

### 3. *Control over Fees*

Reviewing courts are likely to find a due process violation if the judiciary controls the financial assessments generated from adjudications. Control over financial assessments gives a judge an incentive to generate income for the court. For example, in *Augustus v. Roemer*, a federal court invalidated a Louisiana statute imposing a fee on bail bonds because state court judges exercised "complete executive control" over the fees.<sup>153</sup> Orleans, Jefferson, and Terrebonne Parishes enacted laws that imposed a 2 percent charge on all bail bonds and a twenty-dollar charge on all recognizance bonds.<sup>154</sup> While the parish judges did not receive direct compensation from the fees, the federal court found that the judges exercised or potentially exercised "total control over the amounts collected."<sup>155</sup> Thus, the bail fee "plainly creates a temptation for the judges to forego due process and assess high bail amounts in order to maintain the level of funding necessary to run their respective criminal justice systems."<sup>156</sup>

In *State v. Rideau*, a Louisiana appellate court found Calcasieu Parish's funding scheme "particularly troubl[ing]."<sup>157</sup> Louisiana statute permitted the criminal court to pay its expenses from a Criminal Court Fund account derived from fines and forfeitures.<sup>158</sup> Although fines and forfeitures were deposited into the city treasury, "the trial court, along with the district attorney, manage and control the Criminal Court Fund."<sup>159</sup> The court paid jury expenses from these funds and loaned the public defender's office funds to pay for Rideau's defense.<sup>160</sup> After being convicted of manslaughter,<sup>161</sup> the trial court imposed \$127,905.45 in court, prosecution, and indigent defense costs.<sup>162</sup> The trial judge described these as costs "*the Court itself actually had to spend in the prosecution of this case.*"<sup>163</sup> The appellate court noted "the inherent danger in allowing courts or judicial officers to have a stake in the costs collected from defendants," a danger "recognized long ago by the framers of [Louisiana's] 1898 Constitution."<sup>164</sup>

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152. Hubby v. Carpenter, 350 S.E.2d 706, 709–10 (W. Va. 1982).

153. 771 F. Supp. 1458, 1473 (E.D. La. 1991).

154. *Id.* at 1460.

155. *Id.* at 1473.

156. *Id.*

157. 943 So. 2d 559, 576 (La. App. 2006).

158. *Id.*

159. *Id.* at 577.

160. *Id.*

161. *Id.* at 560.

162. *Id.*

163. *Id.* at 577.

164. *Id.*

Similarly, in *United Church of the Medical Center v. Medical Center Commission*, the Seventh Circuit held that a statute that granted a municipal commission the right to accept proceeds from land-use judgments violated the Due Process Clause.<sup>165</sup> The commission evaluated whether the property owners in its district violated certain property use restrictions.<sup>166</sup> If the commission found a violation, title to the property would revert to the commission, and the commission would also receive profits from a later sale.<sup>167</sup> The court found that the statute gave the commission, which served as both a judge and an interested party in all reverter proceedings, a direct financial stake in the outcome of proceedings: “In simple terms the particular evil is that the Act permits the commission to award valuable property to itself without compensation and without due process.”<sup>168</sup>

The First Circuit also reviewed conflicts of interest in *Esso Standard Oil Co. v. López-Freytes*.<sup>169</sup> The court held that fines imposed by Puerto Rico’s Environmental Quality Board (EQB) created “structural bias” because they were deposited into a special fund over which the EQB had “complete discretion” and control.<sup>170</sup> The board imposed a \$76 million fine against an oil company—twice the EQB’s annual budget and five thousand times greater than the largest fine ever imposed.<sup>171</sup> The court held that the “unprecedented” size of the fine “intensifie[d]” the potential conflict of interest.<sup>172</sup> While the court found evidence of actual bias, even the possibility of an appearance of bias was sufficient to violate due process.<sup>173</sup>

Other courts have found that where a judge or administrative agency does not have control over assessed fees, then the imposition of those fees does not violate the Due Process Clause. In *Mallinckrodt LLC v. Littell*, a district court held that the Board of Environmental Protection (“Board”) did not have a structural conflict of interest when it upheld an order requiring a corporation to pay for remedial measures caused by environmental contamination at a paper mill.<sup>174</sup> The order generated fees for the state, which partially funded the Board.<sup>175</sup> The court found no evidence of a structural conflict of interest because the fees were deposited into a fund that the Board did not control.<sup>176</sup> While some of the fees might be transferred to the Board, a state statute capped

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165. 689 F.2d 693, 699 (7th Cir. 1982).

166. *Id.*

167. *Id.*

168. *Id.* at 700.

169. 522 F.3d 136 (1st Cir. 2008).

170. *Id.* at 147.

171. *Id.*

172. *Id.*

173. *Id.* at 147–48.

174. 616 F. Supp. 2d 128, 130–32, 147 (D. Me. 2009).

175. *Id.* at 144.

176. *Id.* at 147.

the fees at \$325,000 and state law required the legislature to approve any expenditures.<sup>177</sup> Further, there was no evidence that the state would not appropriate sufficient funds to the Board if it failed to uphold the order.<sup>178</sup> Thus, the Board's relationship to the fees was remote.<sup>179</sup>

### III.

#### APPLICATION TO NEW ORLEANS'S ADULT CRIMINAL COURTS

This Part will apply the legal rules just described to the funding structures in New Orleans's adult criminal courts. These structures create both personal and structural conflicts of interest that violate the Due Process Clause.

##### *A. Personal Financial Conflicts of Interest*

The funding structures in New Orleans's adult criminal courts create the possibility of personal financial conflicts of interest. The criminal courts' funding structures create a possible temptation to convict criminal defendants to extract revenue that the judges control.<sup>180</sup> Criminal district court judges have spent nearly \$2 million from their judicial expense fund to supplement their health insurance.<sup>181</sup> Municipal court judges have used their judicial expense fund on Ford Expeditions and leather seat upgrades.<sup>182</sup> Neither court maintained a budget sufficient to make these purchases without imposing financial assessments on criminal defendants. The possibility of personal conflicts is amplified because the judiciary controls any funds collected.

##### *B. Structural Financial Conflict of Interest*

The funding structures in New Orleans's adult criminal courts also create the possibility of a structural conflict of interest. This conflict violates the Due Process Clause. In New Orleans, criminal judges depend on judicial expense funds and other financial assessments to support court operations. Such reliance "plainly creates a temptation for the judges to forego due process and [to] assess" fines, fees, and costs "in order to maintain the level of funding necessary to run their respective criminal justice systems."<sup>183</sup> A structural conflict of interest exists because the judiciary has both executive and judicial responsibilities, financial assessments make up a substantial portion of each court's budget, and the judiciary has significant discretion over spending.

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177. *Id.*

178. *Id.*

179. *Id.*

180. *See* *Brown v. Vance*, 637 F.2d 272, 284 (5th Cir. 1981).

181. *See* Perlstein, *supra* note 75.

182. *See* QUATREVAUX, *supra* note 8, at 16; Perlstein, *supra* note 75.

183. *See* *Augustus v. Roemer*, 771 F. Supp. 1458, 1473 (E.D. La. 1991).

### 1. Executive Responsibility

The funding structures in New Orleans's adult criminal courts violate the Due Process Clause because the judiciary is partially responsible for raising funds to pay for operations.<sup>184</sup> The courts' fundraising responsibility is traditionally reserved for the legislative and executive branches.<sup>185</sup> This raises concerns about the separation of powers.

The judiciary's fundraising responsibilities may interfere with a judge's obligation to impartially adjudicate cases. While judges are required to adjudicate cases impartially,<sup>186</sup> the adult criminal court judges are also responsible for raising funds to pay for operations. For example, the mayor's 2013 proposed budget reduced the city's contribution to the municipal court, while increasing the court's reliance on "self generated funds."<sup>187</sup> While some of these funds will be derived from the court's reserves from judicial expense funds, the court is expected to raise approximately \$600,000 through additional financial assessments.<sup>188</sup> The traffic court is also expected to "self-generate the funds that we need to operate,"<sup>189</sup> while the criminal district court used judicial expense funds to compensate for the city's 2010 and 2011 funding reductions.<sup>190</sup> The judiciary's financial obligations reflect the significant responsibility that New Orleans's judges have to generate revenue to pay for operations. This responsibility creates a structural financial conflict of interest: although judges must adjudicate cases impartially, the judiciary can only raise court revenue by convicting criminal defendants.<sup>191</sup>

The judiciary's fundraising responsibility distinguishes New Orleans's judges from the judges in *Kaipat*, whose sole responsibility involved adjudicating cases, not generating revenue for the court. The judiciary's funding responsibility gives judges a "strong motive . . . to rule in a way that would aid" court finances, which raises concerns about a possible structural conflict of interest.<sup>192</sup> As Chief Municipal Court Judge Desiree Charbonnet told the city council: "We're not . . . supposed to be placed in that extremely conflicting position, as to be concerned about how many fines and fees we take

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184. See *supra* Part I.

185. See *Hoag v. State ex rel. Kennedy*, 836 So. 2d 207 (La. Ct. App. 2003).

186. See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused, denies the latter due process of law."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("Fairness of course requires an absence of actual bias in the trial of cases. . . . But to perform its high function in the best way 'justice must satisfy the appearance of justice.'").

187. *City Council Budget Hearings on 2013 Proposed Budget*, *supra* note 4, at 1:00.

188. *Id.*

189. *Id.* at 1:43:00.

190. See *id.* at 27:00.

191. See *supra* notes 56 and 68.

192. *Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley*, 114 F.3d 840, 844 (9th Cir. 1997) (quoting *Tumey v. Ohio*, 273 U.S. 510, 533 (1927)).

in so that we can operate.”<sup>193</sup> Separating funding responsibility from adjudication would help resolve both the appearance of and any actual financial conflict of interest.

## 2. *Substantiality of Financial Assessments*

Concern about a structural conflict of interest is compounded because the judiciary depends on judicial expense funds and other financial assessments. In recent years, financial assessments have made up a large percentage of the criminal, municipal, and traffic courts’ revenue.<sup>194</sup> The contribution that financial assessments make to the courts’ revenue is comparable to *Ward*, a system where fines, forfeitures, costs, and fees ranged from about one-third to one-half of total village revenue.<sup>195</sup> They also greatly exceed the 10 percent contribution in *Rose*, which that court found to be a “major part of village income.”<sup>196</sup> Under New Orleans’s current funding method, the courts would be financially insolvent if the judges failed to convict criminal defendants. This fiscal reality not only creates an appearance of a structural conflict of interest, but may indicate an actual conflict.

## 3. *Control over Funds*

The possibility of a structural conflict of interest is magnified because the court controls revenue from particular financial assessments. As in *Roemer* and *Esso*, the courts have almost complete discretion over judicial expense funds and certain other financial assessments.<sup>197</sup> Louisiana statutes grant judges in traffic and municipal court control over judicial expense funds and the discretion to use the funds for any court expenses.<sup>198</sup> Criminal district court judges may spend judicial expense funds even if the purpose is only incidental to the court.<sup>199</sup> A state statute does prohibit judges from using judicial expense funds to pay judicial salaries,<sup>200</sup> but this limitation is insufficient to protect defendants from the possibility of structural bias.

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193. See *City Council Budget Hearings on 2013 Proposed Budget*, *supra* note 4, at 20:00.

194. See *supra* notes 7–9.

195. See *Ward v. Vill. of Monroeville*, 409 U.S. 57, 58 (1972).

196. See *Rose v. Vill. of Peninsula*, 875 F. Supp. 442, 450–51 (N.D. Ohio 1995) (quoting *Ward*, 409 U.S. at 58–59).

197. See *Augustus v. Roemer*, 771 F. Supp. 1458, 1473 (E.D. La 1991) (“The statutes themselves vest the judges with complete executive control of their respective 2% funds. . . . This plainly creates a temptation for the judges to forego due process and assess high bail amounts in order to maintain the level of funding necessary to run their respective criminal justice systems.”); *Esso Standard Oil Co. v. López-Freytes*, 522 F.3d 136, 147 (1st Cir. 2008) (“[T]his is a case in which the EQB has complete discretion over the usage of those funds which are supplied, at least in part, by fines which it imposes. In this particular case, the possibility of temptation is undeniable . . . .”).

198. See *supra* note 87; LA. REV. STAT. ANN. § 13:2496.2 (2012).

199. LA. REV. STAT. ANN. § 13:1381.4 (2012).

200. *Id.* § 13:1381.4(D), § 13:2507.1(B), § 13:2496.4(B).

Due process might be satisfied if Louisiana statutes restricted the courts' ability to control judicial expense funds and other financial assessments. Few limitations are imposed at present. The Maine statutes in *Mallinckrodt* might serve as a useful guide. In *Mallinckrodt*, a federal district court found Maine's statutory scheme sufficient to ensure due process because it strictly limited an administrative agency's "receipt and control over funds."<sup>201</sup> The agency did not control the fees after collection and a state statute capped the amount of fees that the agency could receive from financial assessments.<sup>202</sup> Furthermore, there was no evidence that the administrative agency would not receive appropriate funding regardless of how the agency resolved the dispute.<sup>203</sup> By contrast, Louisiana statutes place none of these restrictions on New Orleans's judicial expense funds: the courts retain control over the funds and certain other financial assessments, the courts have almost complete discretion over spending, and these financial assessments play an important role supporting the courts' operating costs. Part IV outlines several recommendations that would address the constitutional concerns about a structural conflict of interest.

#### IV.

##### RECOMMENDATIONS FOR NEW ORLEANS'S ADULT CRIMINAL COURTS

The funding structures in New Orleans's adult criminal courts violate the due process rights of defendants. They are also bad public policy. This Part explains why and describes several reforms that Louisiana and New Orleans should make to address these constitutional and policy concerns.

##### *A. Consolidate the Courts and Provide Adequate Funding*

Louisiana and New Orleans should provide adequate funding for the court system regardless of the amount of fines, fees, or costs collected. As the Conference of State Court Administrators said: "Courts . . . should be substantially funded by general government revenues. It is as illogical to expect the judiciary to be self-supporting through user fees as it would be to expect the executive or legislative branches of government to be funded through user fees."<sup>204</sup> Not only do courts perform a core government function, but the judiciary is also a coequal branch. It is easy for the legislature and executive

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201. See *Mallinckrodt LLC v. Littell*, 616 F. Supp. 2d 128, 147 (D. Me. 2009) ("While the Board conceivably could have an interest in selecting a remedy with substantial financial upside for the state, the individual Board members have no apparent personal financial interest in such a result, and any institutional interest is minimized by a statutory scheme strictly limiting the Board's receipt and control over funds possibly derived from the Order. Given these circumstances, the Court cannot infer impermissible bias.").

202. *Id.*

203. *Id.*

204. CONFERENCE OF STATE COURT ADM'RS, *supra* note 3, at 8.

branches to forget this when it comes to making budgetary decisions for the court system.

Although the state and city should adequately fund the courts, it is unclear how much each court should be allocated. As discussed below, the courts' total revenue historically is not reflected in the city's budget,<sup>205</sup> and significant funds are administered outside the budgetary process.<sup>206</sup> Additionally, recent reports documenting staff, budgetary, administrative, and adjudicatory inefficiencies within criminal district, municipal, and traffic courts have proposed that New Orleans consolidate or eliminate some courts altogether.<sup>207</sup> For example, Orleans Parish is the only parish in Louisiana with a separate civil and criminal district court, one of only four parishes with a juvenile court, and the only parish with a separate traffic court.<sup>208</sup> Furthermore, several courts in New Orleans have overlapping jurisdiction and duplicative staff (e.g., clerks, court reporters, probation officers) and services (e.g., drug programs and specialty courts).<sup>209</sup> The city inspector general estimated that consolidating traffic and municipal courts alone would save an estimated \$2.5 million annually.<sup>210</sup> By consolidating judicial resources, the city could fund the courts more adequately, reallocate resources to other public safety needs, and potentially eliminate constitutional concerns about judicial conflicts of interest.

### B. Abolish Judicial Expense Funds

Courts should not be in the "collection business."<sup>211</sup> In order to eliminate financial incentives to set bond and convict criminal defendants, judicial expense funds should be abolished.

Criminal justice experts and policy makers have recommended for forty years that the state abolish judicial expense funds. In 1972, the Institute of Judicial Administration issued a report criticizing Louisiana's reliance on fees

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205. See PFM GROUP, *supra* note 86, at 15.

206. See *supra* note 87.

207. See, e.g., PFM GROUP, A 21ST CENTURY CRIMINAL JUSTICE SYSTEM, PART II: IMPROVING THE OPERATIONS OF THE COURT SYSTEM 8–9 (2012); see also QUATREVAUX, *supra* note 85, at 5–6.

208. PFM GROUP, *supra* note 207, at 1. The number of judges does not appear to correspond to caseloads. In a recent report, the city inspector general compared 2010 case filings in New Orleans with Baton Rouge, which has a consolidated court system where judges hear civil, criminal, and traffic cases. Although there were a similar number of case filings in New Orleans (197,068) as Baton Rouge (199,288), New Orleans had seven more judges. See QUATREVAUX, *supra* note 85, at 5–6.

209. See PFM GROUP, *supra* note 207, at 2–5, 7.

210. QUATREVAUX, *supra* note 85, at 12–13.

211. Donze, *supra* note 42. In the article, Chief Judge Paul Sens said: "I don't want to be in the collection business. Please give it to someone else." *Id.* See also CONFERENCE OF STATE COURT ADM'RS, *supra* note 3, at 9 (lamenting that courts have been recast as a "collection agency for executive branch services").

and costs.<sup>212</sup> In 1989, the National Center for State Courts criticized judicial expense funds for placing judges in an “ethically tenuous position of benefiting from the judgments they impose.”<sup>213</sup> Most recently, the city inspector general issued several reports critical of these funds.<sup>214</sup>

The state should eliminate judicial expense funds for at least three reasons. First, as discussed in Part II, judicial expense funds create an unconstitutional conflict of interest. Judges are constitutionally required to adjudicate cases impartially, but the funds create a “possible temptation” for the judges to raise money for court operations.<sup>215</sup> This possibility of judicial bias is magnified in New Orleans because the courts depend on these assessments to fund their operations and because judges have wide discretion over spending.

Second, criminal defendants may face incarceration directly or indirectly because of an inability to pay any financial assessments. If a defendant is not indigent, that defendant may be incarcerated directly for failure to pay.<sup>216</sup> If a defendant is indigent, she may face incarceration indirectly for missing a payment, for failing to appear in court, or for being placed in contempt.<sup>217</sup> As Municipal Court Judge Landry explained, criminal defendants “get time to pay. They don’t come back [to court to pay]. We issue the attachment. We arrest them. We incarcerate them.”<sup>218</sup> The city bears the cost of this incarceration.

Third, judicial expense funds are bad public policy. Courts are insulated from political accountability because the judiciary administers the funds en banc outside the political process.<sup>219</sup> This may undermine the city’s attempts to oversee spending, to promote financial transparency, and to coordinate public safety resources and policy initiatives.<sup>220</sup>

212. The report found that the funds defeated “attempts at rational financial planning,” resulted in money being unwisely spent, and undermined financial transparency, coordination, and innovation. See INSTITUTE OF JUDICIAL ADMIN., A STUDY OF THE LOUISIANA COURT SYSTEM 333 (1972).

213. ROBERT W. TOBIN ET AL., NAT’L CTR. FOR STATE COURTS, A STUDY OF THE ADMINISTRATION AND FINANCING OF THE ORLEANS PARISH TRIAL COURTS, NEW ORLEANS, LOUISIANA 11 (1989). The report criticized the funds as “fraught with constitutional and ethical ramifications” and for creating “opportunities for abuse.” *Id.* at 127. In effect, it concluded, the funds create a system of “self-supporting, entrepreneurial entities.” *Id.* at 12.

214. See generally QUATREVAUX, *supra* note 85; QUATREVAUX, *supra* note 8.

215. See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (“Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused, denies the latter due process of law.”); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 59 (1972) (finding a due process violation where a mayor had executive and judicial functions and presided over traffic cases that consisted of a substantial portion of village funds); *In re Murchison*, 349 U.S. 133, 136 (1955) (“Fairness of course requires an absence of actual bias in the trial of cases. . . . But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’”).

216. See *supra* notes 23–24.

217. See *supra* notes 28–34.

218. See *City Council Budget Hearings on 2013 Proposed Budget*, *supra* note 4, at 18:30.

219. See *supra* note 87.

220. See INSTITUTE OF JUDICIAL ADMIN., *supra* note 212, at 333.

The Conference of State Court Administrators recommends that courts should deposit all financial assessments into the state or city government that provides their funding.<sup>221</sup> In turn, the state and city should provide full and adequate funding to the courts regardless of collections. Court funding should have no relationship to the amount of money raised by financial assessments. Separating the courts' funding from collections would avoid the constitutional concerns raised by the current funding structures.

### C. Increase Transparency

If judicial expense funds are not eliminated, the courts should at least provide the city and state with a complete budgetary picture. A recent report criticized the criminal justice system's lack of financial transparency:

While it is not uncommon for a criminal justice system to have multiple funding sources, it is rare for different officials to have authority over budgeting levels. That is the case in New Orleans. As a result, a large portion of spending on the criminal justice system is not reflected in the city budget—or in any other single source document.<sup>222</sup>

The Louisiana Local Government Budget Act requires each agency to prepare a “comprehensive budget presenting a complete financial plan” each fiscal year for general and special revenue funds.<sup>223</sup> Because the Act applies to all judicial expense funds,<sup>224</sup> judges must provide a budget for these funds, recommendations for how the court will spend these funds, and an estimate of any remaining year-end balance.<sup>225</sup> In previous years, the courts have failed to comply with the requirements of the Act.<sup>226</sup>

The New Orleans Municipal Code also sets forth budgetary requirements for any agency that receives funds from the city. The municipal code requires these agencies to submit information “regarding all sources of revenue and all expenditures” made in the past year, current year, and a projection for next year.<sup>227</sup> The information must also include “the number of personnel by type of position and contracts valued at \$10,000.00 or more.”<sup>228</sup>

The city council and citizens have several options to enforce these provisions. If the city requests information about a judicial expense fund and a court fails to submit the required information, the city cannot appropriate any general funds to that court.<sup>229</sup> The Louisiana Local Government Budget Act

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221. CONFERENCE OF STATE COURT ADM'RS, *supra* note 3, at 11.

222. *See* PFM GROUP, *supra* note 86, at 15.

223. LA. REV. STAT. ANN. § 39:1305 (2012).

224. *Id.* § 39:1302.

225. *Id.* § 39:1305.

226. Davis, *supra* note 8.

227. NEW ORLEANS, LA., CODE § 70-1 (2012).

228. *Id.*

229. *See* LA. REV. STAT. ANN. § 39:1305 (“If, upon the request of the governing authority, the political subdivision fails to submit its budget document showing the information concerning revenue

also permits an individual to file a suit for “mandamus, injunctive, or declarative relief to require compliance” with the law.<sup>230</sup> The New Orleans City Charter also grants the city council authority to investigate the court system’s use of judicial expense funds.<sup>231</sup>

City government and citizens should utilize these options if the courts fail to follow local and state law. It is possible that the city might reduce the courts’ budgets if it had a better understanding of their resources. However, increased financial transparency would also allow citizens and elected officials to hold the courts accountable for their spending. A comprehensive budgetary picture would allow the city to make more informed decisions about how to allocate scarce public safety resources. Close coordination about budgetary priorities is particularly important in New Orleans because the city continues to have one of the highest murder rates in the country.<sup>232</sup>

#### *D. Provide Statutory Guidance to Judges*

State statutes provide no guidance to trial courts about how to determine whether a defendant can pay financial assessments. Such guidance is feasible and should be encouraged. For example, defendants could be presumed indigent for purposes of financial assessments if they receive public assistance such as food stamps, Temporary Assistance for Needy Families, Medicaid, or disability; live in public housing or a mental health facility; or earn less than 200 percent of the federal poverty guidelines. These same criteria are already used for the appointment of counsel.<sup>233</sup> If adopted for purposes of financial assessments, the administrative burdens would be minimal. This evaluation should be made at sentencing. Although an indigent defendant’s financial circumstances may improve after conviction, empirical research suggests otherwise: arrest, conviction, and incarceration generally *decrease* an individual’s likelihood of future employment and depress future wages.<sup>234</sup>

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sources as mandated by this Subsection, the governing authority shall not appropriate any general funds to such political subdivision.”).

230. *Id.* § 39:1315.

231. *See* NEW ORLEANS, LA., CITY CHARTER § 3-124 (2010) (granting the city council authority to conduct investigations of the operations of any office administering the affairs of the city, any subject upon which the city council may legislate, any entity funded in whole or in part by city taxes, fees, fines, or other revenue generated by the city, and any entity which was created or exists under the authority of the city).

232. Laura Maggi, *New Orleans Homicides Jump 14% in 2011*, TIMES-PICAYUNE (Jan. 1, 2012, 7:47 PM), *available at* [http://www.nola.com/crime/index.ssf/2012/01/new\\_orleans\\_homicides\\_jump\\_by.html](http://www.nola.com/crime/index.ssf/2012/01/new_orleans_homicides_jump_by.html).

233. LA. REV. STAT. ANN. § 15:175 (2012).

234. ECONOMIC MOBILITY PROJECT & PUBLIC SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 4 (2010), *available at* [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2010/Collateral\\_Costs\(1\).pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Collateral_Costs(1).pdf) (“Serving time reduces hourly wages for men by approximately 11 percent, annual employment by 9 weeks, and annual earnings by 40 percent.”).

Although any criteria would be imperfect, the current practice is inefficient and ineffective. For example, Louisiana probation officers spend about 25 percent of their time on collections, which distracts from their supervisory responsibilities.<sup>235</sup> Additionally, a recent study showed that criminal district court judges devote a significant portion of their docket to debt collection.<sup>236</sup> The current practice also results in serious personal and financial costs for defendants.<sup>237</sup> Criminal justice debt may interfere with a defendant's ability to pay child support, housing costs, gas or bus fare, or other essential expenses. The current system may also indirectly lead to a defendant's reincarceration as a result of missed court dates,<sup>238</sup> warrants for nonpayment,<sup>239</sup> or revocation of probation if a court determines that a defendant "willfully failed to pay."<sup>240</sup>

### *E. Establish Statutory Guidelines for Collections*

If state and local governments do not eliminate judicial expense funds and other financial assessments, legislators should establish debt payment priorities. This would improve efficiency, accountability, and the administration of justice. A single defendant may owe money to multiple parties for one conviction, but may be unable to pay all of the debt. For example, a defendant convicted in criminal district court may owe \$25 to the sheriff's office for the detention and prison security fund,<sup>241</sup> \$2000 to the criminal district court's judicial expense fund,<sup>242</sup> \$100 for D.A.R.E.,<sup>243</sup> \$45 for the indigent defender fund,<sup>244</sup> \$20 for the cost of prosecution,<sup>245</sup> \$2 to Crime Stoppers,<sup>246</sup> \$100 for a

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235. LOUISIANA DEP'T OF PUBLIC SAFETY & CORRECTIONS, FISCAL YEAR 2008–2009 ANNUAL REPORT 58 (2009), available at <http://www.corrections.state.la.us/wp-content/uploads/2010/02/DPSC-Annual-Report-2009.pdf> ("It is estimated that officers spend as much as 25% of their time collecting money from offenders under their supervision. Collections activities seriously undermine the effectiveness and efficiency of our staff and have a detrimental impact on public safety.").

236. See BANNON ET AL., *supra* note 4, at 24.

237. See BANNON ET AL., *supra* note 4, for a detailed description of the impact of criminal justice debt on criminal defendants.

238. See LA. CODE CRIM. PROC. ANN. art. 349.1 ("If at the time fixed for appearance the defendant fails to appear as required by the court, the judge may, or shall on motion of the prosecuting attorney, issue a warrant for the arrest of the defendant.").

239. See BANNON ET AL., *supra* note 4, at 23–24.

240. See *State v. Williams*, 598 So. 2d 708 (La. Ct. App. 1992).

241. LA. REV. STAT. ANN. § 13:1381.2 (2012).

242. *Id.* § 13:1381.4 (authorizing the Criminal District Court to collect up to \$2000 in felony cases for the Judicial Expense Fund).

243. LA. CODE CRIM. PROC. ANN. art. 887 (2012) (authorizing a special cost of the court to be assessed against anyone convicted of a violation of the Uniform Controlled Dangerous Substances Law to support D.A.R.E. programs).

244. LA. REV. STAT. ANN. § 15:168 (authorizing a forty-five-dollar cost for any individual convicted after trial, a guilty plea, or bond forfeiture in any court of original criminal jurisdiction to support the public defender's office).

payment installment plan,<sup>247</sup> \$65 for opening a probation file,<sup>248</sup> \$60 to \$110 for monthly supervision fees,<sup>249</sup> and \$100 to the Louisiana Commission on Law Enforcement for the Drug Abuse and Education Treatment Fund.<sup>250</sup> Without statutory guidance, funds may be collected and distributed in ways inconsistent with legislative priorities. Collections may also lead to competition between agencies dependent on financial assessments.<sup>251</sup>

#### CONCLUSION

In 2010, faced with a funding reduction, the New Orleans Municipal Court threatened to incarcerate criminal defendants to generate additional court revenue:

The Court will have to reconsider their [sic] placement of individuals cited in Municipal Court to community service as an alternative to incarceration. The community service option has resulted in over a million (\$1,000,000) dollars [of] in kind services to the City of New Orleans agencies but has also resulted in the loss of revenues to the Court. As the Court will be looking to maximize revenues, incarceration has proven a more persuasive incentive to collections than alternative sentencing.<sup>252</sup>

These statements highlight the constitutional, political, and human costs of the funding structures in New Orleans's adult criminal courts. The judiciary's reliance on judicial expense funds and other financial assessments creates the possibility of a structural conflict of interest. Evidence that judges purchased health insurance and cars with judicial expense funds raises concern about personal conflicts of interest. Both conflicts violate defendants' due process rights.

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245. *Id.* § 16:16.3 (authorizing a \$20 cost against any individual who is convicted, pleads guilty, or forfeits bond in cases in which the district attorney has jurisdiction to defray the District Attorney's expenses).

246. LA. CODE. CRIM. PROC. ANN. art. 895.4 (authorizing a \$2 cost against any defendant convicted of any criminal offense or of any traffic offense in order to support certified crime stoppers organizations).

247. *See* BANNON ET AL., *supra* note 4, at 6.

248. LA. REV. STAT. ANN. § 15:574.4.5.

249. LA. CODE. CRIM. PROC. ANN. art. 895.1 (authorizing the Department of Public Safety and Corrections to collect no less than \$60 and no more than \$110 each month for probation supervision).

250. *Id.* at art. 895.1 (authorizing a fee of no less than \$50 and no more than \$100 from any defendant convicted of a violation of a controlled dangerous substance law and placed on any type of probation to support a grant program to assist local public and private nonprofit agencies involved in drug abuse prevention and treatment programs).

251. *See* La. Pub. Defender Bd. v. Parker, No. 597627 (19th Jud. Dist. Ct. La. Feb. 11, 2011), available at [http://lpdb.la.gov/Serving%20The%20Public/News/txtfiles/pdf/Mandamus%20Order\\_11%20FEB%202011.pdf](http://lpdb.la.gov/Serving%20The%20Public/News/txtfiles/pdf/Mandamus%20Order_11%20FEB%202011.pdf) (describing Orleans Public Defenders' lawsuit against the municipal, criminal district, and juvenile court judges concerning fee collection and remittance).

252. *See* QUATREVAUX, *supra* note 85, at 52.

This Comment also identified how the funding structures in New Orleans's adult criminal courts undermine budgetary transparency and local democracy and governance. Courts raise money for operations outside the political and budgetary process. Consequently, judicial expense funds are not appropriated after careful reflection and debate about New Orleans's public safety and budgetary priorities. This undermines the city's ability to coordinate funding and to target criminal justice resources to meet the city's most pressing public safety needs.

Additionally, this Comment highlighted the impact of financial assessments on New Orleans's most vulnerable residents. In Louisiana, a court may imprison a nonindigent defendant for up to one year for failure to pay fines or costs.<sup>253</sup> An indigent defendant may not be incarcerated directly for failing to pay, but may face incarceration indirectly. For example, an indigent defendant may be arrested for failing to appear at a debt-related court date or hearing.<sup>254</sup> A court may also revoke an indigent defendant's probation if a defendant willfully missed a payment.<sup>255</sup> Efforts to collect debt may also interfere with a defendant's ability to pay child support, rent, utilities, and other basic needs. Additional research is necessary to highlight the impact of financial assessments on criminal defendants in New Orleans.

This Comment proposed several reforms to the city's adult criminal courts. These include abolishing judicial expense funds, separating the courts' funding from financial assessments, consolidating the courts, and providing fee waivers for indigent defendants. These reforms, among others, would better protect citizens' constitutional rights, safeguard judicial independence, and improve local democracy and governance.

Continued scrutiny is necessary to identify how money influences public safety decisions in New Orleans, to challenge current practices, and to reform a criminal justice system that routinely profits from the arrest, detention, and conviction of the city's poor.

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253. LA. CODE CRIM. PROC. ANN. art. 884 (authorizing imprisonment not to exceed one year in default of payment of fines or costs). *But see* State v. Mack, 715 So. 2d 126, 131 (La. Ct. App. 1998) ("An indigent defendant cannot be subjected to default time in lieu of the payment of a fine, costs or restitution.").

254. See LA. CODE CRIM. PROC. ANN. art. 349.1 ("If at the time fixed for appearance the defendant fails to appear as required by the court, the judge may, or shall on motion of the prosecuting attorney, issue a warrant for the arrest of the defendant.").

255. See State v. Williams, 598 So. 2d 708 (La. Ct. App. 1992) (holding that revocation of probation was proper because defendant failed to exert reasonable effort to secure employment or alternative means of paying financial assessments).