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# Chilling the Right to a Jury Trial: The Unconstitutionality of Jury Costs

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Chilling the Right to a Jury Trial: The Unconstitutionality of Jury Costs

A thesis submitted in partial fulfillment of the requirement  
for the degree of Bachelor of Arts in Interdisciplinary Studies from  
The College of William and Mary

by

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Accepted for Honors

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## Introduction

One of the first instructions individuals hear after they are convicted of a crime is to go to the Clerk's Office to pay their court costs. Convicted criminal defendants may also face fines, restitution, or other penalties related to punishment for their crimes, but court costs "reimburse" the state for costs incurred to convict them.

In recent years, as part of the broader movement toward criminal justice reform, the effect of court costs on defendants has been discussed, reported on, and studied. National Public Radio (NPR) conducted a yearlong investigation in 2014, titled, "As Court Fees Rise, The Poor Are Paying The Price," which outlined some of the different costs for which a defendant may be charged "at every step of the system, from the courtroom, to jail, to probation." The study detailed the sharp rise of court costs in recent years, as well as the fact that almost all of these costs were once borne by the government.<sup>1</sup>

As some of the more outrageous problems related to high court fees have gained notoriety in recent years, many news outlets have done profiles on those affected by the system. Political comedian John Oliver, in a segment titled "Municipal Violations," highlighted the case of Harriet Cleveland, a woman from Montgomery, Alabama, who received several tickets for driving without insurance and without a license. Her two hundred dollar ticket snowballed into thousands of dollars because she could not afford to pay the fee; she lost all of her income and assets, and was jailed.<sup>2</sup> Her case is one of at least ten lawsuits filed in 2015 against municipalities

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<sup>1</sup> Joseph Shapiro, "As Court Fees Rise, The Poor Are Paying The Price," *NPR*, May 19, 2014, <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

<sup>2</sup> John Oliver analogizes court fees to "a bully taking your lunch money and then charging you a 'lunch money reallocation' fee." "Municipal Violations," *Last Week Tonight with John Oliver*, <https://www.youtube.com/watch?v=0UjpmT5noto>; Sarah Stillman, "Get Out of Jail, Inc.," *The New Yorker*, June 23, 2014, <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>.

for incarcerating individuals in modern day debtors' prisons.<sup>3</sup> Academic scholarship has rounded out the coverage of many of these stories, analyzing recent lawsuits, reports, and the history of "cash-register justice."<sup>4</sup>

Oliver and other commentators note the high social costs these expensive fees carry. Equally real, but less often discussed, are these fees' constitutional costs. As the NPR study noted, "defendants are charged for many government services... including those that are constitutionally required."<sup>5</sup> One of these constitutionally required services is the right to a jury trial. However, some jurisdictions charge jury costs, "additional fees... assessed as part of the court costs if a jury trial is requested."<sup>6</sup>

Many states have outlawed jury costs as an unconstitutional deterrent to exercising the right to a jury trial, or as a cost of prosecution that should be borne by the state. However, some states, including Virginia, continue to charge this fee.

This thesis explores the status of jury costs in American criminal courts, with a particular focus on Virginia. Like only a few other states, Virginia's jury cost scheme has survived—indeed been ennobled by—a state constitutional challenge. More commonly, states' jury costs have escaped or been undermined by a constitutional challenge.

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<sup>3</sup> Neil L. Sobol, "Charging the Poor: Criminal Justice Debt & Modern Day Debtors Prisons," 75 *Maryland Law Review* 486 (2016),

<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3701&context=mlr>.

<sup>4</sup> Ibid; Laura I. Appleman, "Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System," 57 *Boston College Law Review* 1483 (2016),

<http://lawdigitalcommons.bc.edu/bclr/vol57/iss5/2/>; Claire Greenberg, Marc Meredith, and Michael Morse, "The Growing and Broad Nature of Legal Financial Obligations. Evidence from Alabama Court Records," 48 *Connecticut Law Review* 1079 (2016).

<sup>5</sup> Shapiro, "As Court Fees Rise, The Poor Are Paying The Price."

<sup>6</sup> "Notice of Jury Fees," Fairfax Circuit Court,

<http://www.fairfaxcounty.gov/courts/circuit/pdf/ccr-b-15.pdf>.

The first part of my thesis will explain why court costs and jury costs specifically are problematic. I will then explore the constitutional arguments against charging jury costs. Finally, I will describe my effort attempting to get the practice of charging jury costs in Virginia discontinued.

### I. Court Costs in Virginia

In Virginia, court costs chargeable against a convicted defendant run the gamut. There are base “fixed fees” for different classifications of crimes—\$80 for a non-drug misdemeanor<sup>7</sup> or \$375 for a felony,<sup>8</sup> for example. The authorizing statutes allocate these fees as follows: Forty-seven percent of the fixed felony fee is a “sentencing/supervision fee” for the General Fund; the rest of the fee is allocated among the “Forensic Science Fund,” the “Court Reporter Fund,” the “Witness Expenses/Expert Witness Fund,” the “Virginia Crime Victim-Witness Fund,” the “Intensified Drug Enforcement Jurisdiction Fund,” the “Criminal Injuries Compensation Fund,” the “Commonwealth Attorney State Fund,” the “Commonwealth Attorney Local Fund,” the “Regional Criminal Justice Academy Training Fund,” a “Warrant Fee,” the “Courthouse Construction/Maintenance Fund,” and the “Clerk of the Circuit Court.”<sup>9</sup>

In addition to these fixed fees, there are nineteen other enumerated fees that can accrue.<sup>10</sup> These include fees for legal representation of the defendant, trial transcripts, extradition,

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<sup>7</sup> *Fixed misdemeanor fee*, Virginia Code §17.1-275.7.

<sup>8</sup> *Fixed felony fee*, Virginia Code §17.1-275.1.

<sup>9</sup> Fees Apportioned as Sentencing/supervision fee (General Fund): 47.05%; Forensic science fund: 10.33%; Court reporter fund: 8.87%; Witness expenses/expert witness fund: 0.53%; Virginia Crime Victim-Witness Fund: 0.80%; Intensified Drug Enforcement Jurisdiction Fund: 1.06%; Criminal Injuries Compensation Fund: 8.00%; Commonwealth’s attorney fund (state share): 5.33%; Commonwealth’s attorney fund (local share): 5.33%; Regional Criminal Justice Academy Training Fund: 00.26%; Warrant fee: 3.20%; Courthouse construction/maintenance fund: 0.53%; and Clerk of the circuit court: 8.67%. *Ibid.*

<sup>10</sup> *Amounts to be added; judgment in favor of the Commonwealth*, Virginia Code §17.1-275.5.

psychiatric evaluation, returned check or disallowed credit card charges, *any jury costs*, an ignition interlock device, HIV testing, jail processing, courthouse security personnel, DNA samples, reimbursement for medical fees, local criminal justice training academy, failing to appear, refusing a breathalyzer or blood test, maintaining electronic summons systems (to go toward hardware, software, and associated equipment) and additional fees if the crime involved drug dealing. For an example court cost listing, see Appendix I.

These fees, which often add up to thousands of dollars, present numerous ethical concerns. The stated purpose of court costs is to reimburse the state for the expenses of being convicted, but many of the fees charged are unrelated to the crime and incident expenses. None of the court costs are charged exactly for what the state incurred for a particular defendant, and while the additional fees are generally only assessed when applicable to the crime, the fixed fee's allocation toward witnesses and drug enforcement is charged regardless of whether witnesses or drugs were involved in the case. Additionally, costs for "courthouse construction/maintenance" and "criminal justice academy training" are such indirect expenses as to be clear attempts to not raise taxes on Virginia citizens for services that are enjoyed both by convicted defendants and by ordinary civilians.

Furthermore, states can make it very difficult to understand how much they are collecting from these fees, and where those revenues are actually going. Commonwealth Data Point, "Transparency at Work in Virginia," is a data-dump of unaudited Virginia state revenues, expenses, budgets, and demographic information.<sup>11</sup> It shows that selected court costs revenues, such as Criminal Justice Academy Fees, Criminal Injury Compensation Fund Fees, and

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<sup>11</sup> "About Commonwealth Data Point," Virginia.gov, <http://datapoint.apa.virginia.gov/aboutus.cfm>; "2012 ESLFOA — APA Data Point," Auditor of Public Accounts, <http://hac.virginia.gov/ESLFOA/APA%20-%20ESLFOA%202012.pdf>.

Intensified Drug Enforcement Jurisdiction Fees, for example, took in \$1.3 million, \$2.9 million, and \$5.2 million in fiscal year 2016, respectively.<sup>12</sup> Jury costs earned the state \$183,648 in fiscal year 2016, and have increased 180% since data collection began in 2003.<sup>13</sup> Still, the data does not show information such as the amount expended to furnish juries, nor does it show the path each dollar takes from revenue to expenditure, or the percentage of costs actually collected.

Virginia likely has the data, but, as the Newport News *Daily Press* has shown through its three-year pending suit to compel the Office of the Executive Secretary of the Supreme Court of Virginia to release a statewide database of court case information under the Freedom of Information Act, clerks are very reluctant to release this information.<sup>14</sup> The executive director of the ACLU of Virginia stated, “The ACLU of Virginia would hope that court clerks would be leading rather than impeding efforts to bring transparency to court records... Voters should ask

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<sup>12</sup> Aggregate FY2016 Revenues from these selected accounts—Criminal Injury Compensation Fund: \$2,942,783; Intensified Drug Enforcement Jurisdiction Fees: \$5,239,997; Criminal Justice Academy Fee: \$1,313,021. “Statewide Revenues by Class,” Virginia.gov, [http://datapoint.apa.virginia.gov/rev/rev\\_srccls\\_src.cfm?SRCCLS=Fines,%20Forfeitures,%20Court%20Fees,%20Codes,%20Penalties,%20And%20Escheats](http://datapoint.apa.virginia.gov/rev/rev_srccls_src.cfm?SRCCLS=Fines,%20Forfeitures,%20Court%20Fees,%20Codes,%20Penalties,%20And%20Escheats).

<sup>13</sup> See Appendix II; “Statewide Revenues by Class,” Virginia.gov, [http://datapoint.apa.virginia.gov/rev/rev\\_srccls\\_src\\_agy.cfm?SRC=1151](http://datapoint.apa.virginia.gov/rev/rev_srccls_src_agy.cfm?SRC=1151).

<sup>14</sup> Oral argument in this case is April 21, 2017; Daily Press staff, “Arguments April 21 in Daily Press court data lawsuit,” *Daily Press*, March 27, 2017, <http://www.dailypress.com/news/politics/dp-nws-foia-oes-case-20170327-story.html>; Ryan Murphy, “Daily Press urges Va. Supreme Court to hear open records appeal,” *Daily Press*, September 1, 2016, <http://www.dailypress.com/news/politics/dp-nws-supreme-court-oes-hearing-20160901-story.html>; Josh Reyes, “Daily Press to argue for appeal in open records lawsuit,” *Daily Press*, August 31, 2016, <http://www.dailypress.com/news/politics/dp-nws-oes-scova-advance-20160831-story.html>; Theresa Clift, “Daily Press asks state Supreme Court to review court database ruling,” *Daily Press*, June 10, 2016, <http://www.dailypress.com/news/dp-nws-oes-lawsuit-appeal-20160609-story.html>; Reema Amin, “Virginia Supreme Court to hear Daily Press appeal over court database,” *Daily Press*, September 21, 2016, <http://www.dailypress.com/news/newport-news/dp-virginia-supreme-court-to-hear-daily-press-appeal-over-court-database-20160921-story.html>.



these elected officials why they are against public access to their records and why they seem to be opposing transparency and accountability.”<sup>15</sup>

To return to the case of Harriet Cleveland, the *Connecticut Law Review* conducted a May 2016 study gathering “about two hundred thousand court records from Alabama over the last two decades to perform the most comprehensive exploration of the assessment and payback of [legal financial obligations] to date across an entire state.” They conducted this study because of “a general lack of individual-level data” which made it “nearly impossible to know how common Ms. Cleveland’s experience is.” But, the study was ultimately able to conclude that “the significant debt Ms. Cleveland accumulated for a series of minor traffic offenses is not such an aberration.”<sup>16</sup>

Ms. Cleveland’s situation is also not an aberration in Virginia, where many defendants are unable to pay the exorbitant court costs charged to them. Virginia allows most defendants to enter into payment plans, but their structure and eligibility requirements vary greatly from county to county. Some counties require a down payment to enter into a payment plan at all, while most counties have minimum monthly payments of \$50-\$100.<sup>17</sup> In some counties, the Clerk of the Court handles all payment plans, while in others only a judge can allow a specific defendant to enter into a payment plan; the defendant must go to court to motion the judge to do so.<sup>18</sup>

Historically, none of these plans were tailored to what an individual defendant could actually

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<sup>15</sup> Dave Ress, “Court clerks and electronic records: An old office with a new challenge,” *Daily Press*, August 15, 2015, <http://www.dailypress.com/news/politics/dp-nws-clerks-records-20150815-story.html>.

<sup>16</sup> Greenberg, Meredith, and Morse, “The Growing and Broad Nature of Legal Financial Obligations. Evidence from Alabama Court Records.”

<sup>17</sup> “Authority for Clerk to Establish and Approve Agreements Pursuant to §19.2-354 and §46.2-395,” Circuit Court for the County of Henry, [http://www.courts.state.va.us/online/ppp\\_fines\\_costs/cc/henry.pdf](http://www.courts.state.va.us/online/ppp_fines_costs/cc/henry.pdf).

<sup>18</sup> “Payment Plan Policy for Fines and Costs,” Circuit Court of Goochland County, [http://www.courts.state.va.us/online/ppp\\_fines\\_costs/cc/goochland.pdf](http://www.courts.state.va.us/online/ppp_fines_costs/cc/goochland.pdf).

afford. If one could only come up with \$75 per month, they would default on their payment plan for not meeting the minimum \$100 per month, and, in many cases, would not be allowed to enter into another payment plan while fines and interest accumulated on their account. However, as discussed later, in 2016 the Supreme Court of Virginia and, in response, the Virginia House of Delegates, decided that payment plans needed to be restructured to address some of these issues; these reforms are still in process. Yet, these former practices are still controlling for the hundreds of thousands of individuals already in the system.

If an account is in default, seventeen percent of a defendant's balance will first be added, as a penalty, to what they already owe. Interest then accrues on both the principal and penalty, at the Virginia's statutorily established six percent interest rate.<sup>19</sup> The case is then referred to collections, which can make claims against a defendant's tax refund and lottery winnings. Additionally, the defendant's driver's license is suspended until costs are paid.

For indigent defendants, this situation presents quite the catch-22. First, they are charged more fees for not having enough money to pay their fees. Secondly, their method of earning money to pay these costs—going to work—is impeded by a suspended license. Many indigent defendants have no option but to drive while their license is suspended. This, however, is a Class 1 misdemeanor,<sup>20</sup> and, if convicted under this statute, they will then be charged additional court costs. And so the cycle continues.

The named plaintiff on the recent Virginia case disputing this cycle as unconstitutional, Damian Stinnie, became “caught between two untenable choices: risking more fines and possible jail time if caught driving with a suspended license, or losing his job because he didn't have a

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<sup>19</sup> *Legal rate of interest; when legal rate implied*, Virginia Code §6.2-301.

<sup>20</sup> *Driving while license, permit, or privilege to drive suspended or revoked*, Virginia Code §46.2-301.

way to get to work. Months later, when he was diagnosed with lymphoma, he then had to choose between breaking the law and making his doctors' appointments," because he was unable to pay the fines and costs on his initial traffic citations.<sup>21</sup> Stinnie is not alone, as according to data from the Virginia Department of Motor Vehicles and the United States Census, "The number of people in Virginia with suspended licenses is nearly equivalent to the entire population of the state of Maine [and]... of those suspensions, roughly half are for failure to pay court fines and fees."<sup>22</sup> This issue ties into a much larger modern social concern—how expensive it is to be poor.<sup>23</sup>

### **A. Current Initiatives to Mitigate Harsh Court Cost Procedures**

This is not to say that there are no protections in place for defendants unable to pay their court costs. However, in practice, these protections prove to be more theoretical good intentions than actual workable solutions.

#### *i. Community Service in Lieu of Payment*

Virginia courts have an obligation to provide an option whereby defendants can perform

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<sup>21</sup> Marc Levin and Joanna Weiss, "Suspending driver's licenses creates a vicious cycle," *USA Today*, February 21, 2017, <https://www.usatoday.com/story/opinion/2017/02/21/driver-license-suspension-court-debt-reform-column/98016910/>.

<sup>22</sup> Steve Roberts, Jr., "Driven out: Poverty, justice system strip thousands of right to drive," *WY Daily*, December 19, 2016, <http://wydaily.com/2016/12/19/driven-out-poverty-justice-system-strips-thousands-of-right-to-drive/>.

<sup>23</sup> Barbara Ehrenreich, "It Is Expensive to Be Poor," *The Atlantic*, January 13, 2014, <https://www.theatlantic.com/business/archive/2014/01/it-is-expensive-to-be-poor/282979/>; Lauren Greutman, "Why Being Poor Is More Expensive," *The Huffington Post*, February 9, 2017, [http://www.huffingtonpost.com/lauren-greutman/why-being-poor-is-more-ex\\_b\\_9194906.html](http://www.huffingtonpost.com/lauren-greutman/why-being-poor-is-more-ex_b_9194906.html); Charles M. Blow, "How Expensive It Is to Be Poor," *The New York Times*, January 18, 2015, [https://www.nytimes.com/2015/01/19/opinion/charles-blow-how-expensive-it-is-to-be-poor.html?\\_r=0](https://www.nytimes.com/2015/01/19/opinion/charles-blow-how-expensive-it-is-to-be-poor.html?_r=0); "It's expensive to be poor," *The Economist*, September 3, 2015, <http://www.economist.com/news/united-states/21663262-why-low-income-americans-often-have-pay-more-its-expensive-be-poor>.

community service in lieu of payment of court costs.<sup>24</sup> However, out of the counties who actually post their payment plan guidelines online, as they are all required to do,<sup>25</sup> less than half list a community-service-in-lieu-of-payment option. But, these options are also heavily restricted. In Williamsburg/James City County, for example, eligible defendants are only given one chance at community service in lieu of payment and must perform a minimum of forty hours per month. They are also given a due date for which all community service must be finished. This option is only available at all in cases where no restitution is owed and the account is not in default; as well, defendants are only allowed three opportunities to satisfy a payment plan. If the third agreement goes into default, there are no opportunities for future payment plans *or* community service. Individuals in Williamsburg with accounts in default are at risk of having their tax refund and wages garnished, and the only way a defendant can have a license suspension removed is to pay the account in full.<sup>26</sup> Therefore, in reality, community service is really only available to those defendants who need it the least.

These limitations highlight a major problem with using community service as the solution to indigent defendants' inability to afford court costs. Many low-income individuals work multiple jobs, and so do not have the time or ability to perform forty hours of community service per month. Transportation poses a problem as well given the selective nature of approved

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<sup>24</sup> “The court shall establish a program and may provide an option to any person upon whom a fine and costs have been imposed to discharge all or part of the fine or costs by earning credits for the performance of community service work before or after imprisonment. The program shall specify the rate at which credits are earned and provide for the manner of applying earned credits against the fine or costs.” *Authority of court to order payment of fine, costs, forfeitures, penalties or restitution in installments or upon other terms and conditions; community work in lieu of payment*, Virginia Code §19.2-354.

<sup>25</sup> “The requirements established by the Rules of Supreme Court of Virginia shall be posted in the clerk’s office and on the court’s website.” *Ibid.*

<sup>26</sup> “Williamsburg/James City County Circuit Court Criminal Fines/Costs/Restitution Payment Agreements,” Circuit Court for the City of Williamsburg and County of James City, [http://www.courts.state.va.us/online/ppp\\_fines\\_costs/cc/williamsburg.pdf](http://www.courts.state.va.us/online/ppp_fines_costs/cc/williamsburg.pdf).

community service sites, especially for those with a suspended license. Besides the common sense analysis that buses seldom drop off at trash pickup sites (the quintessential community service site), a third of Virginia counties and cities are not served by public transportation at all.<sup>27</sup> As well, Richmond, one of Virginia's largest metro areas, has been listed as one of the ten worst cities for public transportation in the country.<sup>28</sup>

All in all, community service can present an adequate alternative option to satisfy court-ordered obligations for those who have the means to complete it. But since its purpose is to help those without means, it compounds rather than alleviates their burden.

#### *ii. Litigation Against Mandatory License Suspensions*

In July 2016, the Legal Aid Justice Center, a public interest litigation group based in Charlottesville, Virginia, filed *Stinnie v. Holcomb* on behalf of four plaintiffs whose licenses were suspended because of unpaid court costs that they were financially incapable of paying. They disputed the constitutionality of suspending driver's licenses for failing to pay court costs and received the support of the U.S. Department of Justice, which filed a statement of interest indicating that the practice is unconstitutional on due process and equal protection grounds.<sup>29</sup> In

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<sup>27</sup> Of 135 Virginia cities/counties listed, 44 are listed as having no public transportation serve their area. "Service Locator," Virginia Department of Rail and Public Transportation, <http://www.drpt.virginia.gov/service-locator/results/?fips=670&zip=>; "Virginia Transit Links," American Public Transportation Association, <http://www.apta.com/resources/links/unitedstates/Pages/VirginiaTransitLinks.aspx>.

<sup>28</sup> Derek Thompson, "The 10 Best (and 10 Worst) Cities For Public Transportation," *The Atlantic*, May 17, 2011, <https://www.theatlantic.com/business/archive/2011/05/the-10-best-and-10-worst-cities-for-public-transportation/238985/>; Time Staff, "The 20 Best and Worst Cities for Public Transit," *TIME*, May 12, 2011, [http://content.time.com/time/specials/packages/article/0,28804,2070992\\_2071127\\_2071094,00.html](http://content.time.com/time/specials/packages/article/0,28804,2070992_2071127_2071094,00.html); "Richmond, VA Metro Area," Brookings, <https://www.brookings.edu/wp-content/uploads/2016/07/RichmondVA.pdf>.

<sup>29</sup> *Statement of Interest of the United States*, United States Department of Justice, <https://www.justice.gov/opa/press-release/file/909301/download>.

March 2017, Senior Judge of the United States District Court for the Western District of Virginia, Judge Norman K. Moon, dismissed the lawsuit, ruling that while the practice may be unconstitutional, the federal court does not have jurisdiction over the matter.<sup>30</sup> The Legal Aid Justice Center released a statement in response, stating that they “will not stop fighting until the automatic suspension law is repealed.”<sup>31</sup> While nothing has been filed to date, there is speculation that a state suit will be brought, in an attempt to seek relief from the very courts whose policies it seeks to undermine.<sup>32</sup>

*iii. Rule 1:24*

While the *Stinnie* lawsuit has not yet been decided on the merits, it has been part of a movement to bring attention to these issues, leading to Virginia General Assembly bills and Supreme Court of Virginia Rules issuances. In February 2016, the General Assembly passed HB 572, which called on individual courts to look to Supreme Court Rules for guidelines on payment plan structures.<sup>33</sup> The Rules of the Supreme Court of Virginia govern the practice of lower courts across the Commonwealth. In response to HB 572, the Supreme Court of Virginia issued an amendment to the Rules in November 2016, stating that defendants unable to pay their costs must have access to payment alternatives, the conditions (amount and time to pay) of a payment plan must be tailored to what an individual can afford, and that community service in lieu of

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<sup>30</sup> Memorandum Opinion, *Stinnie v. Holcomb*, No. 3:16-CV-00044, 2017 WL 963234 (W.D. Va. March 13, 2017).

<sup>31</sup> Legal Aid Justice Center, March 14, 2017, <https://www.facebook.com/LegalAidJusticeCenter/posts/10155105011492579>.

<sup>32</sup> Dean Seal, “UVa law students providing pro bono civil rights casework,” *Richmond Times-Dispatch*, March 25, 2017, [http://www.richmond.com/news/virginia/uva-law-students-providing-pro-bono-civil-rights-casework/article\\_c9d4b957-1cc3-5bd2-8290-df7c42a6793c.html](http://www.richmond.com/news/virginia/uva-law-students-providing-pro-bono-civil-rights-casework/article_c9d4b957-1cc3-5bd2-8290-df7c42a6793c.html).

<sup>33</sup> However, this could also be criticized as the general assembly punting the problem to the Virginia Supreme Court. *Fines and costs; statutes of limitation on collection, etc.* HB 572, 2016 Session.

payment should be used liberally. This amendment became effective on February 1, 2017.<sup>34</sup>

*iv. Virginia General Assembly Bills*

In response to Rule 1:24, the Virginia General Assembly passed HB 2386, requiring courts to take into account a defendant's financial circumstances—fines and costs owed to other courts and a defendant's indigency—in setting the terms for a payment agreement. As well, “when deemed appropriate,” courts should allow the defendant a credit for community service work. The bill fixed the maximum down payment a court may require to enter into a payment plan at \$100, increased the grace period for collection (the window a defendant has to pay their fees before penalties and interest accrue) from thirty to ninety days, and considers any payment received within ten days of its due date timely made.

While a good start in decreasing the arbitrariness among different payment plan procedures in different counties and extending more leniency toward defendants unable to pay, the bill still allows considerable discretion for individual courts to set or adjust their own payment plan procedures. For example, a “court may require a higher down payment from a defendant for *good cause shown*,” “all fines and costs that a defendant owes for all cases in any single court may be incorporated into one payment agreement, *unless otherwise ordered by the court*,” and “a court shall *consider* a request by a defendant who has defaulted on a payment plan to enter into a subsequent payment agreement.” Essentially, courts have the ability to ignore most of these guidelines if they deem appropriate. Instead of taking absolute steps to remedy the former system's faults, the proposed reforms actually establish clear loopholes to specifically allow their new guidelines to not be followed.

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<sup>34</sup> *Rule 1:24*, Rules of the Supreme Court of Virginia, [http://www.courts.state.va.us/courts/scv/amendments/2016\\_1101\\_rule\\_1\\_24.pdf](http://www.courts.state.va.us/courts/scv/amendments/2016_1101_rule_1_24.pdf).

Additionally, the bill keeps the language, “When the court has authorized deferred payment or installment payments, the clerk shall give notice to the defendant that upon his failure to pay as ordered he may be fined or *imprisoned* pursuant to §19.2-358 and his privilege to operate a motor vehicle will be suspended pursuant to § 46.2-395.”<sup>35</sup>

Another bill introduced in the Virginia House of Delegates, HB2049, attempted to repeal driver’s license suspensions for the nonpayment of court costs legislatively; it was killed in committee on February 7, 2017.<sup>36</sup> The Senate’s corresponding bill, SB 1188, passed the Senate but was killed in House Committee on February 21, 2017.<sup>37</sup>

Other court cost bills introduced in the 2017 term included HB 2385, which attempted to add an additional \$5 court cost for criminal or traffic cases in which the Virginia State Police issued the summons, ticket, or citation, to fund “software, hardware, and associated equipment costs for the implementation and maintenance of an electronic summons system.”<sup>38</sup> This bill was killed in committee but pointed out the philosophy that Virginia tends to espouse in its court cost system—to charge the defendant for every incremental step in the criminal justice system where expenditures were incurred, down to the cost of printing and issuing their traffic ticket. Ironically, perhaps, there is already a court cost for this on the local level.<sup>39</sup> Another bill, SB 833, was introduced to extend the opportunity for community service work in lieu of payment of fines

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<sup>35</sup> *Unpaid court fines, etc.; increases grace period for collection*, HB 2386, 2017 Session.

<sup>36</sup> *Driver’s license; suspension of license for nonpayment of fines and court costs*, HB 2049, 2017 Session.

<sup>37</sup> *Driver’s license; suspension of license for nonpayment of fines and court costs*, SB 1188, 2017 Session.

<sup>38</sup> *Assessed court costs; electronic summons system*, HB 2385, 2017 Session.

<sup>39</sup> *Ibid; Additional assessment for electronic summons system*, Virginia Code §17.1-279.1.



and court costs to those incarcerated, whereas the current system only allows community service work before or after incarceration. This bill was also killed in committee on February 1, 2017.<sup>40</sup>

## **B. Suggestions That Could Go Further**

As concerns about the effect of high court fees gain more public attention, parties in power are likely to look for additional measures to reduce the burden of these fees. While the current initiatives to mitigate the effects of harsh court costs are a start, there are a number of more potent solutions to consider.

### *i. Court-Driven Solutions*

While there are state guidelines<sup>41</sup> for what to charge for certain statutory costs, clerks and judges have considerable discretion over costs where there is no fixed statutory amount, as well as the kinds of payment plans they offer.

Clerks are free to extend community service in lieu of payment options, decrease monthly minimum payments, or defer payment of costs without penalty until the defendant has means to pay. They can also create other standardized procedures to help make the process fairer. As stated above, starting on February 1, 2017, an individual's ability to pay should be taken into account when deciding on a payment plan and more community service options should be offered. Clerks of each court are also able to take additional further measures to relieve the burden court costs pose to indigent defendants. By way of the same loopholes that give clerks the discretion to increase the burden on individual defendants, they can also be used to relieve it.

However, the way the system is set up, Clerk's Offices benefit financially from

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<sup>40</sup> *Fines and court costs; community work in lieu of payment*, SB 833, 2017 Session.

<sup>41</sup> "Appendix B — Criminal Fees and Costs Schedule," Virginia's Judicial System, [http://www.courts.state.va.us/courts/circuit/resources/manuals/cc\\_manual\\_criminal/appendix\\_b.pdf](http://www.courts.state.va.us/courts/circuit/resources/manuals/cc_manual_criminal/appendix_b.pdf).

aggressive court cost payment systems. Clerks would have to reconcile the social goal of fairness in payment systems with the fact that, by statute, the Office of the Clerk of the Court receives 8.7% of all fixed felony fees and 25% of all fixed misdemeanor fees, for example. In an analogous vein, a 2013 *California Law Review* article discussed financial conflicts of interest in New Orleans's criminal court cost scheme.<sup>42</sup>

## *ii. Executive Branch Solutions*

Virginia Governor Terry McAuliffe has prioritized restoring voting rights to felons. As part of these reforms, outstanding court costs will no longer prohibit an individual from having their rights restored. The individual will still have to pay the costs, but McAuliffe made a comparison between having to pay these fees before being allowed to vote and Virginia's old poll tax system. "Their court debts will no longer serve as a financial barrier to voting," he said, "just as poll taxes did for so many years in Virginia."<sup>43</sup> McAuliffe originally signed an Executive Order granting clemency to 200,000 felons in April 2016, but the Supreme Court of Virginia ruled that order unconstitutional in July 2016 in a suit initiated by Virginia GOP legislative leaders. However, McAuliffe is still able to grant individual clemencies and intends to restore rights for all 200,000 felons one-by-one, which the Supreme Court of Virginia did not disallow.

For McAuliffe (and his successor come next year after what is shaping up to be a hotly contested gubernatorial election)<sup>44</sup> to continue with McAuliffe's present initiative, and to take

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<sup>42</sup> "The judiciary's reliance on judicial expense funds and other financial assessments creates the possibility of a structural conflict of interest." Micah West, "Financial Conflicts of Interest and the Funding of New Orleans's Criminal Courts," 101 *California Law Review* 521 (2013).

<sup>43</sup> "Governor McAuliffe Announces New Reforms to Restoration of Rights Process," Virginia.gov, <https://governor.virginia.gov/newsroom/newsarticle?articleId=11651>.

<sup>44</sup> A. Barton Hinkle, "Virginia's 2017 Governor's Race Will Make Trump-Clinton Look Dull," *Reason.com*, February 20, 2017, <http://reason.com/archives/2017/02/20/good-news-theres-a-new-election-to-fight>.

additional steps to assist indigent citizens in the criminal justice system, would offer an executive branch solution to some of the problems related to high court costs. However, if there is a takeaway from his first initiative, it is the tension and lack of compromise between the two parties in Virginia in the legislature—conflict and loyal party affiliation that can create a toxic environment around these issues, sometimes literally.<sup>45</sup>

### *iii. Legislative Solutions*

As almost all guidance on court cost procedures is prescribed by the legislature, the authority and opportunity to change the laws to help indigent defendants lies there. However, as mentioned above, the Virginia General Assembly is quite partisan, and criminal justice reform is generally a Democratic initiative—the party that currently holds the minority in both the House (only 34 of 100 delegates)<sup>46</sup> and the Senate.

As an example of the current status of criminal justice reform in Virginia’s legislature, a proposal was made in the last legislative session to increase the felony theft threshold from \$200 to \$500 to “result in fewer felons, a reduction in the prison population, and system-wide criminal

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<sup>45</sup> Disputed timeline for Alexandria sewer, “what might otherwise be a highly technical environmental issue has morphed into another partisan fight in Richmond.” Alex Koma, “Disputed timeline for Alexandria sewer fix gets General Assembly vote Wednesday,” *Inside NOVA*, April 4, 2017, [http://www.insidenova.com/headlines/disputed-timeline-for-alexandria-sewer-fix-gets-general-assembly-vote/article\\_01b473b4-1952-11e7-b164-2389422fbaa8.html](http://www.insidenova.com/headlines/disputed-timeline-for-alexandria-sewer-fix-gets-general-assembly-vote/article_01b473b4-1952-11e7-b164-2389422fbaa8.html); VA legislators also continued to sue McAuliffe after the Virginia Supreme Court challenge. Graham Moomaw, “Republicans file contempt motion against McAuliffe over felon rights restoration,” *Richmond Times-Dispatch*, August 31, 2016, [http://www.richmond.com/news/virginia/government-politics/republicans-file-contempt-motion-against-mcauliffe-over-felon-rights-restoration/article\\_a8361535-bb81-5a3b-9ad0-9323f1c4f76c.html](http://www.richmond.com/news/virginia/government-politics/republicans-file-contempt-motion-against-mcauliffe-over-felon-rights-restoration/article_a8361535-bb81-5a3b-9ad0-9323f1c4f76c.html).

<sup>46</sup> “Virginia House of Delegates Member Listings,” [GeneralAssembly.gov](http://GeneralAssembly.gov), <http://virginiageneralassembly.gov/house/members/members.php>.

justice cost savings including prosecution, court and prison costs.”<sup>47</sup> All seven pieces of legislation that attempted to raise this threshold failed to make it through the legislature. As a result, Virginia has the lowest threshold in the country: \$200 worth of stolen property is charged as felony larceny instead of misdemeanor larceny, which exposes a defendant to all of the implications of being a being tried for a felony,<sup>48</sup> as well as the implications of being a felon. As a comparison, this threshold has held with inflation and beyond in other states, where thresholds can be \$2,000 instead of Virginia’s \$200.<sup>49</sup>

The point here is that for Virginia to succeed in legislating criminal justice reform initiatives, voters sympathetic to criminal justice reform need to elect representatives sympathetic to criminal justice reform. However, a whole class of these voters are individuals formerly involved in the criminal justice system, and representatives not sympathetic to criminal justice reform have tried to keep them from voting by suing the governor for attempting to restore their constitutional right to vote. The outcome is that the people whose jobs it is to address these problems, and the voters with the power to hold them accountable for addressing these problems, are not those actually affected by the problems.

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<sup>47</sup> “The High Price of Virginia’s Low Felony Theft Threshold,” *The Half Sheet* (blog), The Commonwealth Institute, April 4, 2016, <http://thehalfsheet.org/post/142252729678/the-high-price-of-virginias-low-felony-theft>.

<sup>48</sup> Fixed misdemeanor fee is \$80; fixed felony is \$375, and felony reduced to misdemeanor (which is often done because prosecutors know the limit is outrageous) fee is \$227. For petit larceny cases in Fairfax GDC for March 27-31, total court costs for misdemeanor cases was approximately \$125 total, while a felony reduced to that same petit larceny crime received court costs of \$537 in three cases. General District Court Online Case Information System, <https://eapps.courts.state.va.us/gdcourts>.

<sup>49</sup> “The High Price of Virginia’s Low Felony Theft Threshold,” *The Half Sheet* (blog), The Commonwealth Institute, April 4, 2016, <http://thehalfsheet.org/post/142252729678/the-high-price-of-virginias-low-felony-theft>.

#### *iv. Judicial Solutions*

The Virginia judiciary, especially the Court of Appeals of Virginia and the Supreme Court of Virginia (as well as the Supreme Court of the United States) have the authority to rule in individual cases or flatly about the constitutionality of certain practices related to court costs. As well, the Supreme Court of Virginia, subsequent to Article VI, Section 5 of the Constitution of Virginia, is allowed to make rules governing the practice and procedures used in the courts of the Commonwealth. As indicated by the amendment to the Rules of the Supreme Court of Virginia to add Rule 1:24 discussed above, procedures related to court costs fall within this jurisdiction. The Supreme Court of Virginia could go further with this rule in the future, but the General Assembly, by statute, has the power to modify or annul Rules of the Supreme Court, and if there is a discrepancy between Rules and enactments of the General Assembly, the General Assembly enactment will prevail.<sup>50</sup> This arrangement could foreseeably both undermine the certitude of new Rules, as well as make the Court cautious not to overreach, lest their decisions be subverted or nonpartisanship questioned.

Otherwise, judicial solutions must be used to remedy constitutional violations. If any legislative statutes related to court costs violate the Constitution of Virginia or the Constitution of the United States, the judiciary is able, and obliged to, invalidate these statutes when a suit is brought. For example, a recently decided Supreme Court case, *Nelson v. Colorado*, determined that Colorado's requirement that defendants must prove their innocence by clear and convincing

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<sup>50</sup> *Supreme Court may prescribe rules; effective date and availability; indexed, and annotated; effect of subsequent enactments of General Assembly*, Virginia Code §8.01-3.

evidence to have their court costs refunded, after a reversal of their conviction and payment of various monetary penalties, violated the constitutional right to due process.<sup>51</sup>

Therefore, if one wants to mitigate the effects of large court costs on indigent defendants, they can look to the statutes that cross the line between “unfair” practices and unconstitutional practices. Jury costs are one of these.

## II. Jury Costs

At some point in every criminal case, a defendant probably asks their attorney to evaluate the benefits of a plea, a bench trial, or a trial by a jury of their peers. A candid response would include not only strategic, but financial considerations. For those to whom a jury trial is available, this conversation likely notes the much higher cost of selecting the jury trial. Even law offices that post advice on their website note, “A jury trial may take days to complete and cost the client five to ten times as much as a bench trial.”<sup>52</sup>

This cost analysis is not an exaggeration. Jury costs are a portion of a defendant’s court costs charged if convicted by jury, rather than by a bench trial or a guilty plea. The assumed purpose of charging jury costs is to reimburse the state for the cost of empanelling a jury. In Virginia, jurors are paid \$30 per day of service; the state guideline is to charge the convicted defendant \$30 per juror per day of trial in court costs in addition to all other fees. For a twelve-person jury, this amounts to \$360 per day; for a seven-person jury (the norm for misdemeanor

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<sup>51</sup> “Shannon Nelson and Louis Alonzo Madden v. Colorado,” Legal Information Institute, <https://www.law.cornell.edu/supct/cert/15-1256>; “Nelson v. Colorado,” SCOTUSblog, <http://www.scotusblog.com/case-files/cases/nelson-v-colorado/>.

<sup>52</sup> J.D. Garrett, “Should I Ask For A Jury Trial In Virginia Beach,” Garrett Law Group, PLC, September 26, 2012, <http://www.garrettlawgroup.com/2012/09/26/should-i-ask-for-a-jury-trial-in-virginia-beach/>.

appeals)<sup>53</sup> this amounts to \$210 per day. However, since individual courts have authority to determine the final amount charged, counties such as Fairfax charge \$600 for the first day of a felony trial, and an additional \$360 per each additional day; misdemeanor trials run \$390 for the first day, and \$210 per each additional day.<sup>54</sup> In Virginia, there are no jury trials in General District Court, so all misdemeanor jury trials happen on appeal to the Circuit Court for a trial *de novo*.<sup>55</sup> Here all court costs, in addition to this new jury fee, are charged again if convicted. This would mean that if a defendant charged with a misdemeanor wanted to exercise their constitutional right to a jury trial, they would not only have to pay the excessive jury fee, but twice the base court costs as well (courthouse maintenance fee, Clerk of Court fee, Regional Training Academy fee, drug enforcement fee, etc.)<sup>56</sup> Jury fees are charged even to defendants who end up deciding to plea on the day of trial,<sup>57</sup> and appeal court costs are charged even if an appeal is withdrawn later than ten days from when the appeal was noted.<sup>58</sup>

Courts have ruled jury costs unconstitutional in a number of states—two state legislatures have outlawed them—but Virginia upheld its scheme as recently as 1998.

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<sup>53</sup> Benjamin Griffiths, “Criminal Appeals to Circuit Courts in Virginia,” Livesay & Myers, February 14, 2014, <http://www.livesaymyers.com/criminal-appeals-to-circuit-courts-virginia/>.

<sup>54</sup> “Notice of Jury Fees,” Fairfax Circuit Court, <http://www.fairfaxcounty.gov/courts/circuit/pdf/ccr-b-15.pdf>.

<sup>55</sup> A form of appeal in which the appeals court holds a trial as if no prior trial had been held. “trial de novo,” The Free Dictionary, <http://legal-dictionary.thefreedictionary.com/trial+de+novo>.

<sup>56</sup> “Misdemeanor/Traffic Infraction Appeal Costs,” Fairfax Circuit Court, [http://www.fairfaxcounty.gov/courts/circuit/pdf/appeal\\_costs.pdf](http://www.fairfaxcounty.gov/courts/circuit/pdf/appeal_costs.pdf).

<sup>57</sup> “Juries that are waived the day of court, whether before or during the trial will be assessed the jury fee,” “Notice of Jury Fees,” Fairfax Circuit Court, <http://www.fairfaxcounty.gov/courts/circuit/pdf/ccr-b-15.pdf>.

<sup>58</sup> To withdraw an appeal, all fines and costs for the lower court have to be paid. Therefore, if you appealed but could not afford your fines and costs yet, then changed your mind about appealing, you have to go forward with the appeal and then be charged double the fines and costs. Griffiths, “Criminal Appeals to Circuit Courts in Virginia.”

### **A. Why Jury Costs Are An Appropriate Vehicle for Court Cost Reform**

Jury costs have some of the most obvious constitutional consequences of the exorbitant varieties of types of court costs charged—they directly threaten a “sacred”<sup>59</sup> constitutional right. Additionally, as discussed earlier, significant political barriers await those seeking to solve the broader court cost issue at once. While some constitutional violations do get resolved all at once, more common is an iterative process that challenges one part of a problem, and then another, until a flat ruling becomes a foregone conclusion and thus more politically acceptable. This form of progress with many separate rulings along the same theme also makes the rulings more difficult to dismantle in the future. An example of this iterative process was the closely related sacred right to counsel. In 1942, the Supreme Court of the United States held in *Betts v. Brady* that states providing counsel to indigent defendants was constitutionally required in noncapital cases only if they presented “special circumstances.” Throughout the rest of the 1940s, the Court found “special circumstances” in about half of the cases they decided.<sup>60</sup> After 1950, the Court found “special circumstances” in every right-to-counsel case it decided until finally *Gideon v. Wainwright* came down in 1963, holding that the Sixth Amendment requires courts to provide attorneys for criminal defendants who cannot otherwise afford counsel.<sup>61</sup>

Therefore, if jury costs were to be ruled unconstitutional in Virginia, or dismantled legislatively, it could pave the way for broader solutions in the future. A more robust public understanding of their unconstitutionality could foment additional change. And the experience

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<sup>59</sup> Virginia Constitution refers to a jury trial as a “sacred” right. Virginia Constitution art. I, pt. XI.

<sup>60</sup> Sara Mayeux, “What *Gideon* Did,” *Columbia Law Review* 116 (2016), <http://columbialawreview.org/content/what-gideon-did/>.

<sup>61</sup> *Ibid*; *Gideon v. Wainwright*, 372 U.S. 335 (1963).



would also shed light on what pathways to solving constitutional violations work and which do not.

### **B. Constitutional Arguments Against Charging Jury Costs**

Given the steep amount of court costs that defendants are likely to face, as well as any fines and restitution for whatever crime they are accused of, there is no doubt that defendants have monetary concerns in mind when making decisions about how to proceed in their cases. A hefty, hundreds-of-dollars fee for exercising one's constitutional right to a jury trial is not insignificant, both to the indigent defendant and to the one of means.

#### *i. Deterrence*

It is therefore obvious that in many cases, the jury fee would deter a defendant from exercising their constitutional right to a jury trial, even if they technically have the means to make the expenditure. Deterring someone from exercising a constitutional right—what courts often call a “chilling effect”—is unconstitutional. While mostly frequently cited in First Amendment cases, the chilling doctrine can also be found in Sixth Amendment case law.<sup>62</sup> In *United States v. Jackson*, the Court ruled that a provision in the Federal Kidnapping Act, which allowed a defendant to receive the death penalty if convicted by a jury, but not if convicted by a judge or a plea agreement, was unconstitutional because it was “pursued by means that needlessly chill the exercise of basic constitutional rights.”<sup>63</sup> When defendants who plead or accept a bench trial are not death eligible, they are subtly coerced to forfeit their right to a jury. Though a penalty on a greater scale than a \$600 fee, the reasoning that “Congress cannot impose

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<sup>62</sup> Columbia Law Review Association, Inc., “The Chilling Effect in Constitutional Law,” *Columbia Law Review* 69, no. 5 (1969): 808-842.

<sup>63</sup> *United States v. Jackson*, 390 U.S. 570 (1968).

such a penalty in a manner that needlessly penalizes the assertion of a constitutional right,” surely translates to penalties that indigent defendants incur if they cannot afford their jury costs.

Interestingly, a 1981 *Northwestern Journal of Criminal Law & Criminology* article classified the situation in *Jackson* as an incidental, not intentional, deterrent, and mentioned jury fees as example of an unconstitutional incidental deterrent as well—“Regardless of the state’s revenues, it is constitutionally obligated to provide a jury. The jury tax in *Wright* should have been struck down. At a minimum, an entitlement should be free from government surcharge. One pays for the unusual, the extra, the exceptional—a constitutional right is none of these.”<sup>64</sup>

This deterrence argument has been one of the major bases for outlawing jury costs as unconstitutional in the states that have come to that conclusion. In one of the more recent cases, *State v. Moore*, the Supreme Court of Montana decided that \$1,447.50 in jury costs charged to the defendant was unconstitutional because:

“to require a defendant to pay costs of a jury trial poses a potential chilling effect on an indigent defendant. A defendant who cannot afford the potential cost associated with a criminal jury trial may forego a jury trial, even if a jury trial would be in a defendant’s best interest. As a result, courts cannot apply... ‘costs of jury service’ to indigent defendants without first scrupulously and meticulously determining the defendant’s ability to pay those costs. To apply the provision to a defendant who cannot afford the fee undermines his right to a jury trial.”<sup>65</sup>

The Supreme Court of Montana further solidified this opinion in *State v. Gable*, citing

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<sup>64</sup> The author also makes an interesting argument that if a state paid those who waived a jury, but neither charged nor paid those who took a jury, that *would not* be unconstitutional—“The very act of paying someone not to exercise his constitutional right makes the waiver exceptional. We expect to pay for services received and to be paid for services rendered. By providing a jury, the state is merely doing what it must. By waiving a jury, a defendant is doing what he need not, and what the government desires. If a state believes that the benefits of a jury do not justify its expense, it should try to save that expense by sharing the gain with those who will forego the benefits, not by taxing those who demand them.” Howard E. Abrams, “Systemic Coercion: Unconstitutional Conditions in the Criminal Law,” 72 *Northwestern Journal of Criminal Law & Criminology* 128 (1981),

<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6216&context=jclc>.

<sup>65</sup> *State v. Moore*, 365 Montana 13 (2012).

*Moore* as a reason that a defendant’s ability to pay must be taken into consideration when charging court-appointed attorney’s fees to convicted defendants, as to not undermine their right to an attorney.<sup>66</sup>

Courts spoke even more broadly as early as the late nineteenth century. Michigan recognized the unconstitutionality of jury fees, not only for *indigent* defendants, as far back as 1885. In *People v. Kennedy*, when the defendant was convicted of “selling intoxicating liquor to... a person in the habit of getting intoxicated” and charged \$24 for the cost of his jury, the Supreme Court of Michigan declared, “certainly it would be monstrous to establish a practice of punishing persons convicted of misdemeanors for demanding what the constitution of the state gives them—a trial by jury.”<sup>67</sup> The Supreme Court of Michigan was even more forthright in *People v. Hope* in declaring, “assessing costs against a defendant for a jury in a criminal case is not permissible under the laws of this state... Every person charged with a criminal offense has a constitutional right to a trial by jury.”<sup>68</sup> In *Hope*, this \$80 jury cost—the equivalent of approximately \$1,300 in 2017<sup>69</sup>—was attached to a misdemeanor reckless driving charge.<sup>70</sup>

The Supreme Court of Wyoming removed \$801.10 of jury costs in *Arnold v. State* as improper, citing the abundance of case law in other states, including Colorado, Michigan, and Minnesota, where:

“it has been suggested that to tax as costs the fees and expenses of the jury panel or even those of the trial jurors alone, amounts to coercion and infringes a constitutional safeguard. The right to trial by jury in criminal prosecutions is inviolate and may not be hampered either directly or indirectly... Conceivably that might be such a deterrent as would move even an *innocent person* to plead guilty in some cases and induce him to

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<sup>66</sup> *State v. Gable*, 380 Montana 101 (2015).

<sup>67</sup> *People v. Kennedy*, 58 Michigan 372 (1885).

<sup>68</sup> *People v. Hope*, 297 Michigan 115 (1941).

<sup>69</sup> *Ibid*; “Inflation Calculator,” DollarTimes, <http://www.dollartimes.com/inflation/inflation.php?amount=80&year=1941>.

<sup>70</sup> *Ibid*.

forego his constitutional right to a trial by jury.”<sup>71</sup>

Fifty years later, citing *Arnold*, the Supreme Court of Wyoming ruled much more bluntly in deciding “Wyoming’s case law is clear that ‘institutional costs,’ including jury fees, may not be assessed against a criminal defendant as ‘costs’ . . . Clearly, the reason for not allowing the assessment of jury fees against a criminal defendant is based upon the desire to protect the constitutional jury trial right.”<sup>72</sup> This 2008 case, *Bustos v. State*, involved a non-fatal stabbing subsequent to a bar fight and \$1,440 in costs, while a 1975 Wyoming case decided the same way involved \$234 of jury costs for driving under the influence of intoxicating liquor “after an evening of drinking rum and coke, laced with beer . . . [and running] his new Chevrolet Blazer off a mountain.”<sup>73</sup>

States have also cited this line of reasoning in outlawing jury fees legislatively. North Dakota Rule 23.1, adopted in 2006, states that “Jury expenses may not be assessed in a criminal case.” An attached explanatory note expounds, “This rule is intended to assure a defendant in a criminal case that the assessment of jury expense need not be a factor in deciding whether a trial by jury should be demanded. The assessment of jury expense in a criminal case may tend to ‘chill’ the constitutional right to a jury trial.”<sup>74</sup>

Oregon bridged statutory abolition and judicial abolition in Oregon Revised Statutes Annotated §161.665, which states that, “Costs do not include expenses inherent in providing a constitutionally guaranteed jury trial.” The Supreme Court of Oregon solidified that conclusion in 2002, holding that “juror fees fall within that statutory exception” based on “both the state and

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<sup>71</sup> *Arnold v. State*, 76 Wyoming 445 (1957).

<sup>72</sup> *Bustos v. State*, 180 P. 3d 904 (2008).

<sup>73</sup> *Johnson v. State*, 532 P. 2D 598 (1975).

<sup>74</sup> *Jury Expenses*, North Dakota R RCRP Rule 23.1.

federal constitutions.”<sup>75</sup>

*ii. Costs of Prosecution*

Another major line of case law that has led to the judicial abolition of jury costs in some states is that only “costs of prosecution” are chargeable to a defendant. Jury costs are part of the general maintenance of a constitutional judicial system, and are therefore not costs of prosecution but expenditures that should be borne by the state. In this line of reasoning however, there is a large disparity between states that follow that logic and states like Virginia. Virginia fails to adhere to even the underlying logic, that general expenditures of maintaining a justice system are not chargeable to individual defendants; hence, Virginia defendants are charged such costs as “courthouse maintenance fees”—a cost clearly not anywhere near the realm of costs of prosecution attributable to individual cases.

Florida is one of the states that consistently espouses this line of reasoning. In *Mickler v. State*, the Second District Court of Appeal of Florida found that “juror costs are an ancillary cost of prosecution that are not recoverable... they represent expenditures that must be made in order to maintain and operate the judicial system irrespective of specific violations of the law.”<sup>76</sup>

The Court of Appeals of New Mexico, too, found that jury costs were improperly assessed in *State v. Ayala*. Quoting *Gleckman v. United States*,<sup>77</sup> the judges deemed them “part of the general expense of maintaining the system of courts and the administration of justice, all of which is an ordinary burden of government.”<sup>78</sup>

Idaho, in *State v. Hanson*, referenced many state and federal cases that outlawed charging

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<sup>75</sup> *State v. Ferman-Velasco*, 333 Oregon 422 (2002).

<sup>76</sup> *Mickler v. State*, 682 So.2d 607 (1996).

<sup>77</sup> Case discussed in federal section. *Gleckman v. United States*, 80 F.2d 394 (8th Cir. 1935).

<sup>78</sup> *State v. Ayala*, 95 New Mexico 464 (1981).

jury costs, especially cases that ruled along cost-of-prosecution lines, in concluding that “We believe these are the better reasoned cases and that our statute should be so construed.”<sup>79</sup> Hanson was charged with reckless driving for going 45 miles per hour in a 25 mile per hour zone. He appealed for a *trial de novo* before a jury, contesting that speed cannot be the only factor in determining reckless driving, and was again convicted and fined \$150 with a fee of \$273 for jury costs. Hanson appealed to the Supreme Court of Idaho, and while the Court found that the charge of reckless driving was substantiated, it did throw out the \$273 of jury costs.

Arkansas, the Michigan of this line of case law, determined as far back as 1883 that “compensation of jurors, both in civil and criminal cases, seems to be a part of the current expenses of holding the Circuit Courts, and in the same category with fuel, lights, stationery, etc.”<sup>80</sup>

In *State v. Morehart*, the Supreme Court of Minnesota held that “we have no hesitation in saying that [juror] fees were not taxable against defendant. It has been the policy of the state to treat the expenses of criminal trials as county burdens.”<sup>81</sup> This case dealt with a situation where the state court used a panel of jurors to try multiple cases, but then tried to impose all of the jury fees on Morehart.<sup>82</sup>

This line of reasoning, too, has been used to end jury fees legislatively. South Dakota Code 23A-27-26 states that “costs shall not include items of *governmental expense* such as juror’s fees, bailiff’s fees, salaries and expenses of special agents, and reporter’s per diem.”

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<sup>79</sup> *State v. Hanson*, 92 Idaho 665 (1968).

<sup>80</sup> *Independence County v. Dunkin*, 40 Arkansas 329 (1883).

<sup>81</sup> *State v. Morehart*, 149 Minnesota 432 (1921).

<sup>82</sup> *Ibid.*

### *iii. No Statutory Authority*

A number of state courts have found the imposition of jury fees to be improper in specific cases because of a lack of statutory authority. In Maryland in particular, Rule 2-509 allows “special costs” to be assessed against defendants who remove jury trials within forty-eight hours of the scheduled date.<sup>83</sup> However, this rule applies only in the First, Second, and Fourth Judicial Circuits, and when a sentencing judge in the Seventh Circuit imposed the costs, the Court of Appeals reversed and stated the fees were improper.<sup>84</sup> Another Court of Special Appeals of Maryland found that this rule only properly applies to civil cases, and that “jury costs are not ‘court costs’” under MD Rule 4-353 that authorizes assessments of court costs against convicted defendants in criminal cases.<sup>85</sup>

In *People of the State of Illinois v. Kluck*, the Appellate Court of Illinois found that “the imposition of jury fees and expenses as a portion of court costs as a condition of probation was not authorized by statute and was in violation of defendant’s right to trial by jury” and that “the establishment of jurors’ fees and expenses as being a portion of the costs of a criminal prosecution is a matter for legislative enactment rather than judicial fiat.”<sup>86</sup>

The Supreme Court of Colorado, in *Saunders v. People* in 1917, decided that jury fees charged as \$118.50 must be reduced to \$5. The defendant did not ask for a jury—“the trial was forced upon her against her will by the prosecution”—and the only statutory authority for

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<sup>83</sup> “When a jury trial is removed from the assignment at the initiative of a party for any reason within the 48 hour period, not including Saturdays, Sundays, and holidays, prior to 10:00 a.m. on the date scheduled, the court in its discretion may assess as costs against a party or parties an amount equal to the total reimbursement paid to qualified jurors who reported and were not otherwise used. The clerk shall remit to the county the costs received pursuant to this section. The County Administrative Judge may waive assessment of these costs for good cause shown.” *Jury Trial—Special Costs in First, Second, and Fourth Judicial Circuits*, Maryland Rule 2-509.

<sup>84</sup> *Medley v. State*, 386 Maryland 3 (2005).

<sup>85</sup> *Gantt v. State*, 109 Md.App. 590 (1996).

<sup>86</sup> *People v. Kluck*, 70 Ill.App.3d 582 (1979).

charging jury fees in that particular case was a 1908 statute that stated, “A jury fee of five dollars shall be taxes as part of the costs of the suit in *each cause* tried by jury.”<sup>87</sup> Therefore, only \$5 maximum could be taxed against Saunders. It is worth noting that, in Virginia, jury fees are not charged if the defendant is willing to waive the jury trial but the prosecution or judge refuses.<sup>88</sup> In 1919, the Supreme Court of Colorado expanded its *Saunders* ruling in *McLean v. People*, by disallowing the jury fee altogether. This case, like Michigan’s foundational jury cost case, again involved “intoxicating liquors.”<sup>89</sup>

#### *iv. Federal Case Law*

Federal case law on jury costs has followed a combination of the above three lines of reasoning. The controlling federal statutes on court costs are codified at 28 U.S. Code § 1918(b) “District courts; fines, forfeitures and criminal proceedings,” which states that, “Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution,” and 28 U.S. Code § 1920 “Taxation of costs,” which enumerates the costs of prosecution as follows: “(1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials; (5) Docket fees; (6) Compensation of court appointed experts, compensation of interpreters, and

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<sup>87</sup> *Saunders v. People*, 63 Colorado 241 (1917).

<sup>88</sup> *Clerk to make up statement of whole cost, and issue execution therefor*, Virginia Code §19.2-336.

<sup>89</sup> The opinion also included a long tangent about how “all well-informed men” know that Jamaica ginger is an intoxicating liquor and it “makes a pretty good substitute for a drink of whisky.” *McLean v. People*, 66 Colorado 486 (1919).



salaries, fees, expenses, and costs of special interpretation services.”<sup>90</sup> Nowhere in the statutes are jury costs listed.

In *Gleckman v. United States* (1935), the Eighth Circuit Court of Appeals noted that, “in taxing as costs of the prosecution the items: ‘Jury fees,’ ‘jury mileage,’ ‘jury baliffs’ fees,’ ‘jury meals and lodging,’ [and] ‘jury professional services’... We do not find any authority for holding that such governmental expense can be taxed against one convicted of a criminal offense as ‘costs of the prosecution’ in the absence of statute or established local practice.”<sup>91</sup> The court found that the cost of prosecution “does not include the general expense of maintaining the system of courts and the administration of justice, all of which is an ordinary burden of government.” The court cites *United States v. Murphy*, where “the enumerated items could not be taxed as costs... and we are satisfied with the conclusions concerning taxation of costs there indicated,” as well as *U.S. v. Wilson*, and some of the major state court cases in Minnesota, Colorado, and Michigan.<sup>92</sup>

The Sixth Circuit, in *United States v. Ross* (1976), cited *Gleckman* in determining “no authority for taxing as costs the expenses of calling a jury in federal court.”<sup>93</sup> The Eighth Circuit in 2007 reaffirmed *Gleckman* as well, concluding that the District Court was without authority to impose jury costs against defendant Mink, as imposition of such costs is not authorized under §1920.<sup>94</sup> The precedent stating that courts are restricted by §1920 when choosing which types of costs to charge, was *United States v. Hiland*, which found that “the discretion granted by

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<sup>90</sup> *Taxation of costs*, 28 U.S. Code §1920.

<sup>91</sup> *Gleckman v. United States*, 80 F.2d 394 (8th Cir. 1935).

<sup>92</sup> *United States v. Murphy* (D.C.) 59 F.2d 734; *United States v. Wilson* (C.C.) 193 F. 1007; *State v. Morehart*, 149 Minnesota 432 (1921); *McLean v. People*, 66 Colorado 486 (1919); *Saunders v. People*, 63 Colorado 241 (1917); *People v. Kennedy*, 58 Michigan 372 (1885).

<sup>93</sup> *United States v. Ross* 535 F.2d 346 (6th Cir. 1976).

<sup>94</sup> *United States v. Mink* 476 F.3d 558, 561 (8th Cir. 2007).

§1918(b), [payment of the costs of prosecution] does not authorize federal district courts to order a criminal defendant to pay costs not enumerated in §1920.”<sup>95</sup> It is also worth noting that the attempted jury costs at contest in *Mink* were more than \$3,000.

#### *iv. Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment reads, “No State shall... deny to any person within its jurisdiction the equal protection of the laws.”<sup>96</sup>

While equal protection is usually equated with racial classifications, it has occasionally extended to wealth-based classifications in criminal law. In *Griffin v. Illinois*, the Supreme Court of the United States ruled that “in criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color.”<sup>97</sup> The case dealt with prepaid stenographer’s fees necessary for appellate review, and the Supreme Court found that “the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence, and could not be used as an excuse to deprive a defendant of a fair trial.” Jury costs are not prepaid in Virginia, but the inherent deterrent effect of facing a large fee for one type of trial over another can deprive indigent defendants from receiving a fair trial—one in which all options available to wealthy defendants are available to them. While “providing equal justice for poor and rich, weak and powerful alike, is an age-old problem,” “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>98</sup>

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<sup>95</sup> *United States v. Hiland*, 909 F.2d 1114, 1142 (8th Cir.1990).

<sup>96</sup> U.S. Const. amend. XIV, § 1.

<sup>97</sup> *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>98</sup> *Ibid.*

*v. Charging Someone to Exercise a Constitutional Right*

Even without proving deterrence, jury fees could be deemed unconstitutional by the mere fact that they are a method of charging someone to exercise a constitutional right. In *Murdock v. Pennsylvania*, the Supreme Court of the United States found that levying taxes on the exercise of First Amendment rights to speech, press, and religion, is unconstitutional. The case dealt with Jehovah's Witnesses who went door-to-door distributing literature and soliciting people to "purchase" certain religious books and pamphlets. The Witnesses were arrested under an ordinance that required solicitors to purchase a solicitor's license, which they failed to do. The Court held that, "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution."<sup>99</sup> Even though the Court maintained that proving deterrence was not necessary to invalidate the statute, it did find a deterrent effect in that a tax on a constitutional right "restrains in advance those constitutional liberties of press and religion, and inevitably tends to suppress their exercise."<sup>100</sup>

Another common example of charging people to exercise a constitutional right was the practice of poll taxes. Poll taxes were abolished in federal elections in 1964 by the Twenty-Fourth Amendment, and found unconstitutional in all elections along equal protection grounds by the Supreme Court in *Harper v. Virginia Board of Elections* two years later.<sup>101</sup> The Supreme Court held that, "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax... the

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<sup>99</sup> *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

<sup>100</sup> *Ibid.*

<sup>101</sup> *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

right to vote is too precious, too fundamental to be so burdened or conditioned.”<sup>102</sup> As argued above, jury costs violate the equal protection clause, and further, a defendant’s economic status has no relation to the type of trial that would be best for him to pursue. Likewise, the right to a trial by jury is also “too fundamental to be so burdened or conditioned,” and even more so than voting rights, considering that the right to vote was not actually found in the U.S. Constitution until the passage of the Fifteenth Amendment in 1870.<sup>103</sup>

The Supreme Court of New Hampshire actually ended their jury cost scheme along these lines in 1979:

“The New Hampshire Constitution guaranteed that citizens must ‘obtain right and justice freely, without being obliged to purchase it.’ The right to a jury trial for a criminal defendant is fundamental to our system of criminal justice... The Supreme Court of the United States, when confronted with a conflict between the fundamental right to vote and a State’s asserted interest in collecting a poll tax, struck down the tax as a violation of equal protection... Similarly, we conclude that a criminal defendant cannot be required to purchase a jury trial even for so nominal a sum as eight dollars.”<sup>104</sup>

Of course, in our imperfect justice system, defendants are charged for other rights besides jury fees. Court-appointed attorney fees are a controversial example. An NPR study found that forty-three states, plus the District of Columbia, charge defendants for the cost of their public defender.<sup>105</sup> The Supreme Court, in *Fuller v. Oregon*, found that this practice is constitutional as long as it does not pose a “manifest hardship” to indigent defendants, and numerous state and federal courts have concluded that public defender fees are only constitutional if they take into account a defendant’s ability to pay and have a waiver process for those to whom it would pose a

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<sup>102</sup> Ibid.

<sup>103</sup> “15<sup>th</sup> Amendment to the Constitution,” Library of Congress, <https://www.loc.gov/rr/program/bib/ourdocs/15thamendment.html>.

<sup>104</sup> *State v. Cushing*, 119 New Hampshire 147 (1979).

<sup>105</sup> Samantha Sunne, “Why Your Right To A Public Defender May Come With A Fee,” *National Public Radio*, May 29, 2014, <http://www.npr.org/2014/05/29/316735545/why-your-right-to-a-public-defender-may-come-with-a-fee>.

manifest hardship.<sup>106</sup> Virginia charges for appointed counsel and has no such waiver provisions.<sup>107</sup> Though, while probably still unconstitutional, Virginia at least has a cap on the amount of court-appointed counsel fees that can be charged to a defendant (\$120 for a misdemeanor).<sup>108</sup> There is no such cap for jury costs.

### C. Where Jury Costs Persist

#### i. Virginia

Virginia is unique in that it has quite a bit more case law relating to jury costs than its peer states that have also retained them. The Supreme Court of Virginia, as well as the Virginia Court of Appeals, have directly addressed the constitutionality of charging jury costs numerous times. They have allowed them in all cases.

The foundation case for Virginia opinions is *Souther v. Commonwealth*.<sup>109</sup> *Souther v. Commonwealth* is an 1851 case about whether “the killing of a slave by his master and owner, by willful and excessive whipping, is murder in the first degree, though it may not have been the purpose and intention of the master and owner to kill the slave.”<sup>110</sup> The General Court of Virginia found that the *per diem* allowance of jurors was properly chargeable as costs of prosecution against the defendant, and mileage fees for out-of-county jurors would be, too. Obviously no equal protection arguments were made and addressed in this case because these

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<sup>106</sup> Patriot Daily News Clearinghouse, “Charging prisoners fees, even for public defender, creates debtors’ prison,” *Daily Kos*, August 11, 2013, <http://www.dailykos.com/story/2013/8/11/1230307/-Charging-prisoners-fees-even-for-public-defender-creates-debtors-prison>; *Fuller v. Oregon*, 417 U.S. 40 (1974).

<sup>107</sup> Kevin Johnson, “Reports: Some states charge poor for public defenders,” *USA Today*, October 3, 2010, [http://usatoday30.usatoday.com/news/nation/2010-10-03-feesforjustice\\_N.htm](http://usatoday30.usatoday.com/news/nation/2010-10-03-feesforjustice_N.htm).

<sup>108</sup> *Compensation of court-appointed counsel*, Virginia Code §19.2-163.

<sup>109</sup> *Souther v. Commonwealth* (1851) 48 Va (7 Gratt) 673.

<sup>110</sup> *Ibid.*

principles were not added to the Constitution for another decade and a half. This raises the question of whether cases that refer seriously to “negro man slaves” should be properly used as precedent for modern cases, especially given the historical background of race in the criminal justice and court cost system.<sup>111</sup>

Half of a century later, the Supreme Court of Virginia enumerated its court cost philosophy in *Commonwealth v. McCue*, a case amply quoted in future jury cost litigation. The 1909 case stated,

“the character of the obligation thereunder of a person convicted of crime to the commonwealth for the costs incident to his prosecution and conviction was discussed and defined to be an exaction, simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the State and its violated laws. It is money paid, laid out and expended for the purpose of repairing the consequences of the defendant’s wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth... vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it.”<sup>112</sup>

This antiquely phrased philosophy still animates the Commonwealth’s court cost procedures. Technically, if it were not for criminals, Virginia would not need to train sheriffs and furnish a courthouse, so it is entirely reasonable—according to this analysis—to charge a portion of these expenses against convicted defendants.

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<sup>111</sup> Erik Eckholm, “Court Costs Entrap Nonwhite, Poor Juvenile Offenders,” *The New York Times*, August 31, 2016, [https://www.nytimes.com/2016/09/01/us/court-costs-entrap-nonwhite-poor-juvenile-offenders.html?\\_r=0](https://www.nytimes.com/2016/09/01/us/court-costs-entrap-nonwhite-poor-juvenile-offenders.html?_r=0); Stephen B. Bright, “Rigged: When Race and Poverty Determine Outcomes in the Criminal Courts,” *Ohio State Journal of Criminal Law* (2016), [https://kb.osu.edu/dspace/bitstream/handle/1811/79750/OSJCL\\_V14N1\\_263.pdf](https://kb.osu.edu/dspace/bitstream/handle/1811/79750/OSJCL_V14N1_263.pdf); 13<sup>th</sup>, Directed by Ava DuVernay, Netflix, 2016, <https://www.netflix.com/title/80091741>; A Washington and Lee Law Review Article titled “The New Peonage” posits that criminal justice debt is the modern version of a post-Civil War cycle of coerced labor for blacks. Tamar R. Birkhead, “The New Peonage,” 72 *Washington and Lee Law Review* 1595 (2015), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4476&context=wlulr>.

<sup>112</sup> *Commonwealth v. McCue* (1909), 109 Va. 302, 304, 63 S.E. 1066.

*Kincaid v. Commonwealth* is the controlling precedent that states that not only are jury costs taxable against a convicted defendant, but they “violate no constitutional right of the accused.”<sup>113</sup> In *Kincaid*, the Supreme Court of Appeals of Virginia highlighted the linearity of Virginia’s jury cost case law by citing *Commonwealth v. McCue* (1909)<sup>114</sup>, in citing *Angela v. Commonwealth* (1853)<sup>115</sup>, citing *Souther* (1851), to determine that “Neither is there merit in the third assignment that the taxing of the costs of the jury is an invasion of the constitutional right of the accused to a trial by jury” and that the issue had “been considered by our court in several cases” already.<sup>116</sup>

Virginia’s opinion of jury costs has not changed course since. In *Wicks v. City of Charlottesville* (1974), the Supreme Court of Virginia cited *Fuller v. Oregon*, *Commonwealth v. McCue*, and *Kincaid*, “where we held that to tax the cost of the jury to a defendant in a criminal case works no deprivation of a constitutional right.” The Court was “neither impressed nor persuaded by the argument that the possibility that at some future date a convicted criminal might be called upon to repay the state... ‘chills’ the exercise of his constitutional entitlement.”<sup>117</sup>

In 1978, The Honorable Charles E. King, Clerk of Gloucester County Circuit Court, asked for an Office of the Attorney General advisory opinion about what number of jurors may be included as part of the costs chargeable against a defendant convicted in a criminal jury trial.<sup>118</sup> The Virginia Attorney General issues official opinions that “represent the attorney general’s analysis of current law based on his thorough research of existing statutes, the Virginia

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<sup>113</sup> *Kincaid v. Commonwealth*, 200 Virginia 341 (1958).

<sup>114</sup> *Commonwealth v. McCue* (1909), 109 Virginia 302, 304, 63 S.E. 1066.

<sup>115</sup> *Angela v. Commonwealth* (1853), 10 Gratt. (51 Va.) 696, 701.

<sup>116</sup> *Kincaid v. Commonwealth*, 200 Virginia 341 (1958).

<sup>117</sup> *Wicks v. City of Charlottesville*, 215 Virginia 274 (1974).

<sup>118</sup> The Honorable Charles E. King, 1978-79 Virginia Op. Atty. Gen. 63 (1978).

and United States constitutions, and relevant court decisions,” but “ are not ‘rulings’ and do not create new law, nor do they change existing law.”<sup>119</sup> In response to this advisory opinion asking for a specific number of jurors, Attorney General John Marshall Coleman responded “all,” citing *Kincaid, Angela, Souther, McCue, and Wicks*.<sup>120</sup>

The most recent Virginia case challenging jury costs was *Ohree v. Commonwealth* (1998).<sup>121</sup> In this case, the Court of Appeals of Virginia concluded,

“the imposition of the cost of providing a jury does not impose an excessive or unnecessary burden upon the exercise of the right of a jury trial under the United States Constitution. *See Wicks*... Moreover, the Supreme Court of Virginia has held that a criminal defendant’s constitutional right are not violated by including in the expenses incident to the prosecution the cost of the jury if the defendant exercises his or her right to a jury trial *See Kincaid*... Accordingly, we find no error in the trial court’s refusal to find that the jury fee was an unconstitutional burden upon Ohree’s right to a jury trial.”

While in line with the direction of Virginia case law, *Ohree* also presents the first example of discontent with this prevailing standard. Justice Benton, in dissent, uses *Fuller v. Oregon* against the imposition of jury costs in this case. This is opposed to how *Fuller* is usually cited to state that fees *can* be charged for the exercise of constitutional rights against convicted defendants. Because *Fuller* contained the requirement that charging court appointed attorney’s fees was only constitutional because the defendant’s ability to pay *was* taken into consideration, and because the defendant’s ability to pay *was not* taken into consideration in Ohree’s case, the jury costs imposed were unconstitutional.<sup>122</sup> *Ohree* was not appealed to the Supreme Court of Virginia and remains the last appellate opinion on the issue.

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<sup>119</sup> “Official Opinions,” Attorney General, <http://ag.virginia.gov/citizen-resources/opinions/official-opinions>.

<sup>120</sup> The Honorable Charles E. King, 1978-79 Virginia Op. Atty. Gen. 63 (1978).

<sup>121</sup> *Ohree v. Commonwealth*, 26 Va.App. 299 (1998).

<sup>122</sup> *Ohree v. Commonwealth*, 26 Va.App. 299 (1998) Benton, J. dissenting.



*ii. Other States That Have Considered Jury Costs Judicially and Ruled Them Constitutional*

Virginia is in good company with a few other states that have considered jury costs judicially and ruled them to be constitutional. In a 1911 Wisconsin Supreme Court criminal libel case, the imposition of jurors' fees was challenged and upheld with the reasoning that because the defendant did receive a jury in the case, "he cannot properly complain of the denial of any constitutional right in that respect." The Court also noted that "The subject of costs and the items thereof are largely matters of legislative discretion, and... it is certainly competent for it to say that, in addition to other costs, the defendant, if convicted, shall pay the fees of the jury."<sup>123</sup>

The Supreme Court of Missouri decided similarly in the 1850 case, *State v. Wright*, deciding that "the State has performed its duty"—guaranteed the Sixth Amendment right—"when its legislation had furnished the forum and machinery"—provided the jury—and that a \$3 jury fee on a conviction of practicing law without a license did not "invade or violate... any of the great guarantees."<sup>124</sup>

The Court of Appeals of Georgia addressed the constitutionality of jury costs in *Martin v. State* and noted, "as to the argument that imposition of costs will have a chilling effect on the exercise of the accused's right to a jury trial, we can only observe that laws allowing assessment of costs against convicted criminals have been on the books since 1863" (the case was decided in 1988).<sup>125</sup> The Court of Appeals of Georgia essentially reasoned that because the state has been taking part in the accused unconstitutional practice for so long, it could not be unconstitutional.

In 1961, the Supreme Court of Kansas, like Virginia, cited a 100-year-old case to uphold the imposition of jurors' *per diem* fees. However, the justices indicated that, unless the jury was

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<sup>123</sup> *State v. District Court of Milwaukee County*, 145 Wisconsin 138 (1911).

<sup>124</sup> *State v. Wright*, 13 Missouri 243 (1850).

<sup>125</sup> *Martin v. State*, 189 Ga.App. 483 (1988).

called specifically for the trial in question, it would likely be improper to charge juror *mileage fees* against the defendant.<sup>126</sup>

### *iii. States That Have Considered Jury Costs Judicially and Upheld Them Without Addressing Constitutionality*

Many states have upheld jury costs by implication in cases where the imposition of the fee was addressed, but not from a constitutional perspective. For example, in *Smith v. City of Louisville*, the Supreme Court of Mississippi, interpreting Section 1634 of the Code of 1942, found that “a jury-tax of three dollars shall be collected as costs... in effect, mak[ing] it an item or part of the costs, just as the fees of the clerk, sheriff, and witnesses constitute a part of the costs.”<sup>127</sup> There have been many cases in this vein, essentially deciding when, where, and how the legislature intended to charge this fee, without the challenge of whether it is constitutional under the Sixth Amendment.

The Supreme Court of Appeals of West Virginia found in *State v. Myers* that, in interpretation of West Virginia Code 52-1-17(c), jury fees were included and chargeable against the defendant.<sup>128</sup> However, only the dissent by Justice Albright discussed the constitutionality argument.<sup>129</sup> The defendant’s conviction had been reversed and remanded on appeal, then, in reprosecution, the defendant pled guilty. The Court majority found that the jury fee charged for the later overturned conviction could still be upheld and charged against the defendant, while Justice Albright likened that logic to “making me pay for a paint job on my car, when the paint

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<sup>126</sup> *State v. Thomson*, 188 Kansas 171 (1961).

<sup>127</sup> *Smith v. City of Louisville*, 215 Mississippi 213 (1952).

<sup>128</sup> *State v. Myers*, 602 S.E.2d 796 (W. Va. 2004).

<sup>129</sup> *State v. Myers*, 602 S.E.2d 796 (W. Va. 2004), Albright, J. dissenting.

shop used the wrong color. This would not be fair to me, and the majority opinion’s result is not fair to Mr. Myers.”

*iv. States With a Cap on the Amount That May be Charged*

Among the states that continue to impose jury fees, some at least have a cap on the maximum amount that may be charged. Some, such as Washington state, are statutory, limiting the jury demand charge to \$125 for a jury of six, or \$250 for a jury of twelve.<sup>130</sup> This cap was affirmed judicially in *State v. Morena*, in which it was interpreted that the \$250 guideline set by this statute was, in fact, a firm cap, and the imposition of a \$5,780.50 jury fee charged to the defendant was improper.<sup>131</sup>

Indiana’s Court of Appeals ruled along similar lines, finding in *Jones v. State* that the imposition of \$1,322.60 in jury fees was improper because Indiana Code § 33-37-5-19 states that “[t]he clerk shall collect a jury fee of two dollars (\$2) in each action in which a defendant is found to have committed a crime, violated a statute defining an infraction, or violated an ordinance of a municipal corporation,” and therefore caps the amount that may be charged in jury fees to \$2.<sup>132</sup>

*v. Other State Procedures*

Not all states have clear case law or statutes pertaining to the imposition of jury costs. However, every state has some set of procedures that influences jury fees favorably or unfavorably. However, the states that continue to charge them usually base their conclusions on old or outdated cases, or in situations where the fees upheld as constitutional are minimal. Many

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<sup>130</sup> *Various fees collected—Not subject to division*, Washington State Legislature, RCW 36.18.016.

<sup>131</sup> *State v. Morena*, 173 Wn. App. 479 (2012).

<sup>132</sup> *Jones v. State*, 938 N.E.2d 1248 (Ind. Ct. App. 2010).

of the states where jury costs are still charged have yet to address jury costs in the context of the modern system of huge and rising court costs and their effect on indigent defendants.

### III. Epilogue: Attempting to Abolish Jury Costs in Virginia

Jury costs present very real social and constitutional concerns. However, the political ambivalence around these issues raises the question of the efficacy of attempts to end the practice. Criminal justice reform has been presented as a bipartisan issue at some times,<sup>133</sup> other times, it is presented as a “hard on crime” against “soft on crime” issue that breaks along party lines. In the 2016 presidential campaign, candidate Hillary Clinton listed criminal justice reform in her platform, stating, “People are crying out for criminal justice reform.”<sup>134</sup> Now-President, Donald Trump, did not mention criminal justice reform at all in his presidential platform,<sup>135</sup> and wrote in his 2000 book, *The America We Deserve*, “We can have safe streets. But unless we stand up for tough anticrime policies, they will be replaced by policies that emphasize criminals’ rights over those of ordinary citizens.”<sup>136</sup>

Most criminal justice reform happens at the local level, though, and even states that voted for Trump continue to welcome criminal justice reform.<sup>137</sup> In the past decade, “red states” such as Texas, Georgia, Kentucky, Mississippi, Oklahoma, and South Carolina have adopted a range

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<sup>133</sup> Mark Holden, “Criminal justice reform is ripe for bipartisan achievement,” *The Hill*, January 3, 2017, <http://thehill.com/blogs/congress-blog/judicial/312492-criminal-justice-reform-is-ripe-for-bipartisan-achievement>.

<sup>134</sup> “Criminal justice reform,” Hillary for America, <https://www.hillaryclinton.com/issues/criminal-justice-reform/>.

<sup>135</sup> German Lopez, “Donald Trump wants to bring back the ‘tough on crime’ policies that helped cause mass incarceration,” *Vox*, September 21, 2016, <http://www.vox.com/2016/5/25/11737264/donald-trump-criminal-justice-republican-president>.

<sup>136</sup> Donald Trump, *The America We Deserve* (Renaissance Books, 2000).

<sup>137</sup> German Lopez, “The case for optimism on criminal justice reform — even under President Trump,” *Vox*, November 10, 2016, <http://www.vox.com/policy-and-politics/2016/11/10/13580644/president-trump-criminal-justice-2016>.

of progressive initiatives.<sup>138</sup> Virginia has been called upon numerous times to follow suit. “Across the nation, we have seen the states lead on issues of criminal justice reform. Virginia is now poised to join the ranks of other largely conservative states who have increased public safety, taken strides to save taxpayer money, and ultimately, have created a more restorative system of justice that upholds the dignity of all involved,” said Craig DeRoche, Senior Vice President of Advocacy and Public Policy of the Prison Fellowship.<sup>139</sup> A Richmond *Times-Dispatch* editorial referenced some of the polls that the Prison Fellowship conducted—75 percent of Virginia voters agree that the prison population is costing us too much money and that our prisons should prioritize rehabilitation, for example—and called upon Congress in August 2016 to “make [smart, sensible, and responsible criminal justice reform] happen next month. For the sake of my generation — and future generations — they shouldn’t delay any longer.” As alluded to earlier, almost all criminal justice reform initiatives in the Virginia legislature in the past year have failed.<sup>140</sup>

Therefore, as part of my honors project, I attempted to gain insight into how a practical legislative or judicial challenge to jury costs would fare.

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<sup>138</sup> Brandon L. Garrett, “Conservatives Are Leading the Way as States Enact Criminal Justice Reform,” *Slate*, March 31, 2017, [http://www.slate.com/articles/news\\_and\\_politics/trials\\_and\\_error/2017/03/conservatives\\_could\\_help\\_derail\\_trump\\_s\\_tough\\_on\\_crime\\_policies.html](http://www.slate.com/articles/news_and_politics/trials_and_error/2017/03/conservatives_could_help_derail_trump_s_tough_on_crime_policies.html).

<sup>139</sup> *Virginia Public Opinion Survey on Criminal Justice*, Prison Fellowship, <https://www.prisonfellowship.org/about/justicereform/legislation/state-issues/virginia-3/>.

<sup>140</sup> Travis Fain, “House kills criminal justice reforms,” *Daily Press*, February 15, 2017, <http://www.dailypress.com/news/politics/dp-nws-crime-justice-reform-bills-20170215-story.html>.

*i. Court-Driven Solutions*

As individual Virginia Circuit Courts retain considerable discretion over the costs they may impose, their amounts, and the procedures if one is unable to afford the costs, I reached out to Virginia clerks' offices to get their perspective on jury costs.

George E. Schaefer, Clerk of the Circuit Court of Norfolk, Virginia, maintains that court costs are legislative issues, thereby denying responsibility for the results of their court's procedures. He was aware that Norfolk charges jury costs at a rate of \$360 per day (a figure he likely has considerable control over), but he stated that if court appointed attorney's fees can be charged, so can jury costs.<sup>141</sup> Interestingly, according to a 2015 *Virginian-Pilot* article, he was happy to take responsibility for recouping millions in delinquent court fees by garnishing wages, and went further to say, "and we've got other work to do."<sup>142</sup>

In reaching out to general Clerk's Office staff at the Fairfax County Circuit Court—the way a defendant would to receive information about court cost procedures—the staff expressed extreme confusion in figuring out whether there is the possibility to present a pre-trial waiver of jury costs, or a waiver of court costs entirely, in their jurisdiction. After being transferred to five different individuals, the office concluded that there are no waiver processes for jury costs or court costs in general but it may be a good idea.<sup>143</sup> This call just showed how confusing and frustrating it can be for defendants who are struggling to understand their options, likely after receiving a large a large bill for court fees they are unable to afford.

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<sup>141</sup> George Schaefer, e-mail message to author, October 17, 2016.

<sup>142</sup> Gary A. Harki, "Norfolk turns to automation to collect late court fees," *The Virginian-Pilot*, January 14, 2015, [http://pilotonline.com/news/local/crime/norfolk-turns-to-automation-to-collect-late-court-fees/article\\_ff678ad5-1b30-5adf-93d4-d17d195813d6.html](http://pilotonline.com/news/local/crime/norfolk-turns-to-automation-to-collect-late-court-fees/article_ff678ad5-1b30-5adf-93d4-d17d195813d6.html).

<sup>143</sup> Fairfax Circuit Court Clerk's Office, phone call with author, 2015.

## *ii. Legislative Solutions*

In reaching out to Virginia state legislators, I was met with about a fifteen percent response rate. No Republican legislators responded at all. One of these Republican legislators was Delegate Richard L. Morris of Suffolk, currently personally indicted on two felony and two misdemeanor charges, who introduced changes to Virginia's discovery rules this term after he was "surprised how stacked the deck is against criminal defendants" when tending to his own criminal case.<sup>144</sup> If he is to elect a jury when his case is heard in May 2017, because he continues to maintain his innocence<sup>145</sup>, jury costs could become personally relevant to him and he may become sympathetic to their abolition as he became to rules of discovery reform. To note, Morris' discovery reform bill, HB 2452, was killed in the House Courts of Justice Committee.<sup>146</sup> A larger discovery reform bill headed by William M. Stanley, Jr., a Republican state senator, and backed by defense attorneys, the American Civil Liberties Union, and the Mid-Atlantic Innocence Project passed the Senate, but was then killed in the same House committee as Morris's.<sup>147</sup>

Among Democratic legislators who may be more ideologically aligned with court cost reform, I found that the 2016 election took a huge toll. Besides the presidential election outcome, the Virginia state elections saw Democrats once again losing the Senate, where there was a possibility to prevail this election cycle, and the continuation of a 2/3 Republican majority in the

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<sup>144</sup> Travis Fain, "Virginia General Assembly session wrap: A look at what happened," *Daily Press*, February 26, 2017, <http://www.dailypress.com/news/politics/dp-nws-session-rundown-sunday-20170225-story.html>.

<sup>145</sup> Staff Reports, "Morris won't seek re-election," *Suffolk News-Herald*, March 1, 2017, <http://www.suffolknewsherald.com/2017/03/01/morris-wont-see-re-election/>.

<sup>146</sup> *Discovery in criminal cases; duty to provide*. HB 2452. 2017 Session.

<sup>147</sup> Fain, "House kills criminal justice reforms"; *Discovery in criminal cases; duty to provide*. SB 1563. 2017 Session.

House.<sup>148</sup> Therefore, what can be said of senators and delegates who may have been sympathetic to my cause, yet ignored my outreach, is that the public is paying attention to other matters, so their legislators' efforts are as well.

In meeting with the legislative aide for a local Democratic state senator, who prefers to remain anonymous, he explained that he and the senator are completely sympathetic to my cause, and see jury costs as analogous to not prepaying postage for absentee ballots, another Virginia practice. When people have to pay postage to mail in absentee ballots, is that not a poll tax? However, the aid also described the difficulty in the Virginia General Assembly, which is that if the Speaker of the House, Republican William J. Howell, is against a bill, it will not pass. Likewise, if the Sherriff's Association is against a bill, it is dead on arrival. In describing places where outcomes may be better, he stated that lobbyists are sometimes able to get things to work, and that the Senate has much better outcomes for Democratic initiatives because they only need a couple of crossover votes.<sup>149</sup>

Understandably, those with more clout will likely have better response rates. However, it appears as though Virginia needs to bridge its gaping political divide for even those with the most power and influence to prevail on their initiatives. It may therefore be of more use to seek judicial outlets to resolve the jury cost issue, even if some would prefer the legislature to resolve it by removing just three words from the Virginia code.<sup>150</sup>

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<sup>148</sup> Alan Suderman, "Va. Senate races to watch on election day," *Daily Press*, October 9, 2015, <http://www.dailypress.com/news/politics/dp-va-senate-races-to-watch-on-election-day-20151009-story.html>; The Associated Press, "Latest: Democrat concedes 22nd District Senate race," *wtop*, January 10, 2017, <http://wtop.com/virginia/2017/01/latest-elections-official-not-enough-ballots-in-lynchburg/>.

<sup>149</sup> Meeting with legislative assistant for Virginia state senator who prefers to remain anonymous, in discussion with author, November 28, 2016.

<sup>150</sup> "Any jury costs." *Amounts to be added; judgment in favor of the Commonwealth*. Virginia Code §17.1-275.5(7).



### *iii. Judicial Outreach*

The idea for this honors project was initiated at the Fairfax Public Defender's Office during my internship in Fall 2015. I was tasked with preparing a schedule of court costs so that the attorneys could let their clients know what the court costs were anticipated to be if they decided to plead guilty or go to trial. In gathering information for this listing, I discovered jury costs and developed the immediate opinion that they are unconstitutional. Every attorney I spoke with in the office agreed.<sup>151</sup>

During this time as well, I had the opportunity to speak with Fairfax Circuit Court Judge Robert J. Smith about jury costs. Judge Smith presides over Misdemeanor Term Day, when defendants set the date for their trials, and begins the proceedings by giving a disclaimer about jury costs. He tells the defendants that it is their absolute right to have a jury trial and that he is not trying to dissuade them from exercising that right. He informs them of the large jury fee in order to help them make a decision, and then calls defendants by name and asks them if they would like to set their case for a jury trial or a bench trial.

Judge Smith told me that his disclaimer about jury costs is a decision that arose out of a fundamental difference between him and his predecessor about the role of the court. According to Judge Smith, his predecessor was primarily focused on moving the docket and would try to dissuade defendants from exercising their right to a jury, while Judge Smith believes that justice is more important and it is not his job to talk people out of a jury. That is the reason that he tells people he is not trying to dissuade them from exercising their right to a jury, but simply giving them helpful information; however, I think the disclaimer may actually have the unintended effect of exacerbating the problem. Judge Smith agreed that it could be a constitutional issue if

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<sup>151</sup> Fairfax Office of the Public Defenders, in discussions with author, 2015.

this disclaimer, or the fee in general, did have the effect of deterring defendants from exercising their right to a jury, but one would need experts and statistics to prove this, which he noted that, unfortunately, indigent defendants obviously do not have.<sup>152</sup> Judge Smith also remarked that jury costs should be capped like attorney fees. He noted that the County probably incurs more expenses during the course of a jury trial than it charges for, so as long as the County is not going to recoup all of its costs anyway, it might as well limit the recoupment to what indigent defendants can actually afford.

Other attorneys I spoke with tended to agree with the unconstitutionality arguments related to jury costs, but some had more practical concerns. The head of a public defender office in central Virginia stated that, once a case is over, the payments are between a defendant and a clerk, and the attorney appointed to defend them really has no requirement to attend to, or entitlement over, the legal arguments behind the post-conviction administrative costs.<sup>153</sup>

The most passionate attorney I spoke with pointed out many flaws in Virginia's court cost scheme. He was vehement that the Virginia legislature is never going to do away with jury costs legislatively because Virginia's criminal justice system is funded by court costs and Virginia would not want to use tax revenue to pay these fees. He claimed that if these issues were to go away legislatively, it would have to be through an overhaul of Virginia's court cost system, which is not going to happen. He cited an 1867 case in which it was decided that there was no constitutional harm by charging defendants to restock coffers, but noted that the 14<sup>th</sup> Amendment was not passed until 1868, so this was not based on the federal constitution.<sup>154</sup> He mentioned in other states that judiciaries have decided that they are not the taxing authority of

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<sup>152</sup> Robert J. Smith, in discussion with author, 2015.

<sup>153</sup> Kathy Ortiz, in discussion with author, 2016.

<sup>154</sup> David Baugh, phone call with author, 2017.

the state, in cutting down on a number of court costs enacted by the legislature.

This attorney commented on the prospect of overturning *Ohree*, of which he said the procedure he would recommend would be to have a judge refuse to waive jury costs and have the case proceed without a jury, claiming that the waiver of the jury was involuntary, and thus unconstitutional because of the jury costs. On the new Virginia Supreme Court Rule 1:24<sup>155</sup>, he appreciated that the Virginia Supreme Court was acknowledging a problem but also addressed the concern that there is no real way to implement the new rules and the courts are still using their own discretion in assessing whether a person is indigent; as well, “ability to pay” is dynamic. He noted that in Scandinavia, fines are determined based on income, which led to a €54,000 traffic ticket in an interesting case.<sup>156</sup>

Passionate about *Stinnie* as well, he hoped that it would become the starting point for nipping away at fines and costs, especially because taking away driver’s licenses is like taking away food when defendants can then not go to work to make required income. In response to counterarguments that defendants should be paying costs and fees, because otherwise who would, he advocated not prosecuting those the state cannot afford to prosecute. He also noted that if Virginia were to reinstate parole—abolished two decades ago by Governor George Allen—Virginia would save half a billion dollars in the first year, so the money is there if Virginia decides to find it.<sup>157</sup> In conclusion, he said that Americans do not have a sense of

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<sup>155</sup> Rule 1:24 discussed on page 13.

<sup>156</sup> Joe Pinsker, “Finland, Home of the \$103,000 Speeding Ticket,” *The Atlantic*, March 12, 2015, <https://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484/>.

<sup>157</sup> Jenna Portnoy, Laura Vozzella, and Matt Zaposky, “McAuliffe creates commission to study bringing parole back to Virginia,” *The Washington Post*, June 24, 2015, [https://www.washingtonpost.com/local/virginia-politics/mcauliffe-creates-commission-to-study-bringing-parole-back-to-virginia/2015/06/24/1a10c106-1a7b-11e5-bd7f-4611a60dd8e5\\_story.html?utm\\_term=.6e0ace54218e](https://www.washingtonpost.com/local/virginia-politics/mcauliffe-creates-commission-to-study-bringing-parole-back-to-virginia/2015/06/24/1a10c106-1a7b-11e5-bd7f-4611a60dd8e5_story.html?utm_term=.6e0ace54218e).

justice, but they have a sense of injustice, and when these issues come to the fore, Americans will smell injustice.<sup>158</sup>

Other judicial targets where the issue of jury costs would surely fall within elements of their platform include the ACLU and the Legal Aid and Justice Center. While these organizations did not respond to my request to discuss jury costs, they are certainly part of the system that, if they (courts, legislators, attorneys, nonprofits, lobbyists) came together, would have the best chance of resolving this issue.

Overall, I found a great deal of concern for the constitutionality of jury costs in the legal sector, and could foresee another type of *Ohree* suit being the method to outlaw jury costs. However, both in my research and in my outreach, I found the efficacy of the judiciary to depend highly on the circumstances of the moment. When a large case such as *Stinnie* is consuming the resources of Virginia's criminal justice organizations, there is still sympathy toward, but not necessarily attention to, other matters such as jury costs. As well, the lessons of *Ohree* and *Stinnie* teach that a challenge of this type has to be done in the correct forum, presented the correct way, with a willing defendant, and have an element of luck with the judge it is assigned.

### Conclusion

The point comes in every criminal case where a defendant asks their attorney to evaluate the benefits of a jury trial and inevitably finds out about jury costs. However, the reality is that these conversations hardly ever take place outside of the courtroom, and no matter how effectively one can envision themselves in another's shoes, judges and legislators who are making decisions about whether to keep or get rid of jury costs are those who will never have to

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<sup>158</sup> David Baugh, phone call with author, 2017.

pay them. Even amidst the broader court cost or criminal justice reform conversation, jury costs are often overlooked.

Not every component of every criminal justice issue needs the limelight, but trouble occurs when the problems slipping through the cracks are severe constitutional violations. Jury costs present a clear chilling of one's constitutional right to a jury trial and should be properly paid for by the state or locality furnishing this essential component of the criminal justice system and Constitution.

The fact that jury costs continue to be charged and upheld, and that few in Virginia seem inclined to take action about it, begs the question of how many other constitutionally impermissible practices are happening in local courts and not receiving the attention they deserve. Social and political concerns can be hot-button issues, and jury costs certainly encompass some of this sentiment, but they go beyond as a constitutional concern—something that there is a clear judicial process for remedying.

I hope that my research raises awareness about jury costs and that Virginia and other states that also continue to charge jury costs are able to resolve this violation in the context of broader criminal justice reform. However, I recommend that attorneys and their clients, who feel their constitutional rights being violated when they waive a jury trial because of the high fee, continue to make the argument that the waiver was involuntary and jury costs are unconstitutional. “Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability, without regard to economic status.”<sup>159</sup> Jury trials need to be equally

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<sup>159</sup> Lewis Powell, Jr., U.S. Supreme Court Justice.

accessible, and have equal aftereffects to both those with means and those without to remain within the confines of the Constitution. And, yes, one hundred and thirty-two years later, it is still “certainly... monstrous to establish a practice of punishing persons... for demanding what the constitution... gives them—a trial by jury.”<sup>160</sup>

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<sup>160</sup> *People v Kennedy*, 58 Michigan 372 (1885).

Appendix I: Fairfax Circuit Court Estimated Felony Costs

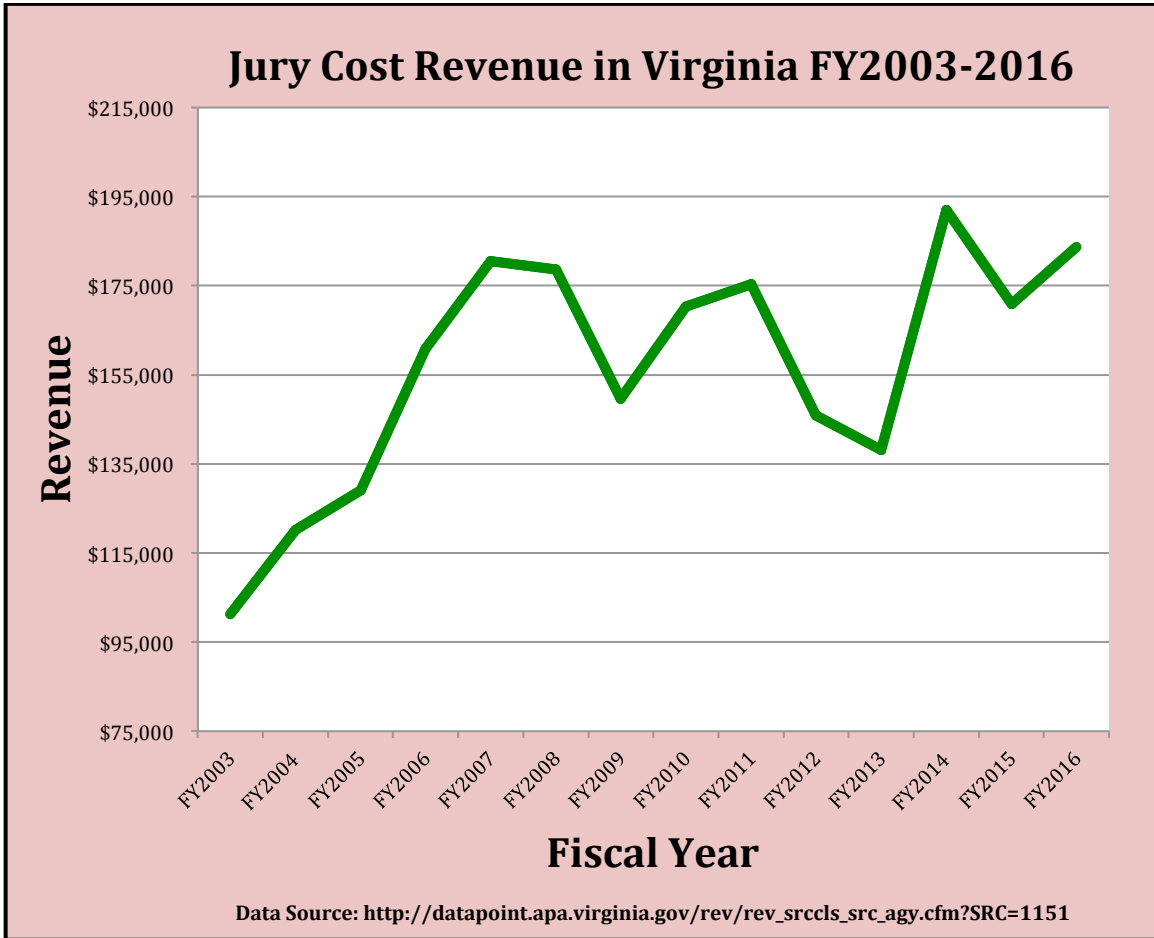
**FAIRFAX CIRCUIT COURT – CRIMINAL DIVISION**

**Estimated Felony Costs**

State Fine		VARIES
Jury Costs	§§17.1-275.5 (7) & 17.1-618	\$600/\$360
Court Appointed/Public Defender	§19.2-163	VARIES
Certificate of Analysis Fee	§§17.1-275.5, 19.2-183, -187.1	\$ 50.00
Drug Offender Fee	§17.1-275.5 (8)	\$150.00
DNA Sample	§19.2-310.2	\$ 53.00
	<i>All Felony convictions plus the following Misdemeanor convictions: §§16.1-253.2, 18.2-60.3, 18.2-60.4, 18.2-67.4, 18.2-67.4:1, 18.2-67.4:2, 18.2-67.5, 18.2-102, 18.2-121, 18.2-130, 18.2-370.6, 18.2-387, 18.2-387.1, 18.2-479.1</i>	
DUI Fee- <i>Charge for each of the following convictions:</i>	§16.1-69.48:1.01	\$100.00
	<i>§§18.2-36.1, 18.2-51.4, 18.2-266, 18.2-266.1, 18.2-268.3, 46.2-341.24, 46.2-341.26:3</i>	
HIV Testing	§18.2-62	VARIES
Trauma Center Fund - Multiple DUIs	§18.2-270.01	\$ 50.00
Fixed Felony Fee	§17.1-275.1	\$375.00
	<i>Sentencing/Supervision, Forensic Lab, Court Reporter, Witness Expense, Victim/Witness, Drug Enforcement, Criminal Injury Comp Fund, Commonwealth Attorney, Regional Training Academy Fund, Sheriff/Warrant Fee, Courthouse Maintenance Fund, Circuit Court Clerks Fee</i>	
Fixed Felony Revocation Fee	§17.1-275.3	\$158.00
	<i>Court Reporter, Witness Expense, Victim/Witness, Drug Enforcement, Criminal Injury Comp Fund, Commonwealth Attorney, Regional Training, Academy Fee, Sheriff/Warrant Fee, Circuit Court Clerks Fee</i>	
Fixed Fee-Reduced to Misdemeanor	§17.1-275.2	\$227.00
	<i>Sentencing/Supervision, Forensic Lab, Court Reporter, Witness Expense, Victim/Witness, Drug Enforcement, Criminal Injury Comp Fund, Commonwealth Attorney, Regional Training Academy Fee, Sheriff/Warrant Fee, Courthouse Maintenance Fund, Circuit Court Clerks Fee</i>	
Fixed Fee-Reduced to Misdemeanor-Revocation	§17.1-275.4	\$114.50
	<i>Witness Expense, Victim/Witness, Drug Enforcement, Criminal Injury Comp Fund, Commonwealth Attorney, Regional Training Academy Fee, Sheriff/Warrant Fee, Circuit Court Clerks Fee</i>	
Electronic Summons System Fee	§17.1-279/4-22-6 (Local Ordinance)	\$ 5.00
Internet Crimes Against Children Fund	§17.1-275.12	\$ 15.00
Criminal Justice Academy	§9.1-106 (Local Ordinance)	\$ 1.00
Sheriff's Processing Fee - Per Sentencing	§15.2-1613.1 (Local Ordinance)	\$ 25.00
Courthouse Security Fee	§53.1-120 / 26-4 (Local Ordinance)	\$ 10.00
Extradition Costs (Court Ordered)	§17.1-275.5 (3)	VARIES
Psychiatric Evaluation Costs	§17.1-275.5 (4)	VARIES
Transcript Fees	§17.1-275.5 (2)	VARIES

Web Felony Costs July 1, 2015 - [http://www.fairfaxcounty.gov/courts/circuit/pdf/felony\\_costs.pdf](http://www.fairfaxcounty.gov/courts/circuit/pdf/felony_costs.pdf)

Appendix II: Jury Cost Revenue in Virginia





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