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*Debtors' Prison Litigation and Other  
Poverty-Based Constitutional Challenges*

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## Introduction

There is a growing trend of poverty-based constitutional challenges to state criminal justice policies around the country. These challenges largely focus on three types of policies: (1) so-called “debtors’ prison” policies that convert criminal fines or fees into jail time if the defendant fails to pay; (2) private probation systems that require fees and revoke probation for failure to pay those fees; and (3) monetary bail schedules that set a presumptive bail amount based on an arrestee’s offense. Although the policies are different, the constitutional claims and available defenses are often the same. This presentation will describe the challenges, summarize the key precedents, and identify potential defenses.

The three different challenges are typically pled as a combined Equal Protection and Due Process claim on behalf of a putative class of plaintiffs. The lead Supreme Court precedents in this area do not prohibit any of these policies, but instead hold simply that courts must conduct a reasonable inquiry into the reasons for the defendant’s failure to pay. Where the failure to pay is willful or where the defendant has not made bona fide efforts to obtain the resources to pay the required amount, then imprisonment is constitutional. But where an individual has made bona fide efforts and is unable to pay solely because of legitimate indigency, then the court must consider alternative measures. If those alternative measures prove insufficient, the indigent individual may still be imprisoned.

There are a number of threshold defenses to these challenges that are familiar to municipal attorneys and that will depend, in part, on the unique facts of each case. Because the cases are typically brought as constitutional challenges under 42 U.S.C. § 1983, the normal § 1983 municipal liability defenses are available. Often times, a municipality can dispute whether the plaintiffs have named the proper defendants, whether the named defendants had policymaking authority, and whether the relevant policy can be attributed to the municipality at all. In addition, given that these cases arise within the context of criminal proceedings, abstention arguments are often available. And depending on the source of the relevant policy, there might be immunity defenses in some cases.

On the merits, the primary constitutional questions are whether the policy at issue adequately takes account of the defendant’s indigency and whether it does so with sufficient promptness. Despite the sweeping rhetoric of plaintiffs’ attorneys in these cases, the Supreme Court’s decisions in this area quite clearly do not prohibit all laws that convert unpaid fines or fees into jail time or utilize a monetary bail schedule. When a government’s policy considers the defendant’s ability to pay, within a reasonable amount of time, then it should be upheld as constitutional. In addition, there are fundamental questions about whether these constitutional claims are amenable to facial Fourteenth Amendment class actions or whether they should be raised as as-applied defenses within a defendant’s state proceedings.

## Key Precedents

Plaintiffs' attorneys led by a small group of public interest law firms have initiated a wave of litigation aimed at criminal fines, fees, and monetary bail policies. The plaintiffs' constitutional claims are rooted in the premise that individuals may never constitutionally be incarcerated solely because they cannot pay a fine or fee or make bail. While the Supreme Court's precedents support a much narrower version of that premise, plaintiffs frequently overstate the reach of those precedents.

The relevant line of Supreme Court authority on poverty-based challenges begins with *Griffin v. Illinois*, 351 U.S. 12 (1956). There, the Court addressed inflexible litigation fees that effectively prevented indigent criminal defendants from appealing their sentences. It was undisputed that the defendants had no means to pay the cost to obtain a written transcript of their trial proceedings, which was required to pursue an appeal of their convictions. And the state courts rejected their requests for a transcript at no cost. The Supreme Court held the transcript fee requirement was unconstitutional as applied to the defendants because "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19. But the court did not mandate that the State provide a full transcript at no cost "in every case where a defendant cannot buy it." *Id.* at 20. Instead, the State could "find other means of affording adequate and effective appellate review to indigent defendants." *Id.*

In *Williams v. Illinois*, 399 U.S. 391 (1970), the Court applied *Griffin's* reasoning to the automatic conversion of criminal fines and fees to incarceration. The defendant in *Williams* was convicted of petty theft and larceny and sentenced to the statutory maximum term of 1-year imprisonment and a \$500 fine. He was also taxed \$5 in court costs. When, at the end of his prison term, he was unable to pay his fine and costs, he was kept in prison to "work off" those obligations at the rate of \$5 per day. It was undisputed that the defendant "was indigent at all stages of the proceedings." *Id.* at 237.

The Supreme Court held that the policy was unconstitutional as applied to the defendant. The Court acknowledged that "[t]he custom of imprisoning a convicted defendant for nonpayment of fines dates back to medieval England and has long been practiced in this country." *Id.* at 239. But it concluded that, in the case of an indigent defendant, the State may not increase his sentence beyond the statutory maximum "solely by reason of [his] indigency." *Id.* at 242. The Court was careful to emphasize that "nothing in [its] decision ... precludes imprisonment for willful refusal to pay a fine or court costs." *Id.* at n.19. The Court also stressed that a "State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other." *Id.* at 244. Instead,

as in *Griffin*, the State was free to consider alternative means of enforcing its judgment against the defendant.

The Court reaffirmed *Williams* in *Tate v. Short*, 401 U.S. 395 (1971). In *Tate*, the defendant “accumulated fines of \$425 on nine convictions ... for traffic offenses.” *Id.* at 396. He was unable to pay the fines solely “because of indigency,” *id.*, and the municipal court committed him to a prison farm to work off the fine at \$5 per day. The Court held that *Williams* controlled and rendered the defendant’s imprisonment unconstitutional. Again, the Court emphasized that States may employ alternative means to enforce judgments against indigent defendants and that there is no “constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so.” *Id.* at 400. Nor did the court preclude “imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant’s reasonable efforts to satisfy the fines by those means.” *Id.* at 401. Rather, the Court simply held that a fine may not be *automatically* converted to a prison sentence where the defendant is unable to pay solely because he is indigent.

In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court applied its previous decisions to a state policy that revoked probation based on the failure to pay a fine and court-ordered restitution. After discussing its precedents in *Griffin*, *Williams*, and *Tate*, the Court noted that “[d]ue process and equal protection principles converge in the Court’s analysis in these cases.” *Id.* at 665. “Whether analyzed in terms of equal protection or due process,” the Court explained, “the issue cannot be resolved by resort to easy slogans or pigeonhole analysis.” *Id.* at 666. Instead, it “requires a careful inquiry into such factors as [1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between legislative means and purpose, and [4] the existence of alternative means for effectuating the purpose.” *Id.* (quotation marks omitted).

Synthesizing its earlier holdings, the Court concluded that “the reason[n] for nonpayment ... is of critical importance.” *Id.* at 668. Where an individual “has willfully refused to pay ... when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection.” *Id.* Likewise, where an individual has not made “sufficient bona fide efforts to seek employment or borrow money in order to pay” the State is fully justified in using imprisonment to induce payment. *Id.* But where an individual “has made all reasonable efforts to pay ..., and yet cannot do so through no fault of his own,” the state may not imprison the individual “automatically without considering whether adequate alternative methods of punishing the defendant are available.” *Id.* at 668-69.

The Court explained that its rule does not absolve indigent defendants of any obligation to satisfy the judgment against them. Rather, it held that where an individual is legitimately indigent and has made bona fide efforts to secure the means to satisfy his fine or fee, the government must consider alternative means of

accomplishing its penological goals. “For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine.” *Id.* at 672. And ultimately the Court held that an indigent individual who made bona fide efforts to pay *may* still be imprisoned “if alternative measures are not adequate to meet the State’s interests in punishment and deterrence.” *Id.* at 672.

In the bail context, there are no directly on-point precedents, but a number of principles and decisions should guide courts’ analysis. As an initial matter, the modern system of monetary bail is deeply rooted in our constitutional history, and the Eighth Amendment’s prohibition on “excessive bail” pre-supposes the permissibility of monetary bail. In *Stack v. Boyle*, 342 U.S. 1, 4 (1951), the Supreme Court underscored this history by emphasizing that “[t]he right to release before trial is conditioned upon the accused’s giving adequate assurance that he will stand trial and submit to sentence if found guilty.” Later, in *United States v. Salerno*, 481 U.S. 739 (1987), the Court rejected a facial challenge to the federal Bail Reform Act, holding that neither the Due Process Clause nor the Eighth Amendment prohibited the government from detaining especially dangerous defendants, *without bail*, to protect the community from danger. In doing so, the Court emphasized the need to weigh society’s “interest in preventing crime by arrestees” and “safeguard[ing] the courts’ role in adjudicating the guilt or innocence of defendants” against “the individual’s strong interest in liberty.” *Id.* at 749-50.

Similarly, the Supreme Court has not directly addressed when an indigency determination should occur in these contexts, although decisions in other areas provide some clues. In the Fourth Amendment context, the Court’s decision in *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991), recognized that “States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity,” and that state and local government’s require some flexibility in their initial procedures. Accordingly, the Court held that law enforcement may hold a suspect arrested without a warrant for up to 48 hours before conducting a probable cause hearing. *Id.* at 54-56. That reasonable safe harbor, the Court held, reflects “a practical compromise between the rights of individuals and the realities of law enforcement.” *Id.* at 53.

### **Types of Challenges**

Plaintiffs’ attorneys have relied on these precedents to bring three main forms of poverty-based challenges around the country.

**Debtors’ Prison Challenges.** The most prominent challenges have been to so-called “debtors’ prison” policies, in which fines or fees are converted to prison terms. While the attorneys bringing these claims often speak of “ending” the policies, that is not a realistic goal (if it is actually their goal at all). Instead, the

suits actually focus on whether the challenged policies sufficiently take account of defendants' indigency. And that challenge can take one of many forms, including (1) that the municipality does not account for indigency at all; (2) that defendants are not adequately informed of their ability to request an indigency determination; (3) that the indigency inquiry is flawed; and (4) that alternative measures are not adequately considered. *Cf. Turner v. Rogers*, 131 S. Ct. 2507 (2011) (addressing similar considerations in counsel-less civil contempt hearings). The various forms of the claim, within the unique facts of each case, have varying levels of support in the precedents discussed above. Yet, the plaintiffs in these cases have succeeded in securing broad settlement agreements from municipalities, which in some cases require a complete reconfiguration of municipal court proceedings.

**Private Probation Challenges.** Plaintiffs have also brought similar claims against probation systems, which in many cases are operated by private companies through a government contract, that require the probationer to pay probation-related fees and revoke probation for failure to pay those fees. Often, the thematic thrust of these cases take aim at the very practice of contracting for private probation services, although the legal claims do not necessarily turn on that fact. Rather, again, the key questions turn on the extent to which the probation policies account for the probationer's ability to pay. They thus typically involve many of the same challenges and legal questions as the debtors-prison cases, but in the context of probation revocation. And depending on how the revocation process functions, bail schedule issues might also arise.

**Monetary Bail Schedule Challenges.** While they rest on similar legal principles, plaintiffs' challenges to monetary bail schedules present different wrinkles. The thrust of these cases is that monetary bail schedules—which set presumptive bail amounts for all arrestees based on the offenses they are accused of committing—discriminate against the poor, who are not able to satisfy the set bail amounts as quickly as wealthy arrestees. Plaintiffs thus complain that they are incarcerated for longer solely because they are not capable of paying the set bail amount. Typically, the bail schedule policies provide for an individualized consideration of bail for anyone who does not post bail according to the schedule. Thus, the challenges tend to turn on whether indigency is adequately considered and whether any such consideration occurs within an acceptable period of time.

### Available Defenses

When faced with these types of challenges, municipalities can raise a number of defenses. At the threshold level, there are often municipal liability, abstention, and immunity defenses available. And on the merits there are often strong constitutional responses to plaintiffs' claims. Because the recent wave of litigation on this issues has yet to yield significant precedents in the federal courts of appeals and Supreme Court, the relative strength of each defense is not yet completely clear. Nor are the following defenses necessarily exhaustive. But these

are among the issues that attorneys representing local governments should consider if faced with poverty-based challenges to criminal justice procedures.

**Threshold Defenses.** Many of the threshold defenses to these lawsuits will be familiar to municipal attorneys. As an initial matter, because the challenges are rooted in federal constitutional claims, they are typically brought under 42 U.S.C. § 1983. Thus, the common forms of defense available under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), and its progeny are applicable in these cases. Among other things, the constitutional harm complained of must arise from official municipal policy. See, e.g., *Board of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). And *respondeat superior* liability is not available. See *Monell*, 436 U.S. at 694.

A number of immunity defenses are potentially available. In many municipalities, judges promulgate the contempt, probation, and bail policies that are at the center of these challenges. In those cases, if the municipal judges are sued, judicial immunity defenses are potentially available. See, e.g., *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980); *Pierson v. Ray*, 386 U.S. 547 (1967). In some cases, the judges are enforcing state, rather than local, law—which raises questions about whether the alleged harm can be attributed to the municipality at all. See, e.g., *McMillian v. Monroe County*, 520 U.S. 781 (1997); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). And in cases brought against local sheriffs or others who oversee incarceration, qualified immunity defenses might be available. See, e.g., *Pearson v. Callahan*, 555 U.S. 223 (2009).

Moreover, because these challenges often arise in federal court challenges to state or local criminal proceedings, abstention principles might be applicable, depending on how the challenge is pled and the unique facts of the case. For instance, the *Rooker-Feldman* doctrine might apply if the plaintiff unsuccessfully challenged the relevant policy's application during state court proceedings. And abstention under *Younger v. Harris*, 401 U.S. 37 (1971), might be applicable if state criminal proceedings are pending against the plaintiff. Indeed, the Supreme Court's leading decisions in this area arose as as-applied constitutional challenges raised during state proceedings, not as class-action facial challenges filed in federal court.

**Constitutional Defenses.** On the merits of the constitutional claims, the plaintiffs in these challenges often overstate the reach of the Supreme Court's precedents through sweeping rhetoric and slogans. As a result, the first challenge in defending these suits is to articulate the actual contours of the Court's decisions (as well as applicable lower court precedents). In the context of debtors-prison and private-probation litigation, the Supreme Court's precedents do not prohibit incarceration for failure to pay in general, but instead require an inquiry into whether the defendant is indigent and has made bona fide efforts to comply, and

the consideration of alternative measures where indigency is present. Thus, to the extent that a municipality considers indigency before converting fines or fees to jail time, it should push back on claims that its process is insufficient. And municipalities should keep these principles in mind when formulating policies or engaging in any settlement negotiations.

Similarly, in the bail context, the primary task is to explain that the Supreme Court's opinions do not prohibit rational bail schedule policies. The Supreme Court has not addressed indigency-based claims against bail policies. And there is a strong argument that such claims should be asserted during bail proceedings under the Eighth Amendment's provision prohibiting excessive bail, not through class-action facial challenges under the Fourteenth Amendment. *See, e.g., Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.") (internal quotation marks omitted). Moreover, the Court has reiterated a number of times that wealth-based Fourteenth Amendment claims receive only rational basis review. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Bail schedules are rationally related to the legitimate government interest of providing an efficient means to secure arrestees' appearance at later hearings and protect communities from dangerous individuals. *See Fields v. Henry County*, 701 F.3d 180, 184 (6th Cir. 2012).

In all three types of challenges, but particularly in the bail cases, the constitutional question might turn on *when* any indigency inquiry occurs. As a general matter, the Supreme Court's precedents support flexibility on this question. Although there is no precedent directly on point, there is a strong parallel with the Court's 48-hour safe harbor in *Riverside*. If the government can hold an arrestee for up to 48 hours before providing a probable cause hearing, then they should receive at least as much time to consider indigency in the context of a bail determination. Indeed, *Riverside* explicitly contemplated that the bail determination and probable cause hearing would occur together. *See* 500 U.S. at 54. Similarly, some flexibility should be available when assessing indigency in the context of revoking probation or converting a fine or fee to jail time.

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Finally, the old adage that the best defense is a good offense is particularly apt here. The Supreme Court's decisions do not categorically prohibit any of the types of policies being challenged. At most, they require an inquiry into a defendant's indigency at a reasonable point of time. And the best way to avoid or win these lawsuits is for local governments to evaluate their policies and ensure that they comply with the Supreme Court's precedents *before* being sued.