V. FINANCIAL CONSEQUENCES

A. THE LAW AND ITS EFFECTS

1. Overview

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

For the purpose of this report, we will focus on the financial consequences that are in the nature of penalties – imposed upon the criminal defendant as he or she proceeds through the criminal justice system as a result of a criminal conviction. Clearly there are many other financial consequences that are faced not only by defendants, but also their families, and even their communities. These "other" financial consequences, which are less in the nature of penalties, are no less compelling or consequential. Some will be noted in this report, however, their effects will not be analyzed and remedial action will not be proposed, as it would take us well beyond the scope of our immediate task.

The use of financial penalties has continued to grow in recent years. New financial penalties are seemingly added at each legislative session. Many of these financial penalties have been increased several times over the years, and are often viewed by the legislature in isolation from the other financial penalties that are also imposed.

Most directly connected to the punishment for the offense are the financial consequences of fines that are imposed as part of the sentence. In New York State, the provisions for fines are found in Penal Law Article 80 and Vehicle and Traffic Law Article 45. Under New York's

Enterprise Corruption Act, Penal Law § 460.30(5), fines can be imposed upon a criminal defendant convicted under the statute for amounts not exceeding three times the gross value of the benefit gained, or three times the gross value of the loss caused, by the defendant's criminal activity. Among the federal statues which authorize fines the basic statute is 18 U.S.C. § 3571. A fine is a sentence to pay a fixed amount, and may be imposed in addition to a revocable sentence or a sentence of imprisonment. If a sentence of imprisonment is mandated, or if imprisonment is not mandatory but the felony is one defined in Article 220 (drugs), then a fine may only be imposed in addition to the sentence of imprisonment. Otherwise, it may be the sole sanction.[457]

a. Mandatory surcharges

All convictions in the State of New York carry with them a mandatory surcharge. Provision for these surcharges is made by Penal Law § 60.35 and Vehicle and Traffic Law § 1809. It is a fee that is imposed upon a defendant when he or she has been convicted of an offense. It is separate and distinct from any fine which the court may have imposed. The current surcharges, amounts, and statutory authority are listed below:

AMOUNT	APPLIES TO	STATUTE
$250	VTL § 1192 DWI felony	VTL § 1809(1)(b)(I)
$140	VTL § 1192 DWI misdemeanor	VTL § 1809 (1)(b)(ii)
$25	VTL Article 9 infraction	VTL § 1809(1)(a)
$45	Selected VTL offenses	VTL § 1809(1)(c)
$25	Surcharge for any conviction VTL § 1192	VTL § 1809-c
$250	Felony surcharge	Penal Law § 60.35(1)(a)
$140	Misdemeanor surcharge	Penal Law § 60.35(1)(b)
$75	Violation surcharge	Penal Law § 60.35(1)(c)

457 *See* N.Y. PENAL LAW §§ 60.01(3)(b), 60.05(7).

AMOUNT	APPLIES TO	STATUTE
$5	Proceeding in town or village	VTL § 1809(9)
5%-10% of total restitution	Designated surcharge paid to agency collecting restitution for collection and administration	Penal Law § 60.27(8)

b. Fees

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

AMOUNT	APPLIES TO	STATUTE
$20	Felony offense Crime Victim Assistance Fee (CVAF)	Penal Law § 60.35(1)(a)
$20	Misdemeanor offense CVAF	Penal Law § 60.35(1)(b)
$20	Violation CVAF	Penal Law § 60.35(1)(c)
$20	For VTL § 1192 felony offense CVAF	VTL § 1809(1)(b)
$20	For VTL § 1192 misdemeanor offense CVAF	VTL § 809(1)(b)
$5	For VTL Art 9 traffic infraction CVAF	VTL § 809(1)(a)
$5	VTL offenses covered by 1809(1)(c) CVAF	VTL § 1809(1)(c)
$50	DNA Databank fee: a person convicted of a designated offense as defined in Executive Law § 995(7) shall, in addition to a mandatory surcharge and crime victim assistance fee, pay a DNA databank fee	Penal Law § 60.35(1)(e)

AMOUNT	APPLIES TO	STATUTE
$50	Sex offender registration fee (SORA): a person convicted of a sex offense as defined in Correction Law § 168-a(2) or a sexually violent offense as defined in Correction Law § 168-a(3)	Penal Law § 60.35(1)(d)
$10	SORA change of address fee	Correctional Law § 168-b(8)
$50	Termination of license revocation fee. If driver's license is revoked – application for re-issuance	VTL § 503(2)(h)
$100	Termination of license revocation fee. If driver's license is revoked for an alcohol-related offense and driver is under 21	VTL § 503(2)(h)
$25	Termination of license suspension fee	VTL § 503(2)(j)
$100	Termination of license suspension fee – Zero Tolerance. If driver is under 21, license is suspended for an alcohol-related offense	VTL § 503(2)(j)
$35	Termination of license suspension fee where suspension is for failure to appear, pay fine, penalty, or mandatory surcharge	VTL § 503(2)(j-1)(I)
$30/month	Fee for parole supervision	Executive Law § 259-a(9)(a)
$30/month	Fee for probation supervision (DWI - related)	Executive Law § 257-c
$1/week	Incarceration Fee: The commissioner may collect from the compensation paid to a prisoner for work performed while housed in a general confinement facility an incarceration fee.	Correction Law § 189(2)
$1,000	Supplemental Sex Offender Victim & Fee	Penal Law § 60.35(1)(b)

One of the fees noted above is the probation supervision fee authorized by Executive Law § 257-c. These types of fees are also known as correctional user fees. Correctional user fees are payments that a person convicted of an offense is compelled to make that generate revenue for

correctional purposes or that recover all or a portion of the costs of services provided. There are two types of correctional user fees: program fees and service fees.[458] By this statute the New York State legislature authorized every county and the City of New York to adopt a local law requiring individuals sentenced to a period of probation upon conviction of any crime under Article 31 of the Vehicle and Traffic Law (DWI) to pay to the local probation department an administrative fee of $30.00 per month. These fees are not required to be turned over to New York State and can be kept by the local probation department. Needless to say many counties passed such local legislation in the early 1990's.

By the mid-1990's revenue from these administrative fees for supervising probationers was seen as revenue enhancement. Not wanting to be limited to supervision fees for DWI probationers only, a number of counties enacted local legislation authorizing the collection of administrative fees for supervising all probationers, and additional fees for such "services" as drug testing, preparation of pre-sentence reports, electronic monitoring and victim impact panels. For counties that were aggressive with the collection of these fees the money was rolling in, at a considerable burden to individuals on probation.

Across New York State concerns were raised as to the legality of these fees being collected pursuant to local laws. The question was presented to the New York State Attorney General by the County Attorney for the County of Essex. In an opinion issued on April 7, 2003, Opinion No. 2003-4, the Attorney General's Office concluded that by enacting Executive Law § 257-c the State had preempted the area of provision of probation services, and a county may not enact local legislation permitting fees for probation services except as specifically authorized by

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

statute. Despite this opinion, some counties have maintained the practice of collecting probation fees that are not authorized by state law.

By recent legislation, Penal Law § 60.35(10), effective February 16, 2005, makes all of the surcharges and fees provided for in Penal Law § 60.35 applicable to "sentences imposed upon a youthful offender finding." The same change was made in Vehicle and Traffic Law § 1809(10) to make defendant's found to be youthful offenders subject to the surcharges and fees required by Vehicle and Traffic Law § 1809.

Effective November 18, 2004, New York was introduced to a new financial penalty. It is known as the Driver Responsibility Assessment. The Vehicle and Traffic Law has been amended to add a new section, § 1199. This section makes any person convicted of a violation of any subdivision of § 1192 (DWI or DWAI) of the Vehicle and Traffic Law or any person found to have refused a chemical test in accordance with § 1194 of the Vehicle and Traffic Law not arising out of the same incident as a conviction for a violation of any of the provisions of § 1192, liable for payment of a Driving Responsibility Assessment in the amount of $250.00 per year for each of three years.

Vehicle and Traffic Law § 503(4) was added to also provide for an additional Driver Responsibility Assessment for any person who accumulates 6 or more points on his or her driving record for acts committed within any 18 month period. The amount of the assessment is $100.00 per year for each of 3 years for the first 6 points on a driver's record and an additional $25.00 per year for each additional point on such driver's record. The Driver Responsibility Assessment is imposed by the Commissioner of the Department of Motor Vehicles.

c. Civil penalties

For people convicted of certain alcohol or automobile insurance related offenses the Vehicle and Traffic Law provides for Civil Penalties, as set forth below:

AMOUNT	APPLIES TO	STATUTE
$125	Zero Tolerance Law: For offenders under age 21 for alcohol-related offense	VTL § 1194-a(2)
$750	Operating with no insurance or underinsured	VTL § 319(5)
$300	Chemical test refused	VTL § 1194(2)(d)(2)
$750	Second Chemical test refusal with alcohol within 5 years	VTL § 1194(2)(d)(2)
$750	Chemical test refusal w/prior VTL § 1192 convictions w/in 5 years	VTL § 1194(2)(d)(2)

The creation and increase of fees, surcharges, or other financial penalties are legislated in a vacuum. They are seldom, if ever, seen by the legislature in the context of the sum of all penalties. Each increased financial penalty viewed in isolation appears to be a good idea for revenue production.

When viewed as a whole, the impact of the financial consequences are easily seen. For example, John, age 20, after refusing a chemical test, was convicted of Driving While Intoxicated, a class E Felony; and operating a motor vehicle with no insurance, a misdemeanor. He was sentenced to 5 years probation. The financial consequences of his conviction included:

Mandatory fine of no less than	$1,000.00
Mandatory Surcharge	$250.00
Crime Victim Assistance Fee	$20.00
Probation Supervision Fee ($30.00/Month)	$1,800.00
Civil Penalty (Zero Tolerance DWI)	$125.00
Fee for termination of license revocation	$100.00
Surcharge for VTL § 1192 conviction	$25.00
Civil Penalty for No Insurance	$750.00
Civil Penalty for chemical test refusal with prior VTL § 1192 conviction within 5 years	$750.00
Driver Responsibility Assessment	$750.00
Court Ordered installation of ignition interlock devise (VTL § 1193 (1-a)(c)(I)	$2,175.00
	$7,745.00

The sum of the financial penalties for this Felony DWI conviction totaled $7,745.00.

Another of the problems that arises with so many financial penalties scattered throughout different sections of the law is that it is difficult for either a Judge or defense counsel to locate and identify them all so that they can review them with the defendant. Yet, professional standards require that defense counsel be familiar with all of the collateral consequences of the sentence including fines, forfeiture, restitution, and court costs.[459] Defense counsel should also advise the defendant, sufficiently in advance of the plea, as to the possible collateral consequences.[460] Most defense counsel can barely keep track of the most common fees and surcharges. A pioneering effort to consolidate these financial penalties in one place as a useful tool for defense counsel was undertaken by the Center for Community Alternatives in 2004.[461]

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

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

[461] *See* Center for Community Alternatives, *Sentencing for Dollars: Policy Considerations, available at* http://www.communityalternatives.org/articles/policy_consider.html.

2. Restitution

Restitution is the financial consequence most directly related to the offense. Drawing upon one of the concepts of restorative justice, restitution and reparation in New York State are authorized by Penal Law § 60.27 as part of the sentence in addition to any of the dispositions authorized. Whenever the court requires restitution or reparation to be made, the court must make a finding as to the dollar amount of the fruits of the offense and the actual out-of-pocket loss to the victim caused by the offense. If restitution is made, the defendant is not required to pay the mandatory surcharge or crime victim assistance fee.[462] The restitution must be made prior to the time sentence is imposed, otherwise a court may impose both an order for restitution and an order for payment of the mandatory surcharge and crime victim assistance fee.[463] The Court of Appeals in *Quinones* was also of the opinion that Penal Law § 60.35 (4) provided a mechanism whereby a person could seek a refund of the mandatory surcharge and the crime victim assistance fee after payment of the restitution had been made.

In all cases where restitution or reparation is imposed directly, as part of the disposition, the court must also impose a designated surcharge of 5% of the entire amount of the restitution or reparation payment payable to the official or organization designated pursuant to Crimianal Procedure Law § 420.10(8).[464] This designated surcharge shall not exceed 5% of the amount actually collected. Provision is also made in Penal Law § 60.27(8) for an additional surcharge of up to 5% upon application by the official or organization designated as the restitution agent satisfying the statutory criteria.

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

463 *People v. Quinones*, 95 N.Y.2d 349 (2000).

464 N.Y. PENAL LAW § 60.27(8).

All of the collection remedies provided for in C.P.L. §§ 420.10, 420.20, and 420.30 apply to the collection of restitution and reparation.[465]

3. Bankruptcy

The collateral effects of the financial penalties and civil sanctions of mandatory surcharges, fines, fees, and penalties are cyclical and far-reaching. While struggling to find employment, explain poor credit histories, civil judgments and unpaid debts, many people with a criminal history contend with the fact that the penalties imposed for their crimes will not be discharged and will remain on their credit reports until they are able to make payment in full. Under federal bankruptcy law, certain debts are not dischargeable in either Chapter 7 or Chapter 13 bankruptcies.[466] These include debts incurred through fraud, back child support and alimony, and for death or personal injury in DWI-related accidents.[467] Also non-dischargeable are debts for fines, penalties or forfeiture payable to and for the benefit of a governmental unit, and judgments of restitution.[468]

There are a number of debts under Chapter 7 that may be determined non-dischargeable, which means they could possibly be challenged by a creditor, but would be dischargeable under Chapter 13 (*i.e.*, debts incurred through fraud,[469] intentional torts and debts for willful and malicious injury by the debtor).[470] Back taxes and back child support must be paid in full in a

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465 N.Y. PENAL LAW § 60.27(3).

466 http://www.newyorkbankruptcylaw.com/nondischarge.htm.

467 11 U.S.C. §§ 523(a)(9), 523(a)(6).

468 11 U.S.C. §§ 523(a)(7), 523(a)(13).

469 11 U.S.C. §§ 523(a)(2), 523(a)(4) and 523(a)(6).

470 11 U.S.C. § 523(a)(6).

Chapter 13 payment plan. However, if there has only been a Chapter 7 bankruptcy filing, the individual will still be responsible for repaying these debts after discharge.

When restitution is ordered as part of a criminal sentence, any payment made by the defendant does not "limit, preclude or impair" the defendant's civil liability for damages.[471]

4. Collection

The Penal Law, Criminal Procedure Law, Vehicle and Traffic Law, and the Executive Law all provide for the collection of many of the financial penalties attendant to a criminal conviction.

Pursuant to Penal Law § 60.35(5), when a person who has been convicted of a crime or a violation and has been sentenced to a term of imprisonment, has failed to pay the mandatory surcharge, sex offender registration fee, DNA bank fee, crime victim assistance fee or supplemental sex offender fee, the clerk of the court that rendered the conviction must notify the superintendent or the municipal official of the facility where the person is confined. The superintendent or municipal official must then collect the money owing from the "inmate's funds" or such money as may be earned by the person in a work release program. Vehicle and Traffic Law § 1809(5) makes the same procedure applicable for unpaid Vehicle and Traffic cases where the mandatory surcharge or crime victim assistance fee is unpaid. Inmates' funds "means the funds in possession of the inmate at the time of his admission into the institution, funds earned by him as provided in section one hundred eighty-seven of this chapter and any other funds received by him or on his behalf and deposited with such warden or superintendent in accordance with the rules and regulations of the commissioner."[472]

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471 *See* Gary Muldoon, *The Collateral Effects of a Criminal Conviction*, 70-Aug N.Y. ST. B.J. 26, 29 (July/Aug. 1998); N.Y. PENAL LAW § 60.27(6); *see Farber v. Stockton*, 131 Misc. 2d 470 (App. Term 1986).

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

In any case where cash bail has been posted by the defendant as the principal and is not forfeited or assigned, the court may order that the bail be applied towards payment of any order of restitution or reparation or fine.[473] Because the provisions of Criminal Procedure Law § 420.10 are made applicable to a mandatory surcharge, sex offender fee, DNA databank fee, and crime victim assistance fee by C.P.L. § 420.35(1), it is assumed that these charges can also be collected from the defendant's cash bail.

The court is given the authority by C.P.L. § 420.10(1)(c), to direct that payment of the fine, restitution or reparation and such designated surcharge be a condition of the sentence in any case where the defendant is sentenced to a period of probation. By the authority of C.P.L. § 420.35(1), this also applies to the collection of the mandatory surcharge, sex offender fee, DNA databank fee, and crime victim assistance fee.

A defendant who fails to pay the mandatory surcharge, sex offender registration fee, or DNA databank fee,[474] or fails to pay a fine, fee or surcharge,[475] faces possible incarceration, or additional incarceration. However, provision is made in C.P.L. § 420.10(5) for a defendant to challenge the incarceration based upon the inability to pay.

Penal Law § 60.35(8) provides that in the case of defendants sentenced to serve less than 60 days in jail or prison, at the time of imposition of the mandatory surcharge, sex offender registration fee, DNA databank fee, crime victim assistance fee, or supplemental sex offender victim fee, all courts must, and a town or village court may, issue a summons for that person to appear before the court if after 60 days from the date it was imposed it remains unpaid. The collection remedies that may be used by the court upon the appearance when payment has not

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473 N.Y. CRIM. PROC. LAW § 420.10(1)(e).

474 *Id.* § 420.35(1).

been made for any of the above fees except, apparently, the supplemental sex offender victim fee, are provided in C.P.L. §§ 420.10, 420.4 and 430.20 and are made applicable by C.P.L. § 420.35(1). The supplemental sex offender victim fee is not included in C.P.L. § 420.35(1).

For defendants sentenced to more than 60 days incarceration, as noted above, money may be collected from their "inmate's fund."[476] In addition, Penal Law § 60.35(8) makes the civil penalties of Penal Law § 60.30 applicable. It is unclear whether Penal Law § 60.30 provides additional collection remedies being written in the negative:

> This article does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty and any appropriate order exercising such authority may be included as part of the judgment of conviction.

The amount owed for any fine, restitution or reparation becomes a judgment and subject to civil collection through application of C.P.L. § 420.10(6). The amount owed for any mandatory surcharge, sex offender registration fee, DNA databank fee, and a crime victim assistance fee imposed pursuant to Penal Law § 60.35(1) (which would appear to exclude the new $1,000.00 supplemental sex offender victim fee), Vehicle and Traffic Law § 385(20-a) and § 401(19-a), or a mandatory surcharge imposed pursuant to Vehicle and Traffic Law § 1809 or § 27.12 of the Parks, Recreational and Historic Preservation Law also becomes a judgment subject to civil collection. C.P.L. § 420.35(1) makes the provisions of C.P.L. § 420.10(6) applicable to create civil judgment status for these debts.

The procedures for reducing all of the above financial penalties to judgment are set forth in C.P.L. § 420.10(6). The court issues an order containing the amount to be paid by the defendant. The court's order must direct the district attorney to file a certified copy of such order

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475 *Id.* § 420.10(3).

476 N.Y. PENAL LAW § 60.35(5).

with the county clerk. The order must then be entered by the county clerk in the same manner as a judgment in a civil case. The entered order is deemed to constitute a judgment-roll and immediately after entry of the order the county clerk must docket the entered order as a money judgment pursuant to C.P.L.R. § 5018.

Not only is such judgment subject to all civil collection remedies, but it will also be reported on any credit report.

When a defendant can prove to the satisfaction of the court that due to indigence, the payment of all or part of a mandatory surcharge, sex offender registration fee or DNA databank fee will work an unreasonable hardship on the person or his or her immediate family, C.P.L. § 420.40 authorizes the court to defer the obligation to pay. However, even if deferred, the amount owed must be entered in an order, and become a judgment, by a procedure set forth in C.P.L. § 420.40(5) that tracks the language of C.P.L. § 420.10(6). As of 2004, by legislative prohibition, under no circumstances can the mandatory surcharge, sex offender registration fee, DNA databank fee or the crime victim assistance fee be waived.[477] The only exception that is made in that subdivision is that a court may waive the crime victim assistance fee if such defendant is eligible for youthful offender adjudication and the imposition of such fee would work an unreasonable hardship on the defendant, his or her family, or any other person who is dependent on such defendant for financial support.

The probation administrative fee of $30.00 per month for persons on probation for DWI, as authorized by Executive Law § 257-c, is made subject to the civil proceedings for collections of C.P.L. § 420.10(6) by subdivision two of Executive Law § 257-c.

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[477] N.Y. CRIM. PROC. LAW § 420.35(2).

The civil judgment that arises as a result of the application of C.P.L. § 420.10(6) and § 420.40(4) may well have the most long lasting effects of any portion of the sentence. As a civil judgment it will appear on any credit report. This will affect the person against whom the judgment is filed in two ways. First, it may give rise to the inference that the applicant for a credit card, loan or mortgage is not credit worthy. Second, it is likely to adversely affect his or her prospects for employment.

5. Credit Reports and Employment

Increasingly employers are checking the credit histories of prospective employees. Some employers routinely screen job applicants by obtaining background investigation reports from consumer reporting agencies. These reports contain information about civil judgments, unpaid debts and often contain information about the individual's credit rating, criminal history, and employment history.

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

According to a 2003 survey conducted by the Society of Human Resource Management, there has been a considerable increase in the use of credit history background checks for employment screening purposes.[478] In the year 1996, 19% of employers ran credit checks. By 2003, 35% of employer's checked credit backgrounds.

Jobs providing access to money, from fast food cashiers to chief financial officers typically require credit checks. Jobs with government contracts and jobs that permit people to

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[478] Susan R. Hobbs, *Daily Labor Report*, THE BUREAU OF NATIONAL AFFAIRS, INC., May 3, 2004, at No. 84, S-7-8.

enter homes, whether to kill bugs, shampoo rugs, or care for the elderly increasingly use credit checks. Succinctly stated by Lewis Maltby, president of National Worknights Institute, a nonprofit organization in Princeton, New Jersey, "[t]he bottom line is that a bad credit report can cost you a job no matter how qualified you are."[479]

This is a sobering thought in light of the fact that a year after being released 60% of people formerly incarcerated have not found legitimate employment.[480]

6. Paying in Prison

Pursuant to the authority of Penal Law § 60.35(5) the New York State Department of Correctional Services ("DOCS") collects more than $2.5 million annually from inmates' funds – from inmates earning an average of one dollar a day – for the fees, fines and surcharges imposed by the courts.[481] That totals $22 million collected from inmates between April 1995 and March 2003.[482] During this same period of time DOCS collected nearly $15 million in fees that DOCS itself imposed.[483] These numbers do not include the $20 million in inmate "collect call only" telephone commissions paid annually to the Department.

Prisoners can receive money paid into the inmate fund from family and from the state for their labor, earning on average $1.00 a day.[484] According to the New York State Department of Correctional Services, of the $131.2 million prisoners received from family or from their

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

480 Nora V. Demleitner, *"Collateral Damage": No Re-entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1040 (2002).

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

482 *Id.*

483 *Id.*

484 *Id.*

"employment" between April 1995 through March 2003, they paid 28% – or $37 million – right back to the state.[485]

Directive Number 2788 issued by the State of New York Department of Correctional Services establishes the procedure for the collection of money to pay the obligations of the incarcerated person by prison officials, including all of the financial penalties referred to above and judgments for child support payments, "gate money," and work release room and board fees. When a new encumbrance is established, all money in the "inmate's fund" is applied to collection. If there are insufficient funds available in the "inmate's fund" to pay off an encumbrance when it is established, then all of the money that is in the account is taken as payment. The balance due on the unsatisfied encumbrance is collected at a rate of 20% of any money earned while working inside the prison and 50% of any money sent into the "inmate's fund," including any money sent by family or friends for commissary. When two encumbrances are active at the same time, up to 40% of weekly earning and 100% of the money sent to the "inmate's funds" from outside the prison is collected. For people on work release, after room and board costs are deducted, 100% of their wages are garnished if they have two or more outstanding judgments, and 20% if they have one.[486]

7. Paying on Parole and Probation

As noted above, Executive Law § 259-a(9)(a) authorizes the Division of Parole to charge a supervision fee of $30.00 per month for each person on parole, conditional release, presumptive release and post-release supervision. These fees are waivable based upon a showing of indigence and unreasonable hardship.[487] The rate of collection of these fees has been low

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485 *Id.*

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

487 N.Y. EXEC. LAW § 259-a(9)(a).

since the inception of the fee and has diminished over the years. In 1993 the collection rate was 10%. By 2001 it had dropped to 1%. For the period October 2000 to September 2001 $179,498.00 was collected from the over 50,000 parolees statewide.[488]

According to the Division of Parole's data, during the period October 2000 to September 2001 58% of all people on parole in New York were unemployed, and 8% were employed part-time.[489] Although 66% of all people on parole were unemployed or only employed part-time, less than 1% of supervision fees were waived for indigence.[490]

In contrast to the low rate of collection of parole supervision fees, some counties have found the collection of probation supervision fees to be a "revenue enhancement" to vigorously pursue. For example, in 1999 alone, the County of Onondaga collected over $212,000.00 for non-DWI probation supervision fees ($171,072.00) and alcohol/drug testing ($41,1136.00).[491] Onondaga County started collecting these fees in December 1, 1996 based upon the passage of Local Law 10 of 1996 and continues collecting to this day. This despite the fact that the New York State Attorney General issued an opinion in 2003 indicating that the state had preempted the collection of these fees and that a county may not collect such fees for probation services.[492] New legislation has been proposed to authorize probation to collect additional user fees.[493]

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488 Division of Parole Briefing Book FY 2000-01.

489 *Id.*

490 *Id.*

491 *See* Onondaga County Probation Department 1999 Annual Report.

492 If the rate of collection of fees remained constant between 1997 through 2004, Onondaga would have collected over $1.6 million in unauthorized fees from its probationers.

493 Senate Bill S. 2842-A proposes to amend Executive Law § 257-c to allow for the imposition of a $30.00 per month probation administrative fee for any person convicted of any crime and sentenced to probation, and also for the imposition of an $8.00 per test, drug testing fee and an $8.00 per day electronic monitoring fee. Governor Pataki's Executive Budget for 2006 not only proposes to include the same amendments as Senate Bill S2842-A, but also proposes several additional fees including an amendment to Penal Law § 60.35 that adds a new $25.00 probation fee for any person on probation who is subject to a DNA bank fee. The new fee would be paid to

8. Collateral Estoppel

There are various federal, state and municipal statutes (as well as some common law equitable remedies) that impose financial penalties, fines, forfeitures, restitution, disgorgement, and treble damages. Some are part of, or follow from the underlying criminal conviction such as fines or criminal forfeiture. Others are separate civil causes of action and/or remedies. Nevertheless, in the event of a criminal conviction, the civil liability may naturally follow because the convicted person will be collaterally estopped by her criminal conviction from contesting the essential elements of the claim against her. The elements of the doctrine of collateral estoppel, and some of the penalties, fines, forfeitures and other remedies that may be imposed upon a criminal defendant, either as part of the criminal proceeding or thereafter, are outlined below.

It is settled law that a litigant is collaterally estopped from re-litigating an issue that has been determined adversely to the litigant in a prior proceeding. Under New York law, the doctrine of collateral estoppel, or issue preclusion, "bars a party from re-litigating in a subsequent proceeding an issue clearly raised in a prior proceeding and decided against that party where the party to be precluded had a full and fair opportunity to contest the prior determination."[494]

The Court of Appeals has opined that "no injustice is committed when criminal defendants are estopped from relitigating issues determined in conformity with [the normal]

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probation to compensate them for supervising and ensuring compliance with the payment of the $50.00 DNA bank fee. Likewise, there is a proposed $25.00 probation fee for any person on probation who is subject to a sex offender registration fee so that probation can ensure compliance with payment of that fee. The net result of these new fees would be that an individual would be required to pay a fee totaling $50.00 so that probation could supervise the payment of two other fees. *See* analysis by Center for Community Alternatives *available at* http://www.communityalternatives.org/justice_strategies/financial_penalties.htm.

494 *Weiss v. Manfredi*, 83 N.Y.2d 974, 976 (1994).

safeguards [attendant to a criminal conviction]."[495] Moreover, a guilty plea is accorded the same preclusive effect in a subsequent civil proceeding as is a conviction after trial.[496] However, a conviction on the basis of a violation alone is not entitled to collateral estoppel effect in a subsequent civil action.[497]

There are two requirements to invoke collateral estoppel: (1) "[t]here must be an identity of issue which was necessarily decided in the prior action and is decisive of the present action" and (2) "there must have been a full and fair opportunity to contest the decision now said to be controlling."[498] The burden of demonstrating that the issue in the second action is identical and necessarily decided in the prior action is upon the moving party, while the burden of establishing that there was not a full and fair opportunity to litigate the issue rests on the party resisting the application of collateral estoppel.[499]

However, "[a] finding of fact in an earlier proceeding, even though put in issue by the pleadings there, is not binding in a later proceeding, if the finding of fact was not essential to the determination of the earlier proceeding."[500] Thus, "'gratuitous' findings, that is, those not essential to the determination, lack a preclusive effect," and "an issue is 'decisive in the present action' if it would prove or disprove, without more, an essential of element of any of the claims

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495 *S.T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 305 (1973).

496 *United States v. Private Sanitation Indus. Ass'n*, 811 F. Supp. 808, 813 (E.D.N.Y. 1992), *aff'd*, 995 F.2d 375 (2d Cir. 1993).

497 *Gilberg v. Barbieri*, 53 N.Y.2d 285, 292-94 (1981).

498 *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 71 (1969).

499 *Kaufman v. Eli Lilly & Co*., 65 N.Y.2d 449, 456 (1985).

500 *Menna v. Joy*, 86 A.D.2d 138, 141 (1st Dep't 1982); *see also Bland v. New York*, 263 F. Supp. 2d 526, 551 (E.D.N.Y. 2003).

set forth in the complaint."[501] Furthermore, collateral estoppel does not attach to determinations made as a matter of law in the prior proceeding.[502]

A determination whether the first action genuinely provided a full and fair opportunity requires consideration of the realities of the prior litigation.[503] The doctrine of collateral estoppel only applies where the issue sought to be precluded was thoroughly explored in the prior proceeding, and the resulting judgment has some indicia of correctness.[504] Accordingly, under New York law, whereas a conviction for a felony or misdemeanor is accorded collateral estoppel effect in a subsequent proceeding because of all the constitutional safeguards that must accompany the criminal proceeding,[505] a conviction for a mere violation does not carry with it the same protections, and therefore may not be afforded preclusive effect because the litigant did not have a full and fair opportunity to contest the facts.[506]

Notably, the collateral estoppel effect of a criminal conviction in state court will also be binding on the litigant in a subsequent federal action.[507] Under the full faith and credit statute,[508] a federal court is required to accord a state court judgment the same preclusive effect that the judgment would receive in state court.[509]

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501 *Bland*, 263 F. Supp. 2d at 551.

502 *Koch v. Con Edison Co.*, 62 N.Y.2d 548, 555 (1984), *cert. denied*, 469 U.S. 1210 (1985); *Mazzocki v. State Farm Fire & Cas. Corp.*, 1 A.D.3d 9 (3d Dep't 2003).

503 *Halyalkar v. Bd. of Regents*, 72 N.Y.2d 261, 269-70 (1988); *Schwartz*, 24 N.Y.2d at 72.

504 *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986); *Bland*, 263 F. Supp. 2d at 552.

505 *S.T. Grand*, 32 N.Y.2d at 304-05.

506 *Gilberg*, 53 N.Y.2d at 292-94; *see also Private Sanitation Indus. Ass'n*, 811 F. Supp. at 813-14.

507 *Private Sanitation Indus. Ass'n*, 811 F. Supp. at 813.

508 28 U.S.C. § 1738.

509 *Migra v. Warren City Sch. Dist. Bd.*, 465 U.S. 75, 81 (1984).

In light of the foregoing, a defendant who is convicted after trial of a felony or misdemeanor will be collaterally estopped from contesting in a subsequent civil proceeding or administrative hearing any facts that have been determined adversely against him in the prior criminal action. Moreover, even without a trial, a plea of guilty will estop that same criminal defendant from contesting the factual basis for the various elements of the underlying crime to which he pled guilty. Indeed, the criminal defendant pleading guilty would be further precluded from contesting certain facts which he specifically admitted in his allocution.

9. Forfeitures

a. In rem forfeiture

There are basically two types of forfeiture: in rem and in personam. In rem forfeiture is based on the ancient belief that the "thing" (for example, the instrumentality of the crime) can be punished for doing wrong, and forfeited to the government. The action therefore typically lies against the res (or thing) itself, with the criminal defendant, or any other person with an interest in the res, needing to intervene in that action by filing a verified claim stating his interest.

Because the verified claim itself may constitute a false statement to the government, and because the criminal defendant may be deposed regarding how he obtained his interest in the res, thereby risking a waiver of his Fifth Amendment right against self-incrimination, as a practical matter, criminal defendants are usually precluded from contesting a civil in rem forfeiture. Moreover, in the context of a civil forfeiture action, the court can draw an adverse inference against a claimant who asserts the Fifth Amendment.

Historically at least, because it was the res that was deemed to have done wrong, there has often been no correlation between the severity of the in rem forfeiture and the culpability of the criminal defendant (for example, the forfeiture of an entire home used to facilitate a relatively minor drug transaction). At least federally, however, law is emerging that requires that there be

some proportionality between the underlying criminal activity and the amount and value of the res to be forfeited.

Finally, the fact that a criminal defendant may have already been punished for the crime, including by the imposition of monetary sanctions, does not protect him from losing his interest in the res in a subsequent civil forfeiture. Because the defendant in the in rem action is the thing, not the defendant who has already been convicted and punished, no double jeopardy applies. The emerging law, however, does recognize that civil forfeiture may constitute a punishment, and accordingly, a defendant who has already been punished (for example, by a large fine in the criminal case), may seek to limit the extent of the subsequent civil forfeiture by relying on the Excessive Fines Clause of the Eighth Amendment.

The federal statutes that authorize in rem civil forfeitures include: the Civil Forfeiture statute, 18 U.S.C. § 981 (which, among other things, allows the forfeiture of the proceeds of various predicate crimes); the forfeiture provisions of the Controlled Substances Act, 21 U.S.C. § 881; the forfeiture provisions of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 5317(c); the provision for the enforcement of Foreign Confiscation Orders, 28 U.S.C. § 2467; and the statutory provisions authorizing forfeiture of conveyances used in offenses involving undocumented aliens, 8 U.S.C. § 1324(b).

Under New York law, there are several in rem forfeiture statutes aimed at vehicles, equipment and conveyances involved in specific criminal activity including N.Y. Penal Law § 410 (in rem civil forfeiture of equipment used to produce, and vehicles used to transport obscene materials); N.Y. Penal Law § 415 (in rem civil forfeiture of conveyances used to transport certain gambling records); and N.Y. Public Health Law §§ 3387-3388 (in rem civil forfeiture of

controlled substances, and of conveyances used in connection with the transportation of controlled substances under circumstances constituting a felony).

b. In personam forfeiture

In personam forfeiture is directed against the individual defendant himself and his property; however, even if the specific property involved in the crime cannot be located, the in personam nature of the proceeding typically permits the government to forfeit substituted assets instead.

At least federally, in personam forfeiture is usually included with the counts of a criminal indictment. In this regard, the Supreme Court has determined that criminal forfeiture is an element of the sentence to be imposed after conviction and is not a substantive charge in and of itself.[510] The amount of the criminal forfeiture is therefore hopefully proportional to the underlying crime. Because it is determined as part of the same criminal action, there are no issues as to double jeopardy, although a criminal forfeiture may still be subject to challenge under the Excessive Fines Clause.

The federal statutes authorizing in personam criminal forfeitures include the Criminal Forfeiture Statute, 18 U.S.C. § 982; the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1963,[511] and the Comprehensive Drug Abuse and Control Act 21 U.S.C. § 853.

In New York State, the Penal Law permits the forfeiture of property in a criminal prosecution following the defendant's conviction of a felony controlled substance offense.[512]

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510 *Libretti v. United States*, 516 U.S. 29, 38-39 (1995).

511 The RICO statute also allows private individuals to seek treble damages against a RICO defendant, whether or not it is preceded by a criminal conviction. *See* 18 U.S.C. § 1964(c).

512 N.Y. PENAL LAW § 480.

New York State also recognizes in personam forfeiture for all other felony offenses, but unlike federal law, the forfeiture allegations generally are not charged as part of the criminal indictment, but rather are asserted by way of a subsequent civil proceeding. Thus, New York law allows a prosecutor to pursue a separate civil action for in personam forfeiture against a defendant. However, except in drug-related cases, the forfeiture action may only be maintained after there has been a criminal conviction.[513] In the case of drug-related offenses, by contrast, the prosecutor need only prove by clear and convincing evidence that the property was the proceeds of, or instrumentality of, the drug-related offense to be entitled to forfeiture, even if there has been no criminal conviction.[514]

In a limited number of circumstances, New York also recognizes criminal in personam forfeiture. Thus, in felony drug cases, New York prosecutors need not bring a separate civil forfeiture action in order to confiscate the defendant's property, but can seek the forfeiture along with the substantive counts of the indictment.[515] Similarly, New York's Enterprise Corruption Act (the so-called "Little RICO Act") contains a criminal in personam forfeiture provision modeled on that in the federal RICO statute.[516]

c. Local and administrative forfeitures

In addition to the foregoing, there are a web of other statutes, local ordinances and administrative regulations, too numerous to mention, that permit the administrative and/or judicial forfeitures of property. As its name implies, administrative forfeiture occurs when a regulatory or law enforcement agency is given authority by statute to seize and/or forfeit to the

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513 *See* N.Y. C.P.L.R. § 13-A.

514 *Id.*

515 *See* N.Y. PENAL LAW § 480.

516 *See id.* § 460.30.

government money or property, that, for example, constitutes the proceeds of prohibited activity or was used to facilitate the prohibited activity. Often, there are procedures whereby a claimant can challenge an administrative forfeiture judicially.

There are also numerous local laws and ordinances that allow for the seizure and forfeiture of property used in violation of law, most commonly, with regard to the forfeiture of motor vehicles used by a driver who is impaired by alcohol or drugs, is engaged in drug offenses or prostitution, or otherwise acting in violation of law.[517] Many of these statutes and ordinances are poorly drafted and their constitutionality is questionable.

For example, in *Krimstock v. Kelly*,[518] the Second Circuit Court of Appeals found unconstitutional NYC Code 14-140, which allows the seizure and forfeiture of "all property . . . suspected of having been used as a means of committing a crime or employed in aid or furtherance of crime . . ."[519] Typically, the provision is used to seize and forfeit vehicles driven by operators who are impaired by drugs or alcohol. The Second Circuit held that, because the Code failed to provide owners with a prompt, post-seizure procedure to challenge the government's probable cause for the initial seizure and the subsequent retention of the vehicle pending a final determination of forfeiture, the Code's provisions violated both the Fourth and Fourteen Amendments of the United States Constitution.[520]

In *Nassau County v. Canavan*,[521] the New York Court of Appeals, following the lead of *Krimstock*, determined that Nassau County's civil forfeiture statute was unconstitutional under

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517 *See, e.g.*, New York City Administrative Code ("NYC Code") 14-140; Nassau County Administrative Code 8-70(g)(3).

518 306 F.3d 40 (2d Cir. 2002), *cert denied*, 539 U.S. 969 (2003).

519 *See* NYC Code 14-140.

520 *Krimstock*, 306 F.3d at 68-70.

521 1 N.Y.3d 134 (2003).

both the federal and state Constitutions because it failed to provide for a prompt post-seizure hearing before a neutral magistrate.[522] The Court further found the Nassau statute to be unconstitutional as written for failing to provide for limitations on the forfeiture of the interests that innocent owners might have in the subject property.[523]

10. Restitution, Disgorgement and Other Financial Penalties

In addition to the normal penalties imposed in the context of the criminal proceeding, there are further financial penalties and consequences that can follow a criminal conviction, particularly given the collateral estoppel impact of prior conviction when trying to defend oneself in a subsequent civil action, whether that action is with the government or private litigants.

For example, the federal RICO Act[524] can subject a criminal defendant to substantial financial exposure even beyond that imposed directly by his conviction. Under RICO, the defendant may be exposed to private litigants for treble damages for injuries flowing from the predicate criminal acts, or in a case brought by the government, for broad injunctive relief, including prohibitions from engaging in particular business activities, and directives to disgorge all illicit profits for payment to the United States or into a fund to support broad injunctive relief. Under the New York's Enterprise Corruption Act ("Little Rico"), the defendant may be liable for fines or forfeitures as set forth further above.

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522 *Id.* at 142-45.

523 *Id.* at 143-44. Subsequent to the Court of Appeals' decision in *Canavan*, the Nassau County Supreme Court determined that the County's amended forfeiture statute still constituted an unconstitutional taking of private property by failing to allow for the interests of innocnet owners. *See County of Nassau v. Pereira*, N.Y.L.J., Aug. 30, 2005, at 16 (Sup. Ct. Nassau Co. Aug. 18, 2005).

524 18 U.S.C. § 1961.

As another example, if the victim of a defendant's fraud is the federal government, the federal False Claims Act[525] permits the government to bring a civil action seeking fines of between $5,000 and $10,000 for each false claim filed, as well as recovery of three times the government's damages.

11. Additional Financial Consequences

In addition to the direct financial penalties imposed by courts or administratively, a person with a criminal conviction faces many other collateral consequences that have financial implications. This includes such consequences as diminished earning capacity, diminished employment prospects, loss of professional licenses, bars from bidding on public contracts, bars from some public and subsidized housing as well as difficulties in obtaining public benefits. These issues are addressed in other chapters of this report. Several of these "other" financial consequences are addressed here to recognize their significance, but no analysis or recommendations are offered in this chapter.

a. Child support arrears

A significant financial consequence faced by formerly incarcerated parents is the accrual of child support arrears during the time they were in prison. The problem is caused by the position taken by New York courts that prohibits downward modification orders while a person is in prison. The rationale for this court constructed policy is that the imprisoned parent's "current financial hardship is solely the result of his wrongful conduct."[526] As a consequence of this policy, many previously incarcerated parents are faced with massive arrears that accumulated during a period of time when they had absolutely no ability to make payments.

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525 31 U.S.C. § 3729.

526 *Knights v. Knights*, 71 N.Y.2d 865, 865 (1988); *Onondaga County Dep't of Soc. Servs. ex. rel. Gloria T. v. Timothy S.,* 294 A.D.2d 27 (4th Dep't 2002).

Once released these accumulated arrears create additional financial problems. This issue is addressed comprehensively in the chapter of this report on family reunification.

b. Creation of civil liability

Several statutes create civil liability related to criminal offenses. General Obligations Law Article 11 creates civil causes of action for victims of the illegal sale of intoxicating liquor, victims injured by the illegal sale of controlled substance, victims of checks drawn on insufficient funds, and for mercantile establishments who are the victim of a larceny. Article 12 of General Obligations Law, known as "the drug dealer liability act" creates a cause of action, and imposes liability on any person convicted of dealing drugs who causes damage to another person that is the result of the use of an illegal drug.[527]

New York was the first state to enact a "Son of Sam" law in 1977, in response to the public outrage that resulted when offenders were seen to profit from the notoriety resulting from their own crimes. Prompted by the events surrounding the arrest of serial killer David Berkowitz, a.k.a Son of Sam, the original Son of Sam law directed all proceeds from the sales of "books, magazines, motion pictures," or other media exploitations of crimes, otherwise payable to the convicted perpetrator, to be paid to the Crime Victims Board ("CVB") for the benefit of victims of the crime.[528]

In June 2001 Executive Law § 632-a was amended and the depth and breadth of its scope was greatly extended. Significantly, the law now allows crime victims to sue the convicted criminal defendants who caused them harm for *any* money and property that the defendant receives from *any* source (including money earned for daily labor while incarcerated), even

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[527] *See* N.Y. GEN. OBLIG. LAW § 12-103. Liability established. A person who knowingly participates in a drug market within this state and has been convicted of a crime for such participation in a drug market and is a drug trafficker shall be liable for civil damages as provided in this article.

[528] *See* N.Y. EXEC. LAW § 632-a.

though the seven year statute of limitation has run, by expanding the statute of limitation to run for up to three years from the time of the discovery of any funds in the possession of the convicted person.[529] The financial and proprietary interests of a "convicted person" are subject to collection under the Son of Sam Law, if the funds were received anytime during his sentence, including probation, parole, and post-release supervision.[530] Specified crimes include convictions for violent felony offenses as defined in Penal Law section 70.02, class B felonies, and any felony categorized as a felony in the first degree, grand larceny in second and fourth degrees, and possession of stolen property worth more than $50,000.[531] Excluded from the list of offenses are drug and marijuana charges, welfare fraud, the criminal conversion of prescription medications and prescriptions, gambling and prostitution.[532] Additionally, when a payment of $10,000 or more is received by a criminal defendant, from any source (excluding child support and earned income), the CVB must be notified.[533] In turn, the CVB notifies crime victims of their right to bring civil actions and recover damages. These civil actions must be commenced within three years of having received notification.[534]

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529 *Id.*; *see also* Al O'Connor, "Legislative Review 2001" Public Defense Backup Center Report, Vol. XVI, Number 5. As a rule, under C.P.L.R. § 215(8), crime victims have one year to commence a civil action against a defendant, once a criminal action has been commenced against the same defendant, concerning the same event or transaction from which the civil action arose. C.P.L.R. § 213-b extended the time limitation within which a crime victim may commence a civil action to recover damages from a defendant convicted of that crime to seven years from the date of the crime. The Son of Sam Law indefinitely extended the Statute of Limitations for recovery by permitting crime victims and their families to commence a civil action within three years of the discovery of any monetary or proprietary interests of the convicted person.

530 *See* N.Y. EXEC. LAW § 632-a(1)(c)(ii).

531 *See id.* §§ 632-a(1)(e)(i)(A)-(B), (1)(e)(i)(c).

532 *Id.* § 632-a(1)(e)(ii); *see also* Anthony J. Annucci, *Anatomy of the Modern Prisoners' Rights Suit: New York's Expanded Son of Sam Law and Other Fiscal Measures to Deter Prisoners' Suits While Satisfying Outstanding Debts,* 24 PACE L. REV. 631, 646 (Spring 2004).

533 N.Y. EXEC. LAW §§ 632-a(1)(c) and (2)(a).

534 *Id.* § 632-a(3).

Moreover, anyone who receives funds on behalf of a convicted person is required to notify the CVB of the payment. Mandatory reporting is required of the Department of Correctional Services and local correctional facilities. Failure to do so by anyone with knowledge or information of such payment will result in the imposition of severe fines and penalties.

Once the crime victim notifies the CVB that she is interested in bringing suit against the defendant, to avoid wasting the defendant's assets, the CVB will seek provisional remedies on behalf of the crime victim, including attachment and injunction.[535] All judgments obtained pursuant to the Son of Sam Law, in excess of the first one thousand dollars deposited in an inmate account, and from up to 90% of compensatory damages and 100% of punitive damages awarded to criminal defendants in civil suits, can be accessed as compensation for victims of criminal offenses.

Executive Law § 634 creates a subrogated claim on behalf of New York State against any person who caused injury to a victim for whom the Crime Victims Board makes an award.

c. Access to the courts and filing fees

Special provision is made by C.P.L.R. § 1101(f) to allow for courts to permit the payment of reduced filing fees for a person who is incarcerated. These fees can be assessed against the persons "inmate account" at the institution where they are confined.

d. MCI collect telephone calls

People in New York who are sentenced to prison, often serve out their sentence at correctional facilities hundreds of miles from their home communities. Their spouses and children, parents and grandparents often do not have the resources necessary to travel these

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[535] *Id.* § 632-a(6)(a).

distances, making in-person visits an infrequent luxury. Under these circumstances, the telephone becomes the primary means for families to keep in touch with their loved ones in prison.

For anyone having a telephone conversation with a friend or family member in a New York State prison, means being a customer of MCI. Since 1996, MCI has had an exclusive contract with DOCS. MCI has had a virtual monopoly over prison phone calls. Every collect call from a person in prison costs $3.00 plus 16 cents a minute. This is more than six times the cost of a regular phone call.[536] Each year, New York State receives more than 57% of all the money generated by the MCI prison phone calls.[537] This totals more than $20 million per year.[538]

Assembly Bill A07231 has been proposed to address this problem by providing for the use of a debit card system and reasonable collect call system rates.

The American Bar Association, Criminal Justice Section recently recommended that prison and jail inmates be afforded reasonable opportunity to maintain telephonic communication with the free world with an appropriate range of options at the lowest possible rates. The resolution was approved by the House of Delegates in 2005.

e. Travel costs

Because people in prison are generally housed hundreds of miles from their communities, families may be forced to spend considerable portions of their meager resources to visit their loved ones.

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536 Errol Louis, *Innocent Victims*, N.Y. DAILY NEWS, Nov. 16, 2004, at 51.

537 *Id.*

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

f. Prisoners of the census

Communities suffer financial consequences in state and federal funding as a result of the census counting people where they are incarcerated and not where they come from. This financial consequence is analyzed in detail in a recent law review article authored by Eric Lotke and Peter Wagner.[539]

g. Participation fees

Any person released from prison on temporary release, participating in work release, is charged 20% of his or her net work release wages as a participation fee (room and board). Day reporting fees are charged against the inmate account at the rate of $10.00 per week.[540]

B. POSSIBILITIES FOR CHANGE

1. General Thoughts

The imposition of financial penalties has rarely been addressed as a collateral consequence of a criminal conviction by researchers, legislators, or policy analysts.[541] The barriers to re-entry caused by the imposition of financial penalties and user fees have for the most part been ignored.

Society has dual – and sometimes conflicting – goals of defraying some of the cost of maintaining the criminal justice system by placing that burden on people who have been convicted of criminal offense and also promoting the successful reintegration of people returning to their communities from prison as self-supporting, law abiding citizens. Striking a balance between these two goals can only be accomplished after careful consideration of the policy

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539 Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*¸ 24 PACE L. REV. 587-607 (2005).

540 New York State Dep't of Correctional Services Directive #2788.

541 *See* Center for Community Alternatives, *Sentencing for Dollars: Policy Considerations*, *available at* http://www.communityalternatives.org/articles/policy_consider.html.

issues at stake and a clear understanding of who it is that is being asked to shoulder this financial burden.

One study, in California, looked at the wide range of fines, fees, surcharges, penalties, and assessments levied on criminal defendants in that state. This study identified over 3,100 separate penalties scattered throughout 27 different government codes.[542] Their concern was primarily focused on inept and unequal fee collection practices. The report of this California Performance Review Committee recommended the consolidation of all of these penalties into one more moderately adjusted fee. This would aid in a more uniform collection practice, and of course give rise to a more realistic approach to the amount any one person could be called upon to pay.

One of the policy goals in assessing financial penalties is to strike the proper balance between shifting costs along to offenders when the penalty bears some relationship to the offense, and the need to promote successful re-entry by eliminating undue financial burdens and negative credit histories, which create barriers to employment. It is beyond argument that there are difficult times ahead for people returning from prison, particularly those with added financial burdens imposed as a result of their criminal conviction. Creating an environment where people with criminal convictions find it even more difficult to find or keep employment is counterproductive. If the overarching goal is to promote public safety, then budgetary concerns may have to give way to long-term prospects for crime reduction through the successful reintegration of people who have served their prison sentence.

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542 *See* The Report of the California Performance Review, *Issues and Recommendations* (CPR Vol. IV): GG34 Simplify and Consolidate Court-Ordered Fines (2004), *available at* http://www.cpr.ca.gov/report/cprrpt/issec/gg/part/gg34.html.

a. Arguments in support of financial penalties

A number of the arguments that are advanced in favor of imposing financial penalties or consequences on people who are convicted of crimes are grounded in revenue production. They are seen as a way to balance the budget. By imposing fees on people who commit crimes, it is seen as a justifiable cost shifting from the "taxpayer" to the "offender."[543] From a political perspective it is seen as one more way to prove that government is "tough on crime." It is also a way to support community corrections. There are even those who argue that there is a benefit to the person who is being called upon to pay these fees. That is, they will benefit from the program that they help to fund. Finally, there is the argument that addresses the ultimate goal of a criminal justice system - public safety. The logic is that the imposition and collection of these fees and restitution promotes a greater sense of responsibility.

b. Arguments favoring the limitation of financial penalties

As awareness about collateral consequences and re-entry has developed, the arguments against the imposition of excessive financial penalties have mounted. The imposition of financial penalties on poor defendants is seen as creating a monetary burden that is overwhelming.[544] The civil judgments that aid in the enforcement of these penalties give rise to other collateral consequences: bad credit, inability to obtain financing, and poor credit histories that are used by prospective employers to screen out job applicants. There are other possible negative consequences of imposing these penalties. One argument suggests that individuals burdened with these fees are induced to commit new crimes, while others simply abscond from supervision under the pressure of collection efforts. Parole and probation revocations for a new

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

[544] R. Barry Ruback, *The Imposition of Economic Sanctions in Philadelphia: Costs, Fines and Restitutions*, Federal Probation (June 2004).

crime or failure to report may simply hide the fact that probationers and parolees are suffering from fee overload. In addition, when the State and its agencies become financially dependent on fees for revenue, there is a very real inducement to engage in net widening.[545]

From a philosophical perspective, some argue that people convicted of criminal offenses are not "voluntary consumers" and should not be forced to pay for services that they do not seek. They suggest that by placing the burden of these fees on the convicted individual personally, the community responsibility for crime and public safety is ignored. There is also the danger that as parole and probation become more dependent on fees, collection can easily become the measure of their performance, rather than being measured by how well they do their job as it relates to public safety and re-entry. Finally, some have argued that the imposition of ever increasing financial penalties is counterproductive to the goal of re-entry, and ultimately public safety. Given the dire economic conditions of most people returning to their communities from prison, any accumulated debt at all can create a hardship.

c. Upon whom do we impose financial penalties?

In order to address the question of whether it is realistic to expect payment of fines, fees, surcharges and other financial penalties we must first come to grips with the profile of the people upon whom we are imposing these financial penalties. Ninety-three percent of all people admitted to prison eventually return to their communities.[546] Any payment of financial penalties must be viewed through the lens of the prevailing social and economic conditions of people returning from prison. They are primarily black and Hispanic, with serious social and medical problems, are largely uneducated, unskilled, suffer mental illness, lack solid family supports,

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[545] *See* American Probation and Parole Association Report, *Supervision Fees*, *available at* http://www.appa-net.org/about%20appa/supervis.htm.

[546] Joan Petersilia, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 3 (2003).

have minimal prospects for employment, and now they have the added stigma of a prison record and the distrust and fear that it inevitably carries with it. The neighborhoods from which most people on parole come suffer starkly lower household income, high rates of single parent households, and high rates of poverty. Together these characteristics make up the social and economic circumstances of the re-entering population.

Of all people released from New York State prisons in 2003, 83% were released under some form of parole supervision.[547] For this reason, a profile of New York's parolees provides us with a snapshot of the characteristics of people leaving prison and re-entering their communities. From data released by the New York State Division of Parole for March 2004 a picture can be pieced together. The parolee population is largely minority, poorly educated, underemployed, and concentrated in urban New York. Fifty-two percent of parolees were black, 29% Hispanic, and 92% were male. Sixty-one percent resided in the five boroughs of New York City. Forty-nine percent of all parolees were unemployed, 81% needed services for drug abuse, and 15% had only a grade school education.[548] Data from the Department of Correctional Services helps to complete the profile. For all people in New York State prisons on January 1, 2003, 36% tested below an 8th grade reading level and more than half had not graduated from high school or received a GED. Forty-nine percent reported having at least one or more living children.[549]

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[547] *See* New York State Dep't of Correctional Servs., *Characteristics of Inmates Discharged 2002*, Table 1.1 (of the 26,662 releasees in 2003, 56% were release onto parole, and 27% were released to parole supervision as a result of their conditional release).

[548] *See* New York State Division of Parole, *Parolee Facts* (Mar. 2004), *available at* http://parole.state.ny.us/program statistics.html.

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

Significant portions of people returning from prison are HIV-positive. New York leads the nation in this regard. In 2002, 7.5% of all people in custody in New York were HIV-positive and New York alone held one fifth of all people in prison nationwide known to be HIV-positive.[550]

National data helps to further our understanding about people returning to their communities from prison. Data from 1997 show that nearly one third of adults in prison were unemployed in the month before their arrest compared to 7% in the general population.[551] From data compiled by the Bureau of Justice Statistics and released in a Special Report in November 2000 it is fair to conclude that about 80% of all defendants charged with a felony in the United States are indigent.[552] It has been estimated that almost one-half of all people who have been previously incarcerated carry with them so many medical problems that it is unrealistic to expect them to re-enter society as normal productive citizens without much greater assistance than is currently available.[553] Nearly 16% of all people in prison, jail, or on probation were identified as mentally ill by a Bureau of Justice Statistics study.[554] The National Adult Literacy Survey has established that 11% of people in prison, compared with 3% of the general population, self-

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

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

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

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

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

reported having a learning disability.[555] For people who were formerly incarcerated nationwide, the unemployment rate has been placed as high as 60%, one year post-release.[556]

With this profile in mind, what else do we know about the "average" person returning from prison? Employment rates for less educated men remained stagnant even after one of the longest economic expansions in history. Twenty-two percent of young men with a high school diploma or less were not working.[557] Some of the factors that contribute to this downward employment trend are: a decline in job availability for less-educated workers overall, due to an increase in demand for literacy and technical skills; the movement of manufacturing, construction, and transportation jobs away from the inner cities; and employer discrimination, particularly against African Americans.[558]

Families of people returning from prison could potentially help them pay the financial penalties, however, they disproportionately find themselves in difficult financial straits as well. Fifty-three percent of African Americans returning from prison grew up in single parent families compared to 33% of their white counterparts, and 40% of their Hispanic counterparts.[559] In addition, 42% of African American's in prison had an immediate relative who had served time,

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

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

557 Ann Cammett, *Making Work Pay: Promoting Employment and Better Child Support Outcomes for Low-Income and Incarcerated Parents*, at 6 (New Jersey Institute for Social Justice 2005), *available at* http://www.njisj.org/reports/makingworkpay.pdf.

558 *Id.*

559 Allen Beck, *Survey of State Prison Inmates, 1991* (Bureau of Justice Statistics, Wash., D.C. 1993).

as compared to 33% whites, and 35% Hispanics. Sixty-seven percent of women and 56% of men who are in prison had a child or children under age 18.[560]

Empirical evidence demonstrates that people leaving prison will have an extremely difficult time finding employment after release. There is a serious stigma attached to a criminal history - particularly a prison record. Surveys of employers reveal a great reluctance to hire a person with a felony conviction.[561] In a study by Holzer, he found that more than 60% of employers were unwilling to hire an applicant with a criminal record.[562] In a study by Devah Pager, she found that acknowledging a prison record cut a white man's chances of getting called back for an interview in half, and decreased a black man's chances for an interview by a much larger two-thirds. Even more startling was her finding that a white man with a criminal records was still more likely to be called back for an interview than a black man with no criminal history.[563] Even when a person with a prison history was able to find a job, Kling found that there was an impact on future earnings, being lowered by about 30%. Employers willing to hire people who had been previously incarcerated tended to offer lower wages and benefits.[564]

As noted above, African Americans and Hispanics make up more than 81% of all people on parole in New York. Yet African Americans and Hispanics are in a much worse financial position than their white counterparts to pay any financial penalties. The median net worth of Hispanic households in 2002 was $7,932.00, while it was $5,988.00 for African American households, and $88,651.00 for white households. Stated another way, the median net worth for

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560 *Id.*

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

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

563 Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 5, 937-75 (2003).

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

white households was 14 times that of African American households, and 11 times that of Hispanic households. 26% of Hispanic households and 32% of African American households had zero or negative net worth in 2002. Only 13% of white households were so situated.[565]

Unemployment data across racial and ethnic lines would help us analyze the ability to pay financial penalties for people returning to their communities from prison. Unfortunately, uncounted in this data are all those who are too disabled to work, those in prison, those working in the underground economy, and those who have given up even looking for a job. David Hilfiker has examined unemployment data taking these categories into account. Looking at all American men of working age, 27% are not working. Among African American men, over 35% are not working, and among African American men who have not completed high school, 63% are not working.[566]

People leave prison typically with no savings or assets, limited job training and work experience, discriminated against in their search for employment as a result of race, ethnicity, and the stigma of a criminal history, and a host of barriers to employment. A comprehensive statutory and regulatory analysis showed that people with criminal records encounter a vast array of legal restrictions that bar them from a wide array of occupations and professions.[567] More and more occupational bars are being imposed against people with various criminal convictions. There has been an expansion of prohibitions against hiring teachers, childcare workers, and related professionals with prior criminal records.[568] As recently as April 1, 2005 New York State

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565 Rakesh Kochhar, *The Wealth of Hispanic Households: 1996 to 2002*, Pew Hispanic Center (2004), *available at* http://pewhispanic.org/files/reports/34.pdf.

566 David Hilfiker, URBAN INJUSTICE: HOW GHETTOS HAPPEN 53 (2002).

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

568 Marc Mauer & Meda Chesney-Lind, INVISIBLE PUNISHMENT 22 (2002).

Department of Health amended its regulations to prohibit the employment of any person convicted of a felony in the preceding 10 years in the field of nursing homes or home care.[569] The amendment of these regulations was followed by legislation in 2005 to the same effect.[570] In 2001 the Legal Action Center produced a survey that provided information about statutory restrictions that affect the ability of individuals with criminal records to receive over 100 state licenses in New York.[571]

The expansion of legal barriers to employment has been accompanied by an increase in the ease of checking criminal records due to new technology and expanded public access to records. One's criminal past has become both more public and more exclusionary, limiting the universe of available work.[572]

The ability of people returning home from prison to pay financial penalties is thus seen to be affected by high unemployment, stigma of a criminal history, race discrimination, bad credit history caused by the financial penalties themselves, low education, poverty, low work experience, low skill levels, high levels of mental health medical disabilities, legal bars to employment, and decrease in earning power. They find themselves at the bottom of the employability hierarchy and subject to legal sanctions imposed by lawmakers that serve to ensure economic deprivation including sanctions on certain economic opportunities that others do not suffer.[573]

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569 10 NYCRR §§ 400.23, 763.13, 766.11 and 18 NYCRR § 505.14.

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

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

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

573 *Id.* at 164.

Can we realistically continue to impose financial penalties on a re-entering population under such circumstances, knowing that it is likely to prove counterproductive to the reintegration of so many?

d. Forfeiture, collateral estoppel, and multiple proceedings

Insofar as financial penalties, fines, forfeitures, restitution, disgorgement, and/or treble damages can be imposed by state or federal government, a fundamental problem is that multiple punishments may, in effect, be meted out against a criminal defendant and his family because of legal fictions that do not comport with reality, and without having any relationship to financial impact on victims from the defendant's criminal conduct.

In this regard, orders of restitution (whereby the criminal defendant is directed to pay money into a fund with the aim of compensating and making his victim(s) whole), or disgorgement (whereby a criminal defendant is compelled to "disgorge" his illicit gains on the theory that he should not be allowed to profit from his criminal activity) are equitable remedies that relate directly to criminal activity for which the defendant has been convicted. Accordingly, the penalty by its nature should fit the crime.

However, under varying circumstances, both New York State and federal law recognize that an individual may be both criminally prosecuted (where, based on a beyond a reasonable doubt standard, the government seeks to impose punishment on a defendant for criminal activity), and sued civilly (where, by a lesser standard of clear and convincing evidence or a preponderance of the evidence, the government seeks to impose fines or other financial penalties that are also aimed primarily at punishing the individual). Moreover, because of the collateral estoppel effect of a prior criminal conviction, it is often a foregone conclusion that the defendant will be found liable in the subsequent civil proceeding for fines, forfeitures or other financial

penalties based on the same illegal conduct for which he has already been punished in the prior criminal proceeding.

In *United States v. Halper*, the Supreme Court attempted to place some limits on this "double punishment" problem, when it recognized that, even in a proceeding designated as civil in nature, the nature of the action might still constitute punishment and violate the Double Jeopardy provisions of the Fifth Amendment of the United States Constitution.[574] In this regard, the *Halper* Court held that one who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction cannot be fairly characterized as remedial, but serves instead the purpose of deterrence or retribution.[575] The Supreme Court cautioned in *Halper*, however, that a subsequent civil financial sanction (in that case, monetary penalties and treble damages under the federal False Claims Act) needed only provide "rough remedial justice" to the government in compensation for its losses to avoid the proscription against double punishment.[576]

Several years later, the Court disavowed this analysis in light of "the wide variety of novel double jeopardy claims spawned in the wake of *Halper*."[577] Instead, the Court in *Hudson* held that the key was whether the Legislature intended the subject statute to be criminal or civil in nature, and then enumerated several factors to be considered in this determination including:

1. Whether the sanction involves an affirmative disability or restraint;
2. Whether it has historically been regarded as a punishment;
3. Whether it comes into play only on a finding of scienter;

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574 *United States v. Halper*, 490 U.S. 435, 443 (1989).

575 *Id.* at 448-49.

576 *Id.* at 443-49.

577 *See Hudson v. United States*, 522 U.S. 93, 98 (1997).

4. Whether its operation will promote the traditional aims of punishment, retribution and deterrence;
5. Whether the behavior to which it applies is already a crime;
6. Whether an alternative purpose to which it may be rationally connected is assignable for it; and
7. Whether it appears excessive in relation to the alternative purpose assigned.[578]

In an apparent effort to ease this reversal of its earlier position, the Court in *Hudson* noted that other constitutional provisions addressed some of the ills at which *Halper* was aimed.[579] In this regard, the Court noted that "[t]he Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational," and that "[t]he Eighth Amendment protects against excessive fines, including forfeitures."[580] Notwithstanding this, it is clear that *Hudson* offers a criminal defendant small comfort against multiple punishments, whether designated criminal or civil in nature.

In any event, a criminal defendant, who is convicted and later faces an *in rem* civil forfeiture proceeding against his property, cannot rely on Double Jeopardy principles at all, because the Supreme Court has held that *in rem* civil forfeitures are neither "punishment" nor "criminal" for purposes of Double Jeopardy analysis.[581]

Nevertheless, despite the apparent inconsistency, the Supreme Court has also held that *in rem* civil forfeiture ***is*** a "punishment" for purposes of Eighth Amendment Excessive Fines

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578 *Id.* at 99-100.

579 *Id.* at 102-03.

580 *Id.* at 103.

581 *United States v. Ursery*, 518 U.S. 267 (1996).

analysis. Thus, the Court has held that an *in rem* civil forfeiture action is subject to the dictates of the Excessive Fines Clause because the forfeiture constitutes a "payment to the sovereign as punishment for some offense."[582] Thus, if the government brings a subsequent civil proceeding seeking fines or forfeitures of a criminal defendant's property interests, even if in an *in rem* action, the defendant may be able to claim the protections of the Excessive Fines Clause.

In *United States v. Bajakajian*, the Supreme Court, applying the Excessive Fines Clause for the first time, struck down a forfeiture as an excessive fine under the Eighth Amendment.[583] Bajakajian, while attempting to leave the United States failed to report that he was carrying $357,144. He later pled guilty to willfully violating 31 U.S.C. § 5316(a)(1)(A), which requires one to report all currency transported internationally, in excess of $10,000. Pursuant to 18 U.S.C. § 982(a)(1), the government also sought forfeiture of all the money in a subsequent bench trial. The Supreme Court determined, however, that full forfeiture of the money would be "grossly disproportionate" to the underlying criminal offense, and a violation of the Excessive Fines Clause of the Eighth Amendment.

Nevertheless, the standard for implicating the Excessive Fines Clause is a high one, and as noted above, Double Jeopardy principles do not apply to *in rem* civil forfeitures at all, and are unlikely to be effective in precluding other subsequent civil actions seeking fines or other financial penalties. Accordingly, it might be advisable for Congress and/or the New York State legislature to enact legislation limiting the extent to which subsequent civil penalties and/or forfeiture actions can impose additional financial penalties, either directly or indirectly, upon a

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582 *See Austin v. United States*, 509 U.S. 602, 622 (1993); *see also Ursery*, 518 U.S. at 281.

583 *United States v. Bajakajian*, 524 U.S. 321(1998).

criminal defendant who has already been fined or otherwise assessed a financial penalty in a prior criminal action.[584]

Notably, Congress recently enacted a long overdue "Civil Asset Forfeiture Reform Act of 2000" ("CAFRA") which addressed several of the often criticized provisions of federal forfeiture laws. Among the reforms enacted were provisions placing the burden of proof for forfeiture squarely upon the government, rather than on the claimant; creating time-frames within which the government must start forfeiture proceedings after seizure of the res; and codifying a uniform "Innocent Owner" defense to an *in rem* forfeiture proceeding.

With regard to the present discussion, Section 16 of CAFRA also broadly expanded the availability to the federal government of seeking an *in personam* forfeiture in the course of a criminal proceeding in any case in which civil *in rem* forfeiture would otherwise be available.[585] Thus, the federal government presently has the option of proceeding either with an *in personam* forfeiture against a defendant in the course of his criminal trial - in which case the extent of the forfeiture and other financial penalties or assessments imposed upon the defendant can all be analyzed together by the Court in order to avoid the constitutional prohibitions of the Double Jeopardy and/or Excessive Fines Clauses – or of bringing a separate civil forfeiture proceeding.[586]

Because of the benefit of addressing all potential financial consequences of a criminal conviction in one proceeding, it may make sense to recommend that, to the extent that a criminal

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[584] Significantly, as noted previously, New York law in most cases *requires* the prosecutor to bring a subsequent civil proceeding in order to forfeit property of the criminal defendant. *See* N.Y. C.P.L.R. § 13-A. Only in limited circumstances, such as prosecutions for narcotics felonies or for Enterprise Corruption, can the prosecutor seek forfeiture as part of the criminal case. *See* N.Y. PENAL LAW §§ 480, 460.30.

[585] *See* 28 U.S.C. § 2461(c).

action is brought against an individual, the government should be required to seek forfeiture of that defendant's interests in the course of that proceeding, rather than in a subsequent civil action. The problem with proposing such legislation as the law of forfeiture presently stands is that a subsequent civil proceeding may be necessary in any event to forfeit or otherwise resolve the potential interests of individuals or entities other than the criminal defendant. Moreover, a lesser burden of proof would apply in the civil case than in the criminal one, with the government only needing to establish by a preponderance of the evidence that it was entitled to penalties or to forfeiture. Thus, for example, even if a criminal defendant were to be acquitted on a criminal forfeiture count in the course of the criminal action, the government might still proceed and obtain forfeiture of that defendant's interests in the subject property in the course of a subsequent civil proceeding.

On another matter and as detailed further above, recent decisions of the New York Court of Appeals and the Second Circuit Court of Appeals have determined that both the federal and state Constitutions require that a prompt, post-seizure hearing be provided to a potential claimant in order to challenge the validity of the initial seizure and retention of her property for intended forfeiture.[587] In *Canavan*, the New York Court of Appeals further determined that a forfeiture statute would be unconstitutional unless it provided for protection against the forfeiture of the interests of innocent owners.[588] Although it is well beyond the purview of this report, it may be

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[586] Of course, the government can, and often does bring a civil forfeiture action against the res without there ever having been any criminal proceeding against an individual defendant as long as the res was involved in, or constitutes the proceeds of criminal activity.

[587] *See Krimstock v. Kelly*, 306 F.3d 40 (2d Cir.), *cert. denied*, 539 U.S. 969 (2003); *Nassau County v. Canavan*, 1 N.Y.3d 134 (2003).

[588] *Canavan*, 1 N.Y.3d at 143-44.

that a Special Committee should be created to develop a model forfeiture statute that might be adopted by states or municipalities with some assurance that it will meet constitutional muster.

2. Specific Recommendations: Legislative Remedies – Protect People From Being Overburdened by Financial Penalties

a. Consolidate all financial penalties into one fee

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

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

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

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

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

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

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

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

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

The judgments that result from the non-payment of certain financial penalties arising from a criminal conviction including fines, restitution or reparation, mandatory surcharge, sex offender fee, DNA databank fee, and crime victim assistance fee unduly prejudice and inhibit employment efforts when employers review the credit histories of prospective employees and become aware of the judgments arising from criminal financial penalty. Limited purpose is served by allowing employers to screen out prospective employees based upon a judgment arising from a criminal financial penalty. Conversely, the additional barrier to employment that this practice creates runs contrary to the public policy of this state to encourage the employment of persons previously convicted of one or more criminal offenses.[589]

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

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

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589 *See* N.Y. CORRECT. LAW § 753(1)(a).

g. Prohibit retaliation for failure to pay financial penalty

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

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

Consolidating all financial penalties into one article in the Penal Law will serve two purposes. First, it will provide ease of access for defense counsel, prosecutors, and judges. No longer will they have to search through a scattered array of statutes in order familiarize themselves with the financial penalties to be imposed in each case. This will also enhance the ability of defense counsel to be able to discuss the collateral consequences of the conviction with his or her client as required by professional standards.[590] Second, it will ensure that the legislature can efficiently be able to assess the sum of all penalties already imposed as a result of a criminal conviction, when considering the imposition of new or increased financial penalties.

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

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

punishment policy, incorporated in our sentencing jurisprudence, and subjected to rigorous research and evaluation.[591]

i. Require disclosure to defendant prior to plea

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

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

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

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