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Robert D. Ebel

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**July
2018**

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Fees and Fines:

An Economist's View of Who Should Pay

Robert D. Ebel

July 12, 2018

Introduction

In *Bearden v. Georgia* (1983), the US Supreme Court found that an indigent defendant cannot be jailed for an inability to pay a fee or fine unless the defendant has “has willfully refused to pay the fine or restitution when he has the resources to pay or has failed to make ... efforts to seek employment or borrow money to pay....” However, the Court stopped short of giving clear guidance on the meaning of either ability or willingness to pay (Edelman, 2017). The US Constitution is explicit that that once a person is convicted of a crime the fines imposed shall not be excessive.

Yet, as documented in these *Proceedings*, in practice things can go badly. It is not uncommon for a state/local (herein after “state”) court to impose a combination of charges that range from fees to access to the courts to fees plus fines that cause a low income defendant to lose employment and be forced into a lifetime of poverty for themselves and their family. A national alert about how fines and fees punish the poor gained nationwide attention following the Ferguson, Missouri police shooting of Michael Brown where the US Department of Justice found that that the City’s emphasis on revenue generation had a “profound effect” on FPDs approach to law enforcement (DoJ, 2017) . And, as these *Proceedings* and other recent examinations of the trends in state courts further reveal, Ferguson is not an isolated example. Furthermore, the matter of levying fees largely for revenue purposes is a state issue: no fees are imposed for access to the federal court system (Smith, Campbell and Kavanagh, 2017).

(Some) Public Finance Economics

The purpose of this essay is to take a public finance economics view of the topic “who should pay?” when it comes to the matter of fees that apply to innocent and guilty alike, and the fines assessed for those found guilty.

There are two normatives that apply: Benefits Received and Ability to Pay.

The Benefits doctrine holds that people should pay for the public services they receive. Taxes and fees are seen as prices paid for public services similar to what the consumer pays for purchasing a private good or service. If the payment is fair—there is a match between “who benefits” and “who pays”—then the system is fair. It is about “getting the prices right” (Bird, 1976).

Fees. There are two groups that benefit from access to justice, and here the Benefits doctrine comes into play. The first is clear cut: the accused. In economics jargon, the benefits of access are internal to the defendant. The second is those who are not directly involved in a judicial activity, but who nevertheless gain from having a system that is available to all citizens and, too, who want to keep the option open for own use if needed at another time. Now the benefits flow to external parties—they are shared by all. This leads to the policy conclusion that for a society that declares equality and liberty for all, access to justice not only has important aspects of a pure public good (no one can be excluded), but also, that in getting the prices right, the benefits are so broad that the cost of access should be funded through general taxes, not fees.

Fines. Dating back to Adam Smith (1776), the Ability doctrine calls for people to contribute to the cost of government according to one’s capacity to pay. Again, things can go terribly awry. As the essays in these *Proceedings* document, often a low-income defendant will plead guilty to a charge just to avoid further fines and penalties on unpaid fines and/or end up in the vortex of an often corrupt the bail system. This said, it is also important that when a person is convicted of breaking the law, a penalty must be assessed.

Again, the task is about “getting the prices right”. There are two matters to consider.

The first is that in measuring ability to pay, it is important is to keep it simple. Two centuries ago property and wealth revealed ability to pay; today income is the preferred indicator. Yes, in concept, ability includes more than current income (e.g., change in net asset worth, plus, even some forms of imputed income), but for purposes of measuring “ability” there is an compliance and administrative administration case to be made to go with current income. If income is not available, proxies are. Note that income may be zero or even negative.

The second, which is related to the first, is to recognize that society can achieve a high degree of equity by pegging a penalty to a convicted defendant’s opportunity cost. An example is the approach used in several European countries whereby offenders with different abilities to pay and who commit the same crime pay the same “day fine”—that is, a similar proportion of their income as distinct from the same

absolute amount of money (Coglan, this volume). Too, there are non-monetary approaches (which can be monetized) including community service and/or some form of restitution.

Finally, on the matter of *Bearden's* willingness to pay: it is not a good working approach. Willingness is a concept that can be used to ascertain how much a user values a public service. This works for finance and funding of infrastructure where there is a market-like exchange among parties, but justice system fines and fees are a one-way government coercion.

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