

FORCING JUDGES TO CRIMINALIZE POVERTY:

ERODING JUDICIAL INDEPENDENCE IN NORTH CAROLINA

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North Carolina Poverty Research Fund

Fall 2018

Acknowledgments

We are deeply appreciative of the support that allows us to study poverty in North Carolina. In particular, the Law Firm of James Scott Farrin provides generous support for this series of reports on criminalizing poverty in the Tar Heel State. The Z. Smith Reynolds Foundation, the A.J. Fletcher Foundation, and the Triangle Community Foundation have also been generous in providing funding to explore, and write about, such matters—as have a number of generous individual and foundation donors.

The terrific work of UNC law students Aaron Dalton, F. Matthew Norchi and Phillip Perko did much to lay the groundwork for this report. We are also immensely grateful to the judges who spoke to us candidly about the issues explored in these pages.

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There is no doubt that the legislature’s enforcement of fines and fees—the pressure to not grant waivers—is part of a larger effort to control judges. It is part of a campaign to strip the judiciary of its independence. You make judges jump through a lot of hoops and you let them know someone is watching them. It also can work to threaten their re-elections—claiming they are soft on crime. The listing of waivers granted is a clear message to judges that Raleigh has its eye on them. Someone in the legislature is keeping score. The purpose of the whole scheme is to intimidate judges. This is the clear politicization our jobs.

- Retired North Carolina District Court Judge¹

Introduction

Over the past two decades, the state of North Carolina has created one of the country’s most extensive and robust regimes of “user fees” for criminal defendants to help pay for the system of justice. Since almost all criminal defendants are indigent, these court fees work a formidable set of hardships on many litigants. Poor North Carolinians across the state become trapped in a cycle of poverty. Increased debts and ancillary punishments—probation extensions, license revocations, and sometimes even incarceration—frequently result. Constitutional rights are routinely sacrificed. Demands of equal justice and due process are discarded. And a Kafkaesque bureaucratic scheme develops whereby the criminal justice system, meant to benefit all, is increasingly sustained by the least plausible set of economic actors: impoverished, heavily-sanctioned criminal defendants. We have written of the operation of the fee system in “Court Fines and Fees: Criminalizing Poverty in North Carolina.”²

North Carolina has joined its impressive list of criminal justice costs and fees with what is likely the nation’s most aggressive enforcement program. Both the United States Constitution and North Carolina law frequently require, or at least allow, court fees and other criminal justice debt to be waived in instances where their imposition would criminalize litigants for their poverty or effectively abrogate constitutionally protected liberties. Since 2011, the North Carolina General Assembly has worked steadily to restrain this traditional judicial authority. Though waiver occurs rarely—fewer than 2% of monetary obligations are waived in a third of counties and under 5% statewide, while over three-quarters of criminal defendants are indigent—legislators have moved repeatedly to close the door even further. The result is a set of intrusions upon the judicial process which not only jeopardizes the rights of impoverished defendants but directly and intentionally interferes with the constitutionally-mandated independence of North Carolina courts. This violation of an appropriate separation of powers, through the legislative subjugation of the courts, is the subject of this report.

¹ Interview with the N.C. Poverty Research Fund. Unless otherwise attributed, quotations from judges are from interviews with the Fund. Not all judges asked to remain anonymous but for reasons of confidentiality, caution, respect and consistency, we chose to omit names.

² Hunt and Nichol, *Court Fines and Fees: Criminalizing Poverty In North Carolina*.

The current push to curtail waiver was initiated in 2011 by a procedural requirement mandating that judges issue a “written finding of just cause” before any fees were dismissed. The North Carolina Administrative Office of the Courts (AOC) was then compelled to produce and maintain a record of all cases where fees were waived and file an annual report on the number of waivers granted. The next year, the “written finding” requirement was expanded to include fully elucidated “findings of fact and conclusions of law” to justify every waiver. In 2014, the General Assembly altered the annual report mandate to require a separate listing for every judge and for every judicial district. North Carolina is apparently the only state demanding the publication of such a roster. Judges refer to it, unsurprisingly, as the “shaming” report. The number of state agencies to which the report must be submitted was also greatly expanded.

In 2017, the legislature piled on. It amended the court fees law to prohibit any waiver unless “notice and opportunity to be heard” was presented to all government entities potentially receiving funds from court fees. The notice must proceed by first class mail, to apparently hundreds of agencies, at least 15 days prior to any granted waiver. It, too, is a first-in-the-nation hurdle—consuming court time and money and requiring secondary hearings. State judges reportedly believe the goal of the agency notice is to make “the process to waive a court fee so burdensome” that judges simply won’t bother—tightening the screws on judicial discretion.³ Early this year the waiver law was altered again, demanding that the AOC report annually to a legislative oversight committee “on the implementation of the notice ... to government agencies” requirement.⁴

We make the claim here that the mandated “shaming” report and the absurdly burdensome agency notice requirement unconstitutionally interfere with the independence and integrity of North Carolina courts. The Supreme Court of North Carolina, echoing the state constitution’s demand that “the legislative, executive and judicial powers be forever separate and distinct,” has held that the separation of powers principle is violated “when the actions of one branch prevent another branch from performing its constitutional duties.”⁵ The General Assembly has given North Carolina courts the power to waive most court-ordered fees under state law. Despite that grant of authority, the annual waiver report and the uselessly laborious agency notice requirement are designed to place a heavy (legislatively-crafted) thumb upon the scales of such judicial determinations. A legislature may grant courts jurisdiction to adjudicate various matters. It may not, having granted such authority, then attempt to compel judges to exercise that power in favor of (or against) a particular litigant. Doing so breaches the independence required by American courts. The breach is made even more worrisome when waiver is, in numerous instances, mandated by the United States Constitution.

In August 2018, the American Bar Association declared, “No law or rule should limit or prohibit a judge’s ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause a substantial hardship.”⁶ The U.S. Supreme Court has made clear that the

³ Fain, “Budget Language Targets Court Fee Waivers for Poor Defendants.”

⁴ See Session Law 2018-5, Senate Bill 99, Section 18B.1, <https://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2017-2018/SL2018-5.html>.

⁵ *Cooper v. Berger*, 809 S.E.2d 98, 111 (N.C. 2018).

⁶ Working Group on Building Public Trust in the American Justice System et al., *ABA Ten Guidelines on Court Fines and Fees*.

Fourteenth Amendment prohibits states from “punishing a person for his poverty” through either penalty, incarceration, or the burdening of constitutional guarantees.⁷ Accordingly, the waiver of court fees is frequently assured not only by North Carolina law but by the federal constitution. When the General Assembly moves to thwart, burden and discourage the granting of vital waivers for poor litigants, as it has with its agency notice and judicial shaming report, it restricts the ability of the judicial branch to carry out its duties. This effective coercion violates essential judicial independence and an appropriate separation of powers. The General Assembly tells North Carolina judges: you have the power to issue waivers in cases of potent economic hardship, but if you use it, we will punish you by making you step through massive bureaucratic hurdles and publishing the fact that you have reached a decision of which we disapprove. If, on the other hand, you deny waiver, we’ll smile, nod our approval, and let you be. We’ve put a thumb on the scales for a reason. We don’t actually want judges to grant waivers. Wise up, or pay the cost.

Of course, the North Carolina General Assembly’s treatment of court fee waivers is hardly its only recent attack on the integrity and independence of the state court system. It has, in the past decade, ended public financing in judicial elections, re-introduced partisan judicial elections, curbed jurisdiction in constitutional challenges, intervened by statute to protect a Republican incumbent justice, manipulated the size of the court of appeals, eliminated judicial primaries, re-districted disfavored Wake and Mecklenburg county courts, moved to reduce gubernatorial appointments, sought to take over the judicial appointment process and threatened judges with the prospect of two year terms. The head of the Republican Party has threatened to impeach judges who rule against the party. So, for North Carolina legislators, interfering with the independence of courts is hardly foreign ground. The General Assembly’s anti-waiver scheme, however, marries two of the legislature’s principal themes of the last decade: attacking the independent functioning of the courts and crushing the prospects of low-income North Carolinians. It is unconstitutional to force judges to step on the necks of poor Tar Heels.

Background on Court Costs

In North Carolina, and in states across the country, defendants in criminal cases must pay a range of costs associated with their involvement in the criminal justice system. Costs vary from state to state but in North Carolina they can accrue at every stage of the criminal justice process, from pretrial detention, to prosecution and trial to incarceration, alternative sentencing and probation. These costs can consist of fines (imposed as part of the punishment), fees (imposed to recoup court costs) and/or restitution (repayment to the victim).

Many of North Carolina’s criminal justice fees are outlined in N.C.G.S. § 7A-304 (“the court fees law”). This subset of fees (we’ll call them court fees for clarity) are imposed on all defendants in criminal or traffic cases who are convicted or plead guilty. They range from mandatory fees that everyone must pay to contingent fees that apply situationally, such as lab test fees, pretrial detention fees, late fees and the like. At minimum, all defendants are assessed about \$200 in court fees, although the total sum can go much

⁷ *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). See also *Tate v. Short*, 401 U.S. 395 (1971); *Turner v. Rogers*, 564 U.S. 431 (2011).

higher. On top of these court fees, defendants may separately have to pay attorney fees, jail fees, probation fees and other fees associated with the “use” of the criminal justice system, as well as fines and restitution.⁸

The North Carolina court system disbursed over \$725 million in the 2016-2017 fiscal year, most of which was distributed to a range of government entities. The single largest governmental beneficiary was the state’s general fund, which received almost \$263 million—\$215 million in court fees alone. Other state officials and departments received \$32 million and local governments claimed over \$70 million.⁹ Seen in this light, fees are a way of shifting state costs from the general public to criminal defendants who are overwhelmingly poor and disproportionately people of color.

The U.S. Supreme Court has held that it is unconstitutional to incarcerate defendants for the inability to pay court-ordered monetary obligations.¹⁰ To avoid this injustice—and to prevent other unconstitutional, unfair and far-reaching harms associated with the inability to pay—judges can waive or remit many fines and fees.¹¹ That is, in most cases they can reduce or eliminate some or all of the costs, court fees included, imposed on defendants.

In North Carolina, the General Assembly in recent years has been working steadily to curb, through statute, the judicial use of waiver. The result is ever-increasing legislative intrusion into judicial independence, starting at first with procedural obstacles and escalating to full-blown coercive measures. To be clear, the legislature is not responding to an epidemic of unwarranted judicial waiver sweeping through the state’s courthouses. In North Carolina overall, fewer than 5% of court-ordered monetary obligations are waived or remitted. In a third of North Carolina’s counties, the waiver rate is negligible, at less than 2%.¹² Given that 80-90% of criminal defendants nationwide are indigent, and many face educational, mental health, addiction or other barriers to stability and employment (including a criminal record), it is likely that waiver is, if anything, underutilized.¹³

⁸ See the court costs and fees chart published by North Carolina Administrative Office of the Courts for a full list of fees. The basic mandatory court fees are on the first page, additional fees on the second. North Carolina Administrative Office of the Courts, “Court Costs and Fees Chart.”

⁹ North Carolina Administrative Office of the Courts Budget Management and Financial Services, *Statistical and Operational Report of Budget Management and Financial Services: 2016-17*, 5–6.

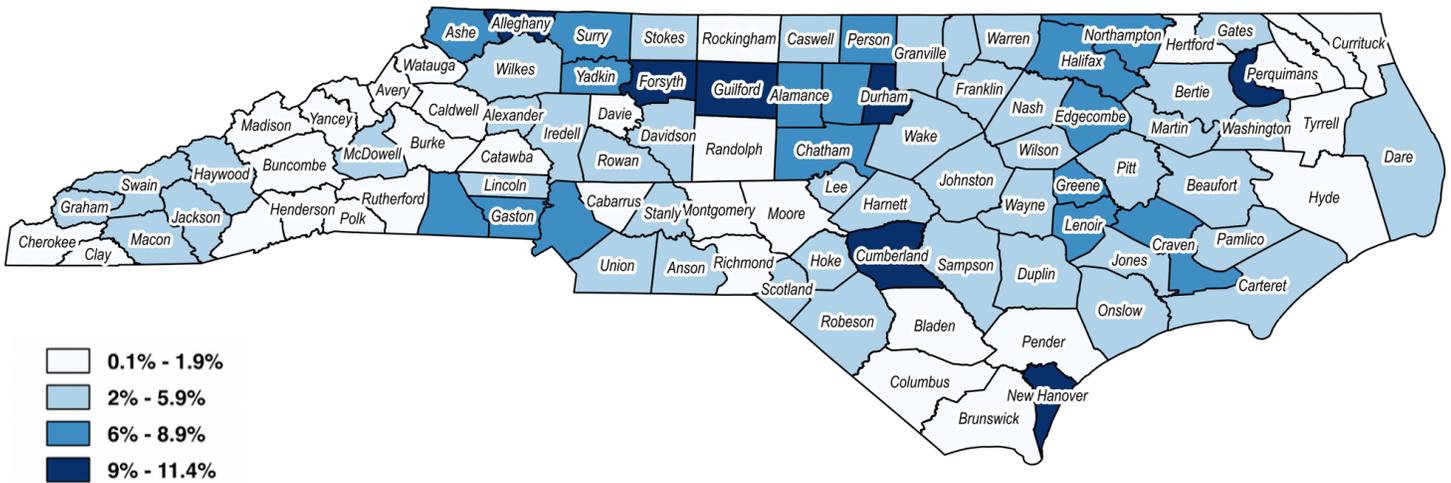
¹⁰ See *Bearden*, 461 U.S. 660.

¹¹ While waiver and remission both relieve court-ordered debt, they are authorized by different statutes and operate somewhat differently. Waiver occurs at sentencing; remission can occur at any time under the required circumstances. The legislature limits both waiver and remission, so for simplicity’s sake we generally refer to waiver only.

¹² North Carolina Administrative Office of the Courts, *2018 Report on Criminal Cost Waivers*.

¹³ In North Carolina, 36% of people entering prison have been homeless, a third have no more than a ninth grade education, and almost all (99%) have a high school diploma at most. Hunt and Nichol, *Court Fines and Fees: Criminalizing Poverty In North Carolina*, 6. Additionally, over 70% of people screened by the NC Department of Public Safety self-reported a need for intermediate or long-term substance abuse treatment. Over 25,000 people with severe mental illness are jailed in North Carolina every year. American Civil Liberties Union, *Blueprint for Smart Justice North Carolina*, 4.

Figure 1. Waiver/Remission Rate by County, 2017



Legislative Intrusion into Judicial Independence

The recent push to limit the judicial use of waiver started in 2011, when the court fees law was revised so that court fees applied by default. Judges who wanted to waive those fees were required to produce “written finding of just cause.”¹⁴ The North Carolina Administrative Office of the Courts (AOC), the state court system’s administrative body, was ordered to maintain records of all cases where court fees were waived and file an annual report on the number of waivers granted.¹⁵ The General Assembly amended the law again in 2012, mandating that judges justify their decision to waive by presenting “findings of fact and conclusions of law” in support of the just cause requirement enacted the year before.¹⁶

More recent restrictions on waiver have intruded more boldly into the judicial sphere. In 2014, the General Assembly struck the first blow in this aggressive new regime, requiring that the annual waiver report provide a breakdown by judge and judicial district.¹⁷ On top of that, the number of agencies to which the report was required to be submitted was greatly expanded.¹⁸

¹⁴ See Section 15.10(a) of Session Law 2011-145, <http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H200v9.pdf>.

¹⁵ See Section 15.10(b) of Session Law 2011-145, <http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H200v9.pdf>.

¹⁶ See Section 16.6(b) of Session Law 2012-142, <http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H950v7.pdf>.

¹⁷ See Section 18B.2 of Session Law 2014-100, <http://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2014-100.html>. Enacted as N.C.G.S. § 7A-350.

¹⁸ *Id.*

The annual waiver report is widely understood as a way to control judges by exposing them to public or political pressure. Judges in North Carolina are elected and the annual report can be exploited to oppose judges or smear them as “soft on crime.” In Mecklenburg County, judges call it the “List of Shame.”¹⁹ When asked about the purpose of the report, one judge said simply, that it’s “all about trying to constrain judges in this decision-making process.” Richard Boner, a retired Mecklenburg County superior court judge remarked, “What purpose does it serve? To embarrass people, I guess.” Boner stated,

they can put my name on a list if they want to, but I wasn’t going to send people to jail if they were doing the best they could do, and for bad health or some other reason they couldn’t afford the payments. That’s no better than a debtor’s prison.²⁰

Rationalizations in support of the annual report are pretextual and tepid. Former state senator, E. S. “Buck” Newton, suggested it could serve a policing function. “If we see areas that have an unusually high amount [*sic*] of waivers,” he stated, “that might be useful for local justice officials to realize that they’re out of what might be the normal range. That could be something the legislature might want to consider down the road if there appeared to be a problem.” Senator Newton also stated that the data was important “from a taxpayer’s protection standpoint,” reinforcing the notion that the report serves as a check on the judiciary.²¹ Yet even accepting these troubling explanations on their face, the report still fails. It is too simplistic, reductive and error ridden to serve any real reporting purpose. Almost half of the total number of monetary obligations that are supposed to be counted are missing or uncategorized. The report lacks contextualizing information. It looks exclusively at a subset of criminal justice fees, ignoring others. It is not a genuine tool for guidance or reform.

The legislature’s second major incursion into judicial independence occurred in 2017 when the court fees law was amended yet again. This time, the legislature prohibited the waiver or remission of “court fines or costs” unless judges provided “notice and opportunity to be heard by all government entities directly affected” (those entities eligible to receive a portion of the fees the judge was proposing to waive). Such entities, the law stipulated, must be notified by first class mail²² at least 15 days prior to waiver.²³

The notice requirement creates waste and delay. North Carolina’s trial courts, especially its district courts, have high volume dockets. In total, they disposed of over 1.6 million criminal and traffic cases in fiscal year 2016-2017.²⁴ Fees might be waived or remitted in almost any case. In some jurisdictions, the notice requirement entails alerting more than 20 government entities for each fee waived.²⁵ Mecklenburg County estimated that the notice requirement would be triggered thousands of times a week, representing

¹⁹ Gordon, “His Sentence Carried No Jail Time. So Why Did He Keep Ending Up There?”

²⁰ Gordon.

²¹ Bantz, “Report on Waived Criminal Court Fees Shows a Divide Between Some Counties.”

²² Though the reduction of waivers is often couched in the language of fiscal responsibility, it is noteworthy that the law requires first-class mail, and not a more inexpensive substitute. Legislators rebuffed an appeal to allow courts to send the notice electronically. Fain, “Budget Language Targets Court Fee Waivers for Poor Defendants.”

²³ See Section 18B.6.(a) of Session Law 2017-57, <https://www.ncleg.net/Sessions/2017/Bills/Senate/PDF/S257v9.pdf>. Enacted as amendment to N.C.G.S. § 7A-304.

²⁴ North Carolina Judicial Branch, Data, Caseload Inventory, <https://data.nccourts.gov/explore/?sort=modified>.

²⁵ Fain, “Push to Limit Waivers of Court Fees Will Require at Least 615 Mailed Notices Monthly.”

“a huge increase and burden on an office already overburdened.”²⁶ The notice requirement also forces the court to schedule an additional hearing in the unlikely case a representative from an affected government entity chooses to appear.²⁷ As the AOC itself noted, implementation of the notice requirement “poses numerous operational difficulties for our criminal courts.”²⁸

The notice requirement is believed to be the first of its kind in the country.²⁹ As with the annual waiver report, its purpose “is just another way to prevent the judges from [waiving fees].”³⁰ “It’s clear that the provision is designed to make the process so cumbersome that judges will elect to not waive costs and have, essentially, enforcement hearings to make sure [the defendant] pays sometime in the future,” said one chief district court judge. “What’s supposed to be a very impartial and fair system becomes one where there seems to be incentive for the authorities in the system to find you guilty and collect these fees and fines.”³¹ State Representative Marcia Morey, a former chief district judge, has been more direct. The General Assembly, she stated, is “tightening the screw to take away judicial discretion.”³² The Criminal Justice Debt Fellow at the ACLU of North Carolina observed,

To the judges that care about staying within the parameters of the Constitution, this will just clog up the courts; it will cost more money for them, and I think it will cost more money than money that they would actually get back from poor defendants... And then for the other judges who have basically just assumed the role of debt collector for the state will find this refreshing that there’s an even better reason or another reason to not waive court costs.³³

While no legislators claimed authorship of the notice requirement, it has been linked to former state senator, Shirley Randleman. Senator Randleman has deflected attribution, claiming the amendment was “a group effort by senior budget writers in both chambers.”³⁴ But as the provision’s de facto spokesperson, she made her priorities clear. Efforts to clamp down on the judicial use of waiver “were all about revenue” and agencies deserved “an opportunity to be heard,” she claimed (although agency input is pertinent to neither the case nor the fair and efficient dispensation of justice).³⁵ Fellow Republican Senator Warren Daniel remarked that the notice requirement “was meant to encourage judges not to waive fines ‘as a matter of course.’”³⁶ Anecdote and the waiver rate suggests that this is not a real problem anywhere in the state.

²⁶ Fain, “Budget Language Targets Court Fee Waivers for Poor Defendants.” There are 615 entities statewide that could receive the notice.

²⁷ Fain, “Push to Limit Waivers of Court Fees Will Require at Least 615 Mailed Notices Monthly.”

²⁸ North Carolina Administrative Office of the Courts, “Memorandum on New Fee Waiver Provision in the 2017 Appropriations Act.” While not the focus of this report, the requirement of a second hearing is also a serious burden on defendants.

²⁹ Neff, “No Mercy for Judges Who Show Mercy.”

³⁰ Fain, “Budget Language Targets Court Fee Waivers for Poor Defendants.”

³¹ Boughton, “House and Senate Differ Over Budget Provision Making It Harder for Judges to Waive Fees for Poor Defendants.”

³² Ewing, “A Judicial Pact to Cut Court Costs for the Poor.”

³³ Boughton, “House and Senate Differ Over Budget Provision Making It Harder for Judges to Waive Fees for Poor Defendants.”

³⁴ Neff, “No Mercy for Judges Who Show Mercy.”

³⁵ Neff. As Rep. Marcia Morey notes, most of the lawmakers responsible for enacting the barriers to waiver have “never been in a courtroom—they don’t understand the hardships these defendants face. They want more money coming into the state revenue.” Ewing, “A Judicial Pact to Cut Court Costs for the Poor.”

³⁶ Fain, “Push to Limit Waivers of Court Fees Will Require at Least 615 Mailed Notices Monthly.”

The General Assembly's most recent change to the court fees law is further evidence of its hostility to waiver. In November 2017, the AOC outlined a plan to ease the administrative burden on judges by sending a monthly blanket notice to all government entities who stood to receive funds from court fees.³⁷ This step relieved judges from having to do the same in every case in which they were considering waiver. In January 2018, the AOC announced the creation of a central registry of government responses that would allow each agency to lodge a standing objection to waiver or to opt out of receiving notices in future, streamlining the process further.³⁸ The General Assembly, however, appeared dissatisfied with the AOC's stab at procedural efficiency and asked legislative staff to investigate the AOC's plan. This was done, said Senator Warren Daniel, "to make sure" the AOC is "complying with the spirit of the provision."³⁹

Presumably as a result of this investigation, the General Assembly again modified the waiver provision in 2018. Now, beginning October 1, 2018, the AOC is required to submit an annual report, "on the implementation of the notice of waiver of costs to the government entities directly affected."⁴⁰ Little guidance is currently available as to the meaning of, or purpose behind, this new demand. But it indicates that the General Assembly is scrutinizing the AOC's blanket notice provision, possibly with an eye toward enacting greater restrictions.

The statutory changes limiting waiver are unusual in that no legislators want to take credit for them. Revisions have occurred through the anonymity of the budget process and have been crafted largely in secret. For example, the 2011 changes appeared in the Senate's version of HB200, the Appropriations Act of 2011, materializing with no comment in the first publicly available version.⁴¹ The 2012 changes appeared in the first publicly available version of modifications to the 2011 budget released by the House.⁴² (The legislative record suggests that the additions were made by the House Committee on Appropriations.)⁴³ The 2014 changes appeared in the second publicly available draft of SB744, modifying the Appropriations Act of 2013.⁴⁴ (Here again, signs point to the House Committee on Appropriations as the source of the changes.)⁴⁵ The 2017 changes appeared in the second publicly available Senate version of the 2017 Appropriations Act, SB257.⁴⁶ (The House Committee on Appropriations' fingerprints are on these changes too.)⁴⁷ While the identity of some of the authors can be postulated, many of the provisions simply appear

³⁷ Harris, "November 13, 2017 Guidance Memo to Court Officials."

³⁸ Harris, "Guidance Memo to Judicial Officials." Registry as of October 18, 2018 available at <https://www.nccourts.gov/assets/documents/publications/WaiverResponseTable-20181018.pdf>.

³⁹ Fain, "Push to Limit Waivers of Court Fees Will Require at Least 615 Mailed Notices Monthly."

⁴⁰ See Section 18B.1, Session Law 2018-5, <https://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2017-2018/SL2018-5.html>.

⁴¹ See § 15.10(a) and (b) of the first public draft of HB200, <https://webservices.ncleg.net/ViewBillDocument/2011/716/0/H200-PCS30343-LEXF-14>.

⁴² See § 16.6(b) of the first public version of HB950, <https://webservices.ncleg.net/ViewBillDocument/2011/6033/0/H950-PCS30609-LU-19>.

⁴³ The legislative history of HB950 is available at: <https://www2.ncleg.net/BillLookup/2011/H950>.

⁴⁴ See § 18B.2 of the second publicly available version of SB744, <https://webservices.ncleg.net/ViewBillDocument/2013/8497/0/S744-PCS35555-MDxf-29>.

⁴⁵ It was the co-chairs of the Committee on Appropriations (Senators Hunt, Brown, Harrington, and Jackson) who proposed the committee substitute bill containing § 18B.2 on May 29, 2014. The legislative history of SB744 is available at <https://www2.ncleg.net/BillLookup/2013/S744>.

⁴⁶ See 18B.6 of the second publicly available version of SB257, <https://webservices.ncleg.net/ViewBillDocument/2017/4280/0/S257-PCS55078-MLxfr-10>.

⁴⁷ See the legislative history of SB257 is available at: <https://www2.ncleg.net/BillLookup/2017/S257>.

with no comment, explanation, or sponsorship in the published draft of the annual budget. This furtive style of governance stymies debate and frees lawmakers from political pushback or consequence.

Both the annual waiver report and the notice requirement serve one purpose: to limit waiver through unconstitutional usurpation of judicial authority. As Representative Morey put it, “The legislature is trying to put a spotlight on judges, to keep them from doing what they are supposed to do. And the judges are feeling the pressure. It is part of a continual efforts to undermine the judiciary.”⁴⁸ The result is a kind of judicial self-censorship. One district court judge described a common reaction: “I want to keep my head down, I don’t want to call attention to myself. I just want to do my job and for people to leave me alone.”

Many states are moving away from a user fee model, enacting reforms that ease the financial duress posed by court fees, fines and other costs. North Carolina is going in the opposite direction. Judges are increasingly hamstrung in their efforts to relieve poor defendants struggling with excessive and unpayable fines and fees. As explained in the next section, the General Assembly’s interference in judicial decision-making not only impedes the fair administration of justice, it goes beyond the scope of legislative authority and constitutes a violation of the foundational principle of separation of powers.

Unconstitutional Abrogation of the Independence of the Courts

State Separation of Powers Cases in North Carolina

The annual waiver report and agency notice requirement violate the state constitution’s separation of powers provision. Separation of powers is “one of the fundamental principles on which state government is constructed” in North Carolina.⁴⁹ Every version of the North Carolina Constitution “has explicitly embraced the doctrine of separation of powers.”⁵⁰ Article I, Section 6 states, “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”⁵¹ Article IV, Section 1 notes that “[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government.”⁵² These “inherent powers” of the court include the “authority to do all things that are reasonably necessary for the proper administration of justice.”⁵³

Flowing from these principles, the General Assembly has the duty to create and define the law (a prospective or forward-looking act), while the judiciary has the duty to interpret the law in specific cases (a retrospective act that applies the law to factual situations that arise). In *State ex rel. Lanier v. Vines*, the

⁴⁸ Marcia Morey interview with the N.C. Poverty Research Fund.

⁴⁹ Orth and Newby, *The North Carolina State Constitution*, 50.

⁵⁰ *State ex rel. Wallace v. Bone*, 304 N.C. 591, 595, 286 S.E.2d 79, 81 (1982).

⁵¹ North Carolina Constitution, Article I, § 6.

⁵² North Carolina Constitution, Article I, § 1.

⁵³ *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987).

North Carolina Supreme Court articulated this distinction, noting that while the legislature has the authority to enact laws and to set the punishment, the

power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative.⁵⁴

The punishment prescribed by the legislature may be very specific or it may give judges discretion within a range.⁵⁵ It is “not necessary for the trial judge to state or explain his reasons for the degree of punishment imposed in a particular case” and as long as the punishment is within lawful limits, the judgment and sentence are presumed to be regular and valid.⁵⁶ Thus, the judiciary’s role is broadly defined as resolving legal matters within the parameters fixed by the General Assembly.

The standard for evaluating whether a separation of powers violation has occurred was laid out by the North Carolina Supreme Court in *Cooper v. Berger*. According to the court, two types of legislative acts violate the separation of powers principle: 1) “when one branch exercises power that the constitution vests exclusively in another branch;” or 2) “when the actions of one branch prevent another branch from performing its constitutional duties.”⁵⁷ The restrictions on waiver violate the second prong of this test. Judges are given a job to do. They have a constitutional duty to determine defendants’ ability to pay fines and fees and to waive them if the defendant is indigent, but they have been hobbled by legislatively-imposed constraints.⁵⁸ Other constitutional rights are also at risk if judges are stripped of the ability to waive.

Courts in North Carolina have not grappled explicitly with the legislative overreach of the type presented here. The state supreme court has upheld legislation limiting judicial authority in two related separation of powers cases, but they are distinguishable from the current situation and cannot be relied on to support the annual waiver report and agency notice requirement.

In *In re Greene*, the state supreme court held that a mandatory sentencing law for driving while intoxicated was not a violation of the separation of powers doctrine.⁵⁹ And in *Rhyne v. K-Mart Corp.*, the court upheld as constitutional a legislative cap on the recovery of punitive damages in tort cases.⁶⁰ In stripping the judicial branch of the authority to suspend a sentence (in *Greene*) and to award punitive damages beyond a certain amount (in *Rhyne*), the General Assembly was exercising its constitutional power to define penalties. As an expression of the legislature’s prescriptive power, this is within its wheelhouse. Judges must apply these two laws, as enacted, to all relevant cases that come before them.

⁵⁴ State ex rel. Lanier v. Vines, 274 N.C. 486, 495, 164 S.E.2d 161, 166 (1968).

⁵⁵ In re Greene, 297 N.C. 305, 308, 255 S.E.2d 142, 144 (1979).

⁵⁶ State v. Snowden, 26 N.C. App. 45, 46, 215 S.E.2d 157, 158 (1975)

⁵⁷ Cooper v. Berger, 809 S.E.2d 98, 111 (2018) (quoting State ex rel. McCrory v. Berger, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016)).

⁵⁸ See *Bearden*; Turner v. Rogers, 564 U.S. 431 (2011).

⁵⁹ *Greene*, 297 N.C. at 312, 255 S.E.2d at 147.

⁶⁰ Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1 (2004).

With the annual waiver report and the notice requirement, in contrast, the legislature is not defining penalties for specific offenses. It is interfering with authority that judges retain by law. The General Assembly cannot bestow statutory permission with one hand, and then thwart it with the other.⁶¹ To do so tramples the independence and integrity of the courts in violation of the state constitution.

State Separation of Powers Cases from Other States

While not dispositive in North Carolina, other state supreme courts have ruled against similar types of legislative overreach. In a Wisconsin case, *In re Grady*, the state supreme court reviewed the claim that a circuit judge, Warren A. Grady, had failed to abide by a state law requiring judges to dispose of cases within a set amount of time. Judges who failed to comply with the time limits forfeited their salary. Judge Grady argued that this law violated the state constitution's separation of powers provision.⁶²

The Wisconsin Supreme Court observed that setting time limits for judicial decision-making generally “comes within the administrative authority over all state courts which the Wisconsin Constitution vests in the supreme court [cites omitted].”⁶³ However, the law's salary-forfeiting penalty, “goes beyond court administration.”⁶⁴ This action, the court continues,

constitutes an attempt by the legislature *to coerce judges in their exercise of the essential case-deciding function of the judiciary* [italics added]. In so doing, the legislature violates the well-established policy that the judicial branch of government must be independent in the fulfillment of its constitutional responsibilities. That policy, a part of American jurisprudence since the founding of our republic and first acknowledged in the English Act of Settlement in 1701, requires that a truly independent judiciary must be free from control by the other branches of government.⁶⁵

Two cases out of Ohio also deal with legislative trespass into judicial territory. In *State v. Sterling*, the Supreme Court of Ohio considered the constitutionality of a statute declaring that a decision by a prosecutor to deny an inmate's request for DNA testing was “final and not appealable by any person to any court.”⁶⁶ Under this law, courts did not have the authority to order DNA testing on their own. This gave the prosecutor, an executive branch official, sole discretion in deciding whether to allow DNA testing.

The court reasoned that this law confined “the exercise of judicial authority to those instances where the prosecutor agree[d] with” an inmate's application for DNA testing.⁶⁷ This interfered with a central role of the judicial branch: determining the judgment in a case. The legislature, the court held, “may not impede the judiciary in its province to determine guilt in a criminal matter—and DNA testing results affect that issue—nor can it delegate to the executive branch of government the power to exercise judicial authority.”⁶⁸

⁶¹ Under this analysis, the General Assembly could theoretically abrogate waiver altogether. This would then raise a host of other constitutional issues.

⁶² *In re Grady*, 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

⁶³ *Grady*, 118 Wis. 2d at 782, 348 N.W.2d at 569.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *State v. Sterling*, 113 Ohio St. 3d 255, 256, 864 N.E.2d 630, 631 (2007).

⁶⁷ *Sterling*, 113 Ohio St. 3d at 261, 864 N.E.2d at 635.

⁶⁸ *Id.*

While the legislature could authorize the prosecutor to agree or disagree with the application for DNA testing, making this decision final and unappealable deprived “the court of its ability to act without the prosecutor’s agreement” and “interfere[d] with the court’s function in determining guilt, which is solely the province of the judicial branch of government.”⁶⁹

In *State v. Dingus*, the Ohio Court of Appeals expanded on principles from *Sterling*.⁷⁰ At question in *Dingus* was a provision in a statute that required defendants convicted of arson to register with law enforcement every year for the rest of their lives. A trial court could reduce the lifetime requirement only if the prosecutor and investigating law enforcement agency requested it. The Court of Appeals declared this provision unconstitutional, noting the “overruling influence” the prosecutor and law enforcement agency had over the trial court.⁷¹ “By depriving the trial court of the ability to act without the request of the prosecutor and the investigating law enforcement agency, the trial court’s independence is compromised.”⁷² The decision-making authority of the trial court was usurped, violating the state’s separation of powers doctrine.

Lastly, in *State v. McCahill*,⁷³ the Connecticut Supreme Court reviewed the constitutionality of a provision that prohibited trial courts from releasing on bail anyone convicted of a crime involving actual, attempted or threatened physical force.⁷⁴ To determine constitutionality, the court applied a two-pronged test that parallels the language in *Cooper*. The law in question, Public Act 00-200, § 5, would violate the state’s separation of powers doctrine if it “represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts . . . or if it establishes a significant interference with the orderly conduct” of the trial court.⁷⁵

The court, focusing on the second part of the test, found that Public Act 00-200, § 5 interfered with the orderly conduct of the courts in a number of ways. Defendants who received short sentences might serve most or all of their term in jail before their appeal was decided. If an appeal was successful, the victory would be “empty,” since the sentence was already served.⁷⁶ Defendants who might receive only a fine or probation would be incarcerated if their case was continued after their conviction but before sentencing. Trial courts would have to incarcerate defendants while they evaluated whether the conviction should be vacated or the defendant placed in an alternative sentencing program such as community service. For all these reasons, the court concluded that Public Act 00-200, § 5 “creates such a significant interference that it can only be construed to be unconstitutional.”⁷⁷

These four cases stand for the proposition that another branch cannot intervene in the judiciary’s exercise of fundamental powers, such as the authority to render decisions within the scope of the law. Like

⁶⁹ *Sterling*, 113 Ohio St. 3d at 261, 864 N.E.2d at 635-636.

⁷⁰ *State v. Dingus*, 2017-Ohio-2619, 81 N.E.3d 513 (2017).

⁷¹ *Dingus*, 2017-Ohio-2619 at P31, 81 N.E.3d at 519 (quoting *State v. Sterling*, 113 Ohio St. 3d 255, 259, 864 N.E.2d 630, 634 (2007)).

⁷² *Id.*

⁷³ *State v. McCahill*, 261 Conn. 492, 811 A.2d 667 (2002).

⁷⁴ No. 00-200, § 5, of the 2000 Public Acts (P.A. 00-200, § 5).

⁷⁵ *McCahill*, 261 Conn. at 505, 811 A.2d at 676.

⁷⁶ *McCahill*, 261 Conn. at 513, 811 A.2d at 680.

⁷⁷ *McCahill*, 261 Conn. at 519, 811 A.2d at 684.

the law in the Wisconsin case, the North Carolina annual waiver report threatens judges that refuse to play along with the General Assembly. Instead of forfeiting salary, as in Wisconsin, North Carolina judges risk public opprobrium, political opposition and the loss of their place on the bench. Another branch cannot, as in *Sterling* and *Dingus*, substitute its own preferences in lieu of the courts' authority to determine case outcomes. Nor can the legislature pass laws that create a "significant interference" with the orderly functioning of the trial court, as in *McCahill*. Through the annual report and agency notice requirement, the North Carolina General Assembly has expressed its intention to inhibit waiver. Without it, courts are forced to impose fines and fees in cases where to do so is a violation of the Fourteenth Amendment's equal protection and due process clauses, as well as other constitutional guarantees. The North Carolina legislature has devised these constraints on waiver in an attempt to strong-arm judges. The independence of the courts is trampled and poor people suffer the consequences.

The Feeney Amendment

Passed by Congress in 2003, the Feeney Amendment amended the Sentencing Reform Act to address the growing tendency of federal judges to deviate from mandatory sentencing guidelines.⁷⁸ It was intended to reduce "downward departures," in which a judge, in consideration of mitigating factors, could hand down a shorter sentence than the guidelines instructed. ("Upward departures" were not targeted.)

Among other things, the Feeney Amendment severely limited judicial discretion in sentencing. It forced judges to submit in writing the specific reasons for imposing a lower sentence. It created a mechanism for scrutinizing individual judge's decisions, forcing judges to submit case information, including the judge's name and the sentence imposed, to the Sentencing Commission, ostensibly for data collection purposes.⁷⁹ The U.S. Attorney General was also authorized to submit a report to the House and Senate Judiciary Committees describing any case involving a downward departure. The report was required to set forth the facts of the case and the identity of the presiding judge, among other details.⁸⁰

Although more narrowly drawn than originally proposed, Feeney ignited a firestorm of protest. The Judicial Conference of the United States, the American Bar Association, current and former members of the U.S. Sentencing Commission, legal academics, prosecutors and defense attorneys issued public denunciations of the amendment. Many critics decried the intimidation of judges as an egregious violation of judicial independence.⁸¹ One commentator referred to the reporting requirement as a "judicial 'black list' that threatens the separation of powers and the independence of the judiciary."⁸² Senator Edward Kennedy called the report "the latest salvo" in an "ongoing attack on judicial independence and fairness."⁸³

⁷⁸ Enacted as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. 108-21, 117 Stat. 650.

⁷⁹ The PROTECT Act of 2003, § 401(h).

⁸⁰ The PROTECT Act of 2003, § 401(l).

⁸¹ Urbina, "New York's Federal Judges Protest Sentencing Procedures."

⁸² Vinegrad, "The Judiciary's Response to the PROTECT Act."

⁸³ Lichtblau, "Justice Dept. to Monitor Judges for Sentences Shorter Than Guidelines Suggest."

A New York federal district judge resigned in protest.⁸⁴ Another used his Statement of Reasons for Imposing Sentence as a *cri de couer* against Feeney.

Congress and the Attorney General have instituted policies designed to intimidate and threaten judges into refusing to depart downward, and those policies are working. If the Court were to depart, the Assistant U.S. Attorney would be required to report that departure to the U.S. Attorney, who would in turn be required to report to the Attorney General. The Attorney General would then report the departure to Congress, and Congress could call the undersigned to testify and attempt to justify the departure. This reporting requirement system accomplishes its goal: the Court is intimidated, and the Court is scared to depart.⁸⁵

No less a jurist than Chief Justice William Rehnquist—a supporter of reduced downward departures—spoke out against the amendment, calling it “an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties”⁸⁶ He was particularly concerned that the reporting of judicial decisions to Congress could result in judges’ removal from office and that recognition of that fact would lead judges to take political factors into account.⁸⁷

The constitutionality of the Feeney Amendment was never settled by the U.S. Supreme Court. However, in *U.S. v. Mendoza*, a California federal district court considered the constitutionality of the reporting requirement.⁸⁸ It held that while the reporting requirement did not give Congress direct power over the judiciary, “the threat, real or apparent, is blatantly present.”⁸⁹ “There is no legitimate purpose served by reporting individual judge’s performance to Congress,” the opinion declared. This provision was simply a “power grab by one branch of government over another branch.”⁹⁰ As such, it represents an “unwarranted interference with Judicial independence and a clear violation of the separation of powers set forth in the United States Constitution.”⁹¹

Ultimately, the U.S. Supreme Court rendered the debate over the Feeney Amendment moot, severing the provisions that made the Federal Sentencing Guidelines mandatory and effectively rendering it advisory.⁹² However, the parallels between Feeney and the waiver restrictions in North Carolina are strong. As with Feeney, trial court judges in North Carolina must supply a written explanation supporting their decision. North Carolina law, like the unconstitutional reporting requirement in Feeney, compels the courts to share information with the legislative branch on the use, by judge, of an unpopular judicial tool. Arguably, the North Carolina notice requirement is broader and more burdensome than any provision in Feeney. As a number of judges in the state have attested, these restrictions—like those in Feeney—have had a stifling effect. This of course is the intention: to make judges who waive court fees pay, while those who go along are left alone.

⁸⁴ Vinegrad, “The New Federal Sentencing Guidelines,” 98.

⁸⁵ *United States v. Kirsch*, 287 F.Supp.2d 1005, 1006-1007 (D. Minn. 2003).

⁸⁶ Greenhouse, “Chief Justice Slams Judiciary Law.”

⁸⁷ Klein and Thompson, “DOJ’s Attack on Federal Judicial ‘Leniency,’ the Supreme Court’s Response, and the Future of Criminal Sentencing.”

⁸⁸ *United States v. Mendoza*, 2004 U.S. Dist. LEXIS 1449.

⁸⁹ *Mendoza*, 2004 U.S. Dist. LEXIS 1449, *19

⁹⁰ *Id.*

⁹¹ *Mendoza*, 2004 U.S. Dist. LEXIS 1449, *21.

⁹² *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005).

Conclusion

Judges possess the authority to waive court fines and fees. The legislature is attempting to steer judges toward a chosen outcome by making the decision to waive as unpalatable as possible. This is akin to lawmakers giving judges discretion in sentencing but then pressuring them to impose the upper limit in every case—a clear breach of judicial independence. Additionally, the attacks on waiver jeopardize defendants’ constitutional rights.⁹³ Defendants with unpayable court debt face a heightened risk of incarceration, despite Supreme Court decisions holding that such a result violates the Fourteenth Amendment.⁹⁴ Due process safeguards, which require judges to hold an ability to pay inquiry before imposing court fines and fees, are rendered meaningless without full access to waiver. The imposition of court fees also implicates other equal protection concerns, since defendants with means can access treatment programs, community service and other sentencing alternatives that, because they cost money, are closed to poor defendants. Waiving those costs is one way to ensure that poor defendants enjoy the same portion of justice as their richer counterparts. Unwaived fees associated with a jury trial—in North Carolina defendants are on the hook for costs incurred by the prosecution—can dissuade defendants from claiming their Sixth Amendment rights. Substantive constitutional rights often demand that judges exercise the ability to waive fines and fees.

While the steps taken by the General Assembly to squelch criminal cost waivers are extraordinary, they fit into a larger pattern of judicial interference. Since 2013, the General Assembly has tampered with the courts in myriad ways, including: closing disciplinary hearings to the public and moving them to the then-friendly state supreme court,⁹⁵ making judicial races partisan,⁹⁶ implementing changes to try to garner a more sympathetic hearing in the courts,⁹⁷ seeking to protect an incumbent Republican judge on the state supreme court,⁹⁸ changing the size of the court of appeals,⁹⁹ attacking judges it disliked,¹⁰⁰ redistricting judges,¹⁰¹ reducing the number of emergency judges,¹⁰² trying to prevent judicial candidates from switching

⁹³ See U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Communities of Color: Civil Rights and Constitutional Implications*, 15–16.

⁹⁴ In *Bearden*, the U.S. Supreme Court held that incarcerating a defendant who was unable to pay his fine was contrary to the “fundamental fairness required by the Fourteenth Amendment.” *Bearden v. Georgia*, 461 U.S. 660, 673. See also *Tate v. Short*, 401 U.S. 395 (1971).

⁹⁵ McCloskey, “Behind Closed Doors.”

⁹⁶ Blythe, “NC Lawmakers Create Partisan Election Process for Courts That Review Their Laws.”

⁹⁷ Blythe.

⁹⁸ Blythe, “NC Supreme Court Race Likely to Be a Partisan Battle.”

⁹⁹ Jarvis, “Shrinking of NC Appeals Court Becomes Law as House, Senate Override Cooper’s Veto.”

¹⁰⁰ Boughton, “Complaint Filed: Berger, Moore Conspired to ‘Intimidate, Interfere’ with Judges.”

¹⁰¹ See, for example, Boughton, “Double-Bunked Judges Speak Out on Judicial Redistricting Plans”; Leslie, “House, Senate Remain Far Apart on Judicial Overhaul”; Leslie, “Democrats Irked by Proposed Judicial District Maps.”

¹⁰² Boughton, “State Courts Attempting to Cope as Number of Emergency Judges Is Slashed by More Than Two-Thirds.”

party affiliation (to protect another incumbent Republican judge),¹⁰³ and proposing a constitutional amendment to gain greater control over the judicial selection process.¹⁰⁴

This partial list of legislative tampering highlights the General Assembly’s antagonism toward a free and independent judiciary. In recent years, the courts have often ruled against key legislative measures, thwarting the General Assembly’s agenda. In response, lawmakers have initiated a multi-front attack to cow and control the judiciary. These efforts are mutually reinforcing and are understood by judges as such. As one judge we spoke to pointed out, the “List of Shame” (the waiver report) contains an implicit threat that judicial redistricting makes real. The special harm that results from legislative attempts to control waiver is that they do more than threaten judicial impartiality, autonomy and legitimacy. As more pressure is placed on courts to raise revenue, and waiver of court fees is placed farther out of reach, it is poor people and people of color—already disproportionately represented in the criminal justice system, subject to “poverty fees”¹⁰⁵ and penalized more harshly¹⁰⁶—who end up paying the price.

¹⁰³ Stern, “North Carolina Court Blocks Republican Effort to Rig State Supreme Court Race.”

¹⁰⁴ See Hendrickson, “Here’s a Look at North Carolina’s Proposed Constitutional Amendments”; Leslie, “Judges Come Out Against Two Proposed NC Amendments.” See also the statement signed by six former Chief Justices of the North Carolina Supreme Court (and other bar leaders) opposing the judicial selection amendment. Billings et al., “Statement of Concerned Lawyers Regarding Two Proposed Constitutional Amendments.”

¹⁰⁵ Poverty fees are those such as late fees, installment plan fees and the like that are imposed on defendants who can’t pay their court costs in one lump sum or by the deadline.

¹⁰⁶ Hunt and Nichol, *Court Fines and Fees: Criminalizing Poverty In North Carolina*, 16–17.

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