

Debtors' Prisons in New Hampshire



*A Report by the American Civil Liberties
Union of New Hampshire*



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Executive Summary

In a practice startlingly akin to the debtors' prisons of the 19th and early 20th centuries, Circuit Court judges in New Hampshire commonly jail those who have no ability to pay fines without a meaningful hearing and without providing access to counsel. This practice imposed on our most vulnerable citizens is unconstitutional, financially unsound, and cruel.

In an alarming number of cases where indigent defendants appear in court to address an unpaid fine, judges do not inform these defendants of their rights. Judges do not afford them a lawyer. Judges do not even determine whether they can pay the fine. Judges simply put them in jail.

This practice is systemic. A year-long investigation conducted by the American Civil Liberties Union of New Hampshire ("ACLU-NH"), in conjunction with University of New Hampshire School of Law Professor and ACLU-NH Board Chair Albert E. Scherr, has revealed that the problem is not limited to a rogue judge or court, but is



occurring throughout the state.



Alejandra Corro: Mother of two infant children who was sent to Valley Street Jail for 9 days to serve off a \$420 fine that she was unable to pay. With the ACLU-NH's help, she was released after spending 1 night in jail.

This practice is also illegal. The United States Constitution, New Hampshire Constitution, New Hampshire law, and New Hampshire's own Circuit Court rules all prohibit this modern-day version of a debtors' prison. The law clearly states that, before an individual can be incarcerated for failure to pay a fine or fee, the court must (i) meaningfully inquire into the reasons for the failure to pay and (ii) determine that the individual is willfully refusing to pay despite having sufficient resources. The law prohibits courts from jailing individuals who simply cannot afford to pay.¹

The Federal and State Constitutions further require representation by counsel if the judge is considering incarceration for failing to pay a fine or fee in a criminal case. In criminal cases, the State already has representation in the form of a prosecutor.

Yet, according to our data, in 2013 New Hampshire judges jailed people who were unable to pay fines and without conducting a meaningful ability-to-pay hearing in an

estimated 148 cases. In all of these cases, defendants were sent to jail without representation by counsel. And in three cases handled by the ACLU-NH in 2014, two Superior Court Judges and the New Hampshire Supreme Court granted relief to three individuals—Alejandra Corro, Richard Vaughan, and Dennis Suprenant—who were (or were going to be) jailed by Circuit Courts in violation of these constitutional principles. These cases, which are described in the “Personal Stories” section below, show that debtors’ prison practices can counterproductively lead to termination of an individual’s new employment, impede ongoing efforts of that individual to gain employment, and prevent struggling parents from caring for their infant children.

The practice of jailing individuals who are too poor to pay a fine needlessly places an extra financial burden on counties by requiring them to house poor individuals who are no danger to society. According to Dartmouth College’s Nelson A. Rockefeller Center, New Hampshire jails spend approximately \$110 per day to house a single inmate.²

Beyond its illegality and cost, this practice creates additional hardships for men and women in New Hampshire who are already homeless, unemployed, or just too poor to pay. The State of New Hampshire has maintained a poverty level below the national average at 8.7 percent for 2013, but the real numbers are still striking: approximately 111,495 Granite Staters live in poverty.³ New Hampshire also has the fastest growing income inequality in the country.⁴

For many New Hampshire residents, paying a fine—whether due to a criminal offense or a violation—is an unpleasant yet straightforward process. For those struggling to get by, this fine can upend one’s life and begin a long, drawn-out, and unavoidable process with the courts culminating in illegal incarceration. This practice attacks the social and economic fabric of their lives and the lives of their families.

Debtor’s Prisons in New Hampshire documents contemporary debtors’ prison practices in the Granite State. It provides a summary of the state of applicable law, a statistical analysis of relevant hearing transcripts obtained by the ACLU-NH, and descriptive profiles of some of the real people impacted by this practice. Finally, this report provides concrete recommendations that will help move our state towards the promise of greater justice and fairness for those with the fewest resources.



Richard Vaughan:
Sent to Grafton
County Jail for 18
days to serve off a
\$895 fine that he was
unable to pay. With
the ACLU-NH’s help,
he was released after
spending 7 days in
jail.

Debtors' Prisons and the Law

The United States and New Hampshire Constitutions address the practice of jailing an indigent person for failure to pay a fine in two primary ways. One focuses on the discriminatory aspect of jailing those who cannot pay a fine while not jailing those who can pay. The other provides a measure of protection for an individual facing the threat of jail for an unpaid fine in a criminal case by requiring the appointment of counsel.

Equal Protection Prevents the Poor from Being Jailed for Inability to Pay a Fine or Fee.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as Part I, Articles 1 and 2 of the New Hampshire Constitution, contain the general promise that all similarly situated people should be treated alike. In light of this principle, the United States and New Hampshire Supreme Courts have explained that jailing individuals who are unable to pay fines and fees assessed against them is unconstitutional because this practice treats the poor (who cannot pay fines and therefore will be jailed) differently from more affluent members of society (who can pay fines and will not be jailed).⁵

It must be noted that judges may incarcerate those who “willfully” refuse to pay fines and fees that they can afford to pay. But, as the courts have concluded, to jail those who cannot afford to pay fines and fees would produce an “impermissible discrimination that rests on ability to pay.”⁶ Accordingly, the United States and New Hampshire Supreme Courts have explained that no individual may be incarcerated for failure to pay fines and fees unless the judge first holds a meaningful hearing regarding the individual’s finances and his or her ability to pay any imposed fines or fees.⁷

These same ideals are reflected in New Hampshire statutes and in the Circuit Court rules. RSA 618:10 states that if a person who has been convicted of a crime is being jailed for not paying a fine, the Superior Court may order the prisoner to be discharged based on appropriate terms, which include proof of an inability to pay the fine.⁸ New Hampshire Circuit Court Rule 2.7(D) further memorializes these constitutional principles by stating that only a “willful” failure to pay a fine (or to perform community service) is punishable by jail.⁹ Such a “willful” failure to pay is treated as contempt of court, with such violators allowed to be held in jail to pay off their fine at the statutory rate of \$50 per day.¹⁰

Debtors’ prisons are strictly prohibited at both the federal and state levels as a matter of equal protection. Before jailing a poor person for nonpayment of a fine or fee, the Circuit Court must hold a meaningful hearing to determine a person’s ability to pay. From that hearing, the Circuit Court may then determine if a “willful” failure to pay has occurred. And only if the person has the ability to pay—thus deeming the non-payment “willful”—can a person be jailed for non-payment, with the fine or fee being reduced by the statutory rate of \$50 for every day confined.

Procedural Due Process Requires That Counsel Be Appointed When There is a Threat of Jail for Nonpayment of a Fine or Fee in a Criminal Case.

The United States and New Hampshire Constitutions protect an indigent person who is under the threat of jail in another way. In criminal cases, when a person is confronted with judicial action that immediately threatens his or her liberty, the person is entitled to counsel under the Due Process Clauses of the Fifth and Fourteenth Amendments and Part I, Article 15 of the New Hampshire Constitution. The New Hampshire Supreme Court has explained that procedural due process requires the appointment of counsel if an indigent person might be subject to incarceration at some point in a criminal proceeding.¹¹ In criminal cases, the State already has counsel in the form of a prosecutor.

Accordingly, at a hearing in a criminal case where the court threatens an individual with jail for not paying a fine or fee—including where an individual is given the choice of paying or going to jail, or where an individual cannot leave the courthouse until he or she pays—the judge must ask the individual whether he or she wants counsel and, if indigent, appoint one. This must all occur before the judge takes up the matter of the unpaid obligation and the individual's ability to pay. Of course, if the judge never intends to impose jail for the unpaid fine or fee, counsel is not required.

The Investigation & Quantitative Findings

The Methodology

In 2014, the ACLU-NH began an investigation into modern day debtors' prisons in New Hampshire. The organization had been hearing from a number of sources that Circuit Court judges were jailing people without meaningful ability-to-pay hearings and without representation by counsel. We began by asking the Houses of Corrections in each of New Hampshire's 10 counties for any documents and records of inmates who were taken into custody in lieu of a fine or for failure to pay off a fine during the year 2013. All but Merrimack County was able to provide data, yielding a total of 289 cases that the jails believed were responsive.

The data included only the defendant's name, the court, the date and length of incarceration, and only a general reason for incarceration. It provided no significant detail about the court hearings or the availability of counsel. To study these cases in depth, we needed to look closely at the individual transcript of each hearing where the court ordered the defendant jailed. That process would give us critical details concerning the circumstances of how and why the defendant was jailed.

We chose to randomly select 39 cases for closer analysis due to the cost and difficulty of obtaining the transcripts of all 289 cases.¹² Random sampling allowed us to generate reliable estimates using generally accepted statistical principles.¹³

Once the 39 cases were randomly selected, we divided the cases into five groups.

- **Group # 1:** Cases in which the individuals were unrepresented by counsel at the time of a post-sentencing or post-plea hearing and were sent to jail to serve off an unpaid fine. 13 of the 39 sampled cases (or 33.3%) fell into this category. Extrapolating based on this sample size, we estimate that 96 of the original 289 cases from 2013 would have fallen into this grouping, with a 95% confidence interval (CI) score of [59.6, 142].¹⁴
- **Group #2:** Cases in which the individuals were unrepresented by counsel and agreed to serve off their fine in jail during the plea or sentencing hearing, with only the judge and prosecutor present. 7 of the 39 sampled cases (or 17.9%) fell into this category. Extrapolating based on this sample size, we estimate that 52 of the original 289 cases from 2013 would have fallen into this grouping (CI [25.9, 94.4]).
- **Group # 3:** Cases in which individuals were represented by counsel at a hearing and agreed to spend time in jail in order to serve off their fine. 10 of the 39 sampled cases (or 25.6%) fell into this category. Extrapolating based on this sample size, we estimate that 74 of the original 289 cases from 2013 would have fallen into this grouping (CI [42.1, 119]).

- Group #4: Cases in which individuals were unrepresented by an attorney in a hearing in which the judge threatened jail time to serve off a fine if the fine was not paid by a certain deadline. 2 of the 39 sampled cases (or 5.2%) fell into this category. Extrapolating based on this sample size, we estimate that 15 of the original 289 cases from 2013 would have fallen into this grouping (CI [4.10, 48.8]).
- Group #5: Cases that were taken out of the investigation due to an issue, such as a data issue or lack of information on the case. 7 of the 39 sampled cases (or 18%) fell into this category. Extrapolating based on this sample size, we estimate that 52 of the original 289 cases from 2013 would have fallen into this grouping (CI [25.9, 94.4]).

Quantitative Findings

Using the methodology described above, we have made the following findings about the entire pool of 289 cases from 2013 obtained from county jails:

- New Hampshire judges jailed people who were unable to pay fines and without conducting a meaningful ability-to-pay hearing in an estimated 148 cases (or 51.2% of those 289 cases in Groups #1 & #2 above). These estimated 148 cases are broken down as follows:
 - In an estimated 96 cases, the judge ordered them to jail (constituting an estimated 33.2% of the 289 cases).
 - In an estimated 52 cases, the judge gave them the “choice” of payment or jail (constituting an estimated 18% of the 289 cases).
 - These 148 cases in Groups #1 and #2 come from at least 8 of New Hampshire’s 10 counties.¹⁵
- In all of these estimated 148 cases from 2013, defendants were sent to jail without representation by counsel. In none of these cases we analyzed did the defendant have the advice of counsel when appearing before the judge.¹⁶ In one 2014 case handled by the ACLU-NH, a judge went so far as to reject a defendant’s request for appointment of counsel even when a lawyer was available to represent her.¹⁷

Additionally, in at least 3 of the 39 sampled cases, the defendant was sent to jail for failure to pay a fine on an underlying case in which the defendant had not been entitled to appointed counsel and in which jail was not an available sentence because the defendant had only been convicted of a Class B misdemeanor or violation-level offense.

Finally, this debtors’ prison practice is not the result of a rogue judge or of a rogue Circuit Court. 9 different Circuit Court judges incarcerated the defendants in Groups #1 & #2. Those 9 judges sat in 10 different Circuit Courts throughout the State. As this statistic is derived from a randomized subset of cases from 2013, it is safe to assume that more judges were involved in this practice in that year.

Analysis

Circuit Court judges across the state are putting people in jail for failure to pay a fine or fee in proceedings where the individuals are not afforded counsel and without conducting a meaningful ability-to-pay hearing. Such practices violate clear protections afforded by the U.S. and New Hampshire constitutions, New Hampshire law, and the Circuit Court's own rules.

The Financial Costs

Judges are jailing these nonviolent defendants at significant costs to counties throughout New Hampshire, and neither the Circuit Courts nor the taxpayers ever collect the outstanding fine when the defendant is jailed. Each night an individual stays in jail reduces the amount owed to the state by \$50. This \$50 amount is a statutory benchmark designed to measure the length of the sentence. Once an inmate serves off his or her fine, neither the courts nor the jails will ever see the money that was previously owed.

According to Dartmouth College's Nelson A. Rockefeller Center, New Hampshire jails spend approximately \$110 per day to house a single inmate.¹⁸ This is more than twice the \$50 fine reduction amount earned by an inmate's stay per day—money which will never be paid back to the state once that time is served. Based on the data received and this \$110 per day cost, the total costs of these practices to county taxpayers statewide can be reasonably approximated to \$166,870 in 2013 to address an estimated \$75,850 in unpaid fines that were ultimately never collected.¹⁹ (This estimate is likely conservative because Merrimack County was unable to produce responsive documents as part of our investigation.)

The Human Costs

Jailing individuals because they are too poor to pay fines also has real human costs. As detailed in the personal profiles at the end of this report, such practices can counterproductively lead to termination of an individual's new employment, impede ongoing efforts of that individual to gain employment, and prevent struggling parents from caring for their infant children. Being jailed because of one's economic status can upset not only the life of the person who poses no danger, but the lives of his or her entire family.

Potential Causes

Though not every New Hampshire Circuit Court judge engages in this practice, it is nonetheless commonplace. One can only speculate as to why this is occurring. As discussed further below, it is, of course, more expedient for a court to forgo the appointment counsel and a meaningful ability-to-pay hearing. Additionally, some judges may even believe that people who do not pay their fines should be punished even if they cannot afford to pay. These practices may also be occurring because Circuit Court judges are over-relying on fines in their sentencing practices.

Regardless of the reasons, the United States and New Hampshire Constitutions do not permit these practices to occur despite any perceived judicial expediency or moral equity. Judges should also not be fining individuals at sentencing if the individuals cannot pay the fine.

A Brisk and Expedient Injustice

Below is an example from one of the cases sampled:

Circuit Court Hearing Transcript²⁰

(Proceedings commence at 11:12 a.m.)

[THE PROSECUTOR]: [defendant's name]: Sir, you're before the Court on a Class A misdemeanor of criminal trespass, the complaint stated July 16th at 269 Hanover Street in Manchester and that the Defendant knowing that he is not licensed or privileged to do so he entered or remained at 269 Hanover Street, a secured premises. How do you wish to plead?

THE DEFENDANT: Guilty.

THE COURT: Have you [the prosecutor] worked out some arrangement with this fellow?

THE PROSECUTOR: Yes, Your Honor. I had made an offer to [the defendant] and he was debating what he was going to do while the others were arraigned.

THE COURT: Does it constitute it remaining a Class A misdemeanor?

THE PROSECUTOR: No, Your Honor. My offer to him would have been reducing this charge to a violation and a fine of \$100 plus the penalty assessment which he would need to serve off at Valley Street Jail [in Manchester].

THE COURT: Is that your agreement?

THE DEFENDANT: I'm not sure, Your Honor. I wanted to ask you, I have a tough time in jail because I'm in poor physical health, if you could just give me a couple days to find –

THE COURT: Sir – sir, again, it doesn't sound like this is negotiated plea, so I'll deal with the issue –

THE DEFENDANT: No.

THE COURT: Do you want it? They're the ones who are offering the terms. I'll accept it if you accept it. Do you want to accept it or not?

THE DEFENDANT: Yes.

THE COURT: All right, then you can go with the deputies. I'll finish the paperwork.

(Proceedings concluded at 11:13 a.m.)

The judge, in less than 90 seconds: (1) took the defendant's plea to a violation-level offense (a non-jailable offense having the same status as a speeding ticket); (2) fined him \$100 plus an assessment; and (3) committed him to jail for payment of the fine and assessment.

The judge afforded the defendant no opportunity to consult with counsel before being jailed. The judge afforded the defendant no meaningful ability-to-pay hearing. The judge had no information on the defendant's ability to pay, did not inquire into the defendant's resources, and ignored the defendant's effort to obtain time to pay and to explain his health status. Here, the Court discarded due process in favor of judicial expediency.

This transcript is one of many examples of how our poorest citizens who owe fines are treated to a hyper-expedient process that is fraught with constitutional violations and that wastes taxpayer resources.

Potential Impact of Appointing Counsel

Using the example above, if the judge had considered appointing counsel in anticipation of jailing the defendant in lieu of paying a fine, the following likely would have happened:

- 1) The judge would have asked the defendant if he could afford counsel and, if not, the judge would have asked the defendant to complete a financial affidavit that would document, under oath, his assets (if any) and his debts.
- 2) If the defendant qualified, the judge would appoint counsel who would then consult with the defendant, understand his health issues, and likely negotiate with the prosecutor and/or the judge arrangements for the payment of the fine that did not involve jail in lieu of fine payment.
- 3) With the benefit of counsel, the defendant would appreciate his circumstances, understand his options given his financial situation, and make a reasoned choice as to how to proceed.
- 4) If an agreement could not be reached and if jail continued to be on the table, defendant's counsel would then advocate before the Court with the knowledge and skill of an experienced lawyer for the best result for his client. This advocacy would include insisting on a meaningful (and constitutionally required) ability-to-pay hearing that would reasonably ensure that the defendant is not jailed if he has no means to pay the outstanding fine.

With defense counsel present, a judge's inquiry into the defendant's ability to pay a fine would be far different and far more meaningful. The judge would:

- 1) Ask the defendant to, with the help of counsel, complete an affidavit of resources, under oath prior to leaving the courthouse as required by Circuit Court Rule 2.7(A).
- 2) Then thoughtfully consider such factors as the defendant's employment, good faith attempts to seek employment, spousal, family and partner income, savings, property ownership, credit lines, and expenses including child support as required by Circuit Court Rule 2.7(A).
- 3) If the Court then finds that the defendant is indigent or that the defendant is unable to pay the fine on the date imposed, the judge may defer payment of the fine to a later date or create a payment plan as advised by Circuit Court Rule 2.7(B).
- 4) In any case where a defendant proves an inability to pay a fine, the judge may allow the defendant to perform community service. Every hour of verified community service shall be applied against the fine at the rate of \$10 an hour as advised by Circuit Court Rule 2.7(C).

In short, appointment of counsel is likely the most effective means to ensure that indigent defendants are afforded the process guaranteed by the Constitution. Ensuring that defendants are adequately represented in all court proceedings that could result in their imprisonment will help prevent the unlawful and counterproductive incarceration of the poor, and thereby save county correctional institutions the cost of housing non-violent offenders.

Recommendations

New Hampshire needs to end the systemic and unconstitutional practice of jailing Granite Staters who are too poor to pay a fine or fee. To accomplish this imperative, we recommend the following:

1. **In practice, judges should not be, when possible, fining individuals at sentencing if the individuals cannot pay the fine.** A reduction in the number of fines at sentencing would dramatically reduce (i) the number of subsequent ability-to-pay hearings conducted and (ii) the number of indigent defendants who are improperly jailed. We appreciate that in those cases involving mandatory fines, the options are more complex.
2. **In those circumstances when the possibility of incarceration remains on the table for an unpaid fine or fee, the court should appoint counsel for the defendant.** Appointed counsel—who were, in many cases, previously appointed in the underlying criminal case—can help advise the defendant and work towards a satisfactory resolution of the issue for all involved. Counsel would also ensure that (i) courts conduct meaningful ability-to-pay hearings, and (ii) defendants are adequately represented at those hearings. And meaningful ability-to-pay hearings conducted with the assistance of counsel would also dramatically reduce the number of instances where taxpayer dollars are wastefully spent jailing poor individuals who pose no danger to society. This would benefit everyone: the justice system, the jails, county taxpayers, and New Hampshire's poorest citizens.
3. **Codifying the recommendations above, the Circuit Court should adopt administrative rules to ensure that all courts properly determine whether a person can afford to pay his or her fines and that all defendants are properly represented in cases that could result in the deprivation of their liberty.** These rules should adopt procedures that focus on payment rather than punishment, which will also ensure that counsel is appointed and that ability-to-pay hearings are conducted only in exceptional cases. Specifically, we recommend to the New Hampshire Advisory Committee on Rules that New Hampshire Circuit Court Rule 2.7 be amended to include the following:
 - a. **Explicitly prohibit incarceration of an individual for non-willful failure to pay a fine or the non-willful failure to complete a community service obligation;**
 - b. **Explicitly require the Circuit Court to appoint counsel for inability-to-pay hearings in which incarceration is a possible outcome;**
 - c. **Explicitly articulate specific procedures that minimize judge and attorney resources when a person is unable to pay a fine.** The goal of such procedures is to minimize the number of cases that get to a point in which a counsel-assisted

hearing before a judge is necessary and in which jailing the defendant for willful non-payment is an issue.

Examples of such procedures might include:

- i. At sentencing:
 1. A defendant must file a new financial affidavit that will assist the Court in determining whether a fine should be imposed;
 2. The Court must make findings, based on the new financial affidavit, on whether any proposed fine can be paid and should be ordered;
 3. If a fine is to be ordered and cannot be paid immediately, the Clerk or the Court shall explicitly and in writing establish a payment schedule based on the financial affidavit.

- ii. After sentencing:
 1. If a defendant does not pay the fine or misses more than one payment pursuant to any payment schedule, the Clerk shall issue a Fine Payment Review Notice requiring the defendant's appearance;
 2. At this review, the defendant shall file a new financial affidavit;
 3. At the hearing, the Clerk or the Court should examine the circumstances for the nonpayment;
 4. The defendant is not entitled to counsel at this Fine Payment Review Hearing;
 5. Based on this review by the Clerk or the Court, either additional time may be provided for payment of the fine or the payment schedule may be modified. That modification shall be in writing.

- iii. If, after at least one such Fine Payment Review hearing and a subsequent expiration of any payment schedule, the defendant's fine remains unpaid:
 1. The Court may schedule a Failure to Pay/Incarceration Hearing;
 2. The Court must appoint counsel prior to the commencement of any such hearing;
 3. The defendant shall file a new financial affidavit before the commencement of the hearing;
 4. At that hearing, the Court shall determine whether the defendant has willfully failed to pay the fine imposed at sentencing;
 5. At the termination of the hearing, the Court may:
 - a. dismiss the obligation to pay the remainder of the fine;
 - b. order the payment of a reduced fine;
 - c. amend the repayment schedule; or
 - d. incarcerate the defendant at the statutory rate (currently \$50/day) based on the total remaining amount of the fine

if the Court concludes the defendant has willfully failed to pay the remaining fine. In doing so, the Court shall make explicit, written findings as to the basis for any conclusion of willful non-payment.

Personal Stories

Alejandra Corro

Alejandra Corro is a 22-year-old poor, single mother of two children, ages two and three. In the summer of 2013, Alejandra was charged with theft for taking assorted infant clothing totaling \$645 from Sears. Though it was wrong, the items were taken for Alejandra's children. This crime constituted a misdemeanor. Alejandra was deemed indigent, and a New Hampshire Public Defender represented Alejandra in the criminal case.

Alejandra pled guilty to a reduced violation-level offence and was sentenced to a fine of \$1,000, with \$500 of the fine suspended on the condition that she not commit any new crimes for one year. Additionally, there was a \$120 penalty assessment, bringing Alejandra's total fine to \$620. The Court authorized her to pay this fine through 62 hours of community service by early March 2014.

In January 2014, Alejandra's apartment was burned in a fire and was rendered uninhabitable. During the fire, Alejandra and her children were trapped on the second floor and had to be rescued by the fire department through the second floor window. As a result of the fire, Alejandra and her children had to move in with Alejandra's mother.



In early March 2014, Alejandra returned to the Nashua Circuit Court for a review hearing. She, with the assistance of her previously appointed public defender, reported to the court that she had only completed 20 of the 62 required hours. She explained she was not able to complete the remaining 42 hours after her family was displaced by the fire and forced to move. With the assistance of her previously appointed public defender, she also informed the Circuit Court that she did not have the money to pay the remaining \$420 of her fine because she is poor.

Alejandra had every intention of completing her community service. She asked the court to review her ability to pay due to her circumstances. She just needed more time. Her previously appointed public defender also asked the Circuit Court that he be appointed as counsel to address Alejandra's ability to pay the fine, as his previous appointment as counsel terminated after she was sentenced for the theft conviction.

The Circuit Court denied Alejandra's request for an ability-to-pay hearing as well as her prior attorney's request to represent her in such a hearing. The Court ruled that the remaining \$420 was due that day and, if that amount could not be paid, Alejandra would be confined to Valley Street Jail in Manchester for 9 days, which would serve off the fine at the statutory rate of \$50 per day.

Having no means to pay this fine, Alejandra immediately turned herself in to serve her 9-day sentence at Valley Street Jail despite both her poverty and family obligations.

Through the diligent work of the public defender and the ACLU-NH, an emergency petition was filed with the Superior Court the next day seeking Alejandra's immediate release from jail. The petition argued that the Circuit Court's decision to jail Alejandra was unconstitutional because she was not willfully failing to pay her fine given her circumstances. The Superior Court granted this petition and released Alejandra after she spent one night in jail away from her two infant children.

Richard Vaughan

In March 2014, 25-year-old Richard Vaughan pled guilty to a class B misdemeanor charge of driving under the influence. He was represented in the case by a public defender due to his indigency. As part of his sentence, Richard was fined a total of \$955. He accepted responsibility for his crime and tried to move on with his life.

Shortly thereafter, Richard was able to make a payment bringing this fine down to \$895. However, in May 2014, Richard lost his housing in Littleton, forcing him to move in with his mother a few towns away. Richard's conviction also resulted in a loss of license for 12 months. Therefore, after his move to his mother's home, he was unable to drive to his job at a Subway restaurant in Littleton and was forced to quit.

Given his new unemployed status, Richard submitted a payment plan to the Court requesting that he be allowed to pay \$25 per month towards the fine. Richard continued to search for a job but was unsuccessful, causing him to fall behind on his payments. A fine repayment hearing was scheduled for July 2014 before the Littleton Circuit Court.

At this July 2014 hearing, Richard was unrepresented by counsel and explained to the Court that he had not made any additional payments and that he was unable to do so because he had no money and was unemployed. Richard stated he would be able to make his payments once he secured employment and mapped out his job search for the Court. He explained that he was submitting two to three applications per day and had an interview at Pizza Hut the following week.

The Circuit Court suggested to Richard that there was "another way" to take care of his fine—meaning spending time in jail for a credit of \$50 per day towards the fine. Since Richard was unable to pay off the remaining fine, the Court ordered him to serve it off by spending 18 days in jail at the taxpayers' expense.

The ACLU-NH filed a petition in the Grafton County Superior Court arguing that the Circuit Court neither held a meaningful hearing on Richard's ability to pay nor made findings that Richard



was willfully refusing to repay the fine, as are constitutionally required. The Superior Court agreed and ordered that Richard be released from jail and credited for the 7 days he had already served at the statutory rate of \$50 per day.

Dennis Suprenant

In October 2012, Dennis Suprenant was charged with misdemeanor conduct after a vehicle accident. Because he was indigent, he was afforded a public defender to represent him in connection with this charge.

In December 2012—while his case was pending—the Office of Cost Containment (“OCC”) began sending Dennis notices regarding repayment of his public defender attorney’s fees in connection with his October 2012 charge. (In New Hampshire, the poor are billed for public defender services.) Dennis was homeless at the time. From approximately May 2013 to September 2013, Dennis successfully completed a drug rehabilitation program. A review hearing on the outstanding \$302.50 in OCC fees was scheduled for February of 2014.

Dennis and his public defender attended this review hearing in Nashua Circuit Court in February 2014. At the hearing, the judge orally ordered Dennis to pay the \$302.50 in its entirety by the end of the day or else go to jail. Dennis was not allowed to leave the courthouse until this fee was paid. Dennis’s public defender explained to the Court that this order would cause Dennis to lose a job he had only had for two weeks. The attorney noted that Dennis was going to receive his first paycheck in two days.

Additionally, Dennis was unable to pay the entirety of the fine by the end of the day, as he had only \$90 to his name. Since the time Dennis entered drug treatment, he had graduated from the drug rehabilitation program, obtained his GED, and secured a job. The public defender urged the court to reconsider jailing Dennis, as jail would jeopardize his new job and cause a huge setback as he was beginning to get his life on track. As the lawyer explained, “he’ll go right back to where he was before.”

Later that afternoon, the Judge amended his order and required Dennis to pay immediately all the money he had in his possession (\$90) and to pay the remaining balance—\$212—in less than two days. The Circuit Court ordered that if the remaining \$212 was not paid by that time “for any reason, he [Dennis] shall be, immediately, transported to the HCHOC [Hillsborough County House of Correction/Valley Street Jail] to be held until the amount is paid in full.”

The New Hampshire Public Defender contacted the ACLU-NH about the case, and the ACLU-NH filed an emergency petition with the New Hampshire Supreme Court arguing that the Circuit Court’s order requiring Dennis to pay or be jailed was unconstitutional due to his inability to pay the fee. The New Hampshire Supreme Court stayed the Circuit Court’s order, and Dennis was no longer under the obligation to pay or be jailed.

Acknowledgments

The ACLU-NH is solely responsible for the contents of this report. The research and writing of this report was conducted by ACLU-NH Legal Director Gilles Bissonnette, Professor Albert E. Scherr of the University of New Hampshire School of Law and Chairman of the ACLU-NH Board, and ACLU-NH Executive Director Devon Chaffee.

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Endnotes

¹ See “Debtors’ Prisons and the Law” section below for further analysis.

² See “Analysis and Recommendations” section below for further analysis.

³ U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/33000.html>.

⁴ Sanders, Bob, “NH’s income inequality fastest-growing in U.S.,” *New Hampshire Business Review*, July 23, 2015 at: <http://www.nhbr.com/July-24-2015/NHs-income-inequality-fastest-growing-in-US/>.

⁵ See *Williams v. Illinois*, 399 U.S. 235, 241-44 (1970) (holding that a state may not under the Equal Protection Clause subject a certain class of convicted Petitioners to a period of imprisonment beyond the statutory maximum solely by reason of their indigency); *Tate v. Short*, 401 U.S. 395 (1971) (holding that United States Constitution prohibits states from imposing a fine as a sentence and then automatically converting the fine into a jail term solely because the Petitioner is indigent); *State v. Morrill*, 123 N.H. 707, 711 (1983) (noting that “[t]he Petitioner acknowledges that he could not be imprisoned if his indigency rendered him unable to pay the fine imposed”).

⁶ *Williams*, 399 U.S. at 241, 244.

⁷ See *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (holding that, if a probationer has *willfully* refused to pay the fine or restitution when he has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay, the State is justified in using imprisonment as a sanction to enforce collection); see also *State v. Fowlie*, 138 N.H. 234 (1994) (citing *Bearden*, and holding that the trial court erred when it based its decision to impose a criminal sentence on a presumption of ability to pay restitution at the time of the original sentence, rather than on Petitioner’s actual ability to pay at any time during the existence of the order to pay).

⁸ See RSA 618:10 (“Whenever a person under conviction for a criminal offense and confined in a county correctional facility is unable to pay the fine, the superior court, upon petition of the prisoner or the superintendent and satisfactory proof of such inability, may order the prisoner to be discharged upon such terms as they may think proper.”).

⁹ N.H. Circuit Court R. 2.7(d) (“Conduct which amounts to willful failure to pay any fine or perform community service as ordered, may be punishable as

contempt of court or through the provisions of RSA 618:9.”).

¹⁰ See RSA 618:8 (noting \$50 per day rate); RSA 618:9.

¹¹ *Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982) (“[A] significant liberty interest exists which is worthy of due process protection ... when some condition set by the court has not been met and incarceration is the proposed remedy.”; noting that, under this circumstance, one of the procedures that must be followed is “representation by counsel, to be appointed by the court if the Petitioner is indigent”); see also *State v. Furgal*, 161 N.H. 206, 218 (2010) (“Because this issue was not sufficiently briefed, we do not decide the specific procedural protections required at a bail hearing ... other than to say that at a minimum the defendant has a right to counsel at such a hearing.”).

¹² Each transcript costs anywhere from \$15-\$30 depending on the length, with some costing considerably more.

¹³ We selected our random sample by placing the 289 cases on a list sorted county by county. We re-numbered the 289 using randomizer software and then selected every 20th case. If there was an issue with the selected case, the case immediately below the rejected one was selected. A case was typically rejected because there was not enough information provided by either the county house of correction or the Court to determine whether the individual in the case was indeed should be part of the sample.

By this method we replaced 7 data-flawed cases with 7 interpretable cases. Once we selected the sample of 39 cases (including the 7 data-flawed cases), we purchased the court transcripts of the hearing that resulted in the person’s incarceration in each of those cases.

¹⁴ An interval of this size will include the true value in 95% of random samples of 39 cases chosen from the population of 289 cases. Wilson, (1927). *JASA*, 22, 209. Agresti & Coull (1998). *Am. Stat.*, 52, 119.

¹⁵ The total data set came from 9 of New Hampshire’s 10 counties. In the 39 cases we randomly sampled from this data set, 20 were in Groups #1 & #2—the groups where unconstitutional practices were the most apparent. These 20 cases were spread out among 8 New Hampshire counties, and led to our extrapolated estimate of 148 problematic cases from the total data set. That said, likely all 9 out of 10 counties from whom we obtained data would be included, but the random

sampling included results from 8 counties, not all 9 counties.

¹⁶ See “Investigation” section below for complete data analysis.

¹⁷ See *Stapleford*, 122 N.H. at 1083; see also “Personal Stories” section for Alejandra Corro story.

¹⁸ http://rockefeller.dartmouth.edu/shop/prs_county_state_corrections_final_060915.pdf (estimating the average annual cost per inmate to be \$39,900 for those held in New Hampshire jails, which is approximately \$110 per day).

¹⁹ In the 39 cases we sampled, 20 were in Groups #1 & #2—the groups where unconstitutional practices were the most apparent. In these 20 cases, defendants were jailed for an approximate total of 205 days in lieu of unpaid fines. At an estimated cost of \$110 per day, the county Houses of Corrections spent approximately \$22,550 to “compensate” for approximately \$10,250 in unpaid fines. Extrapolating from this sample size to the total set of 289 cases from 2013, we estimate that county Houses of Corrections in New Hampshire spent \$166,870 (CI[\$118,388, \$215,353]) to house defendants for 1,517 days (CI[1076.25, 1957.75]) to “compensate” for \$75,850 (CI[\$53,812.5, \$97887.5]) in unpaid fines in 2013.

²⁰ See *State v. Sullivan*, No. 456-2013-CR-04372 (9th Cir. Ct., Dist. Div., Manchester, July 17, 2013).