

Inherently Unstable: The History and Future of Reliance on Court-Imposed Fees in the State of Texas

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MUCH HAS BEEN written and discussed about the imposition of fines, fees, and costs on criminal defendants in this country. And much of the academic research has rightly concerned the unfairness, especially to the poor, of over-relying on court-imposed fees to operate local and state criminal justice systems. Certain advocacy groups have focused their energy on ensuring that local courts and criminal justice agencies follow Supreme Court precedent in ordering the assessment of fines, fees, and costs. In this article I will focus more on the practicality of this problem, asking whether the continued reliance on the imposition of court-ordered fees to support the operation of local adult probation departments in Texas is sustainable.

This article is divided into two parts. The first part examines the history of the assessment of court-ordered fines, fees, and costs on probationers in one state—the State of Texas. This portion of the article attempts to address the question, “How did we get here?” with the disturbing notion that in some respects probation in Texas was more just, humane, and rational 50 years ago than it is today. The second portion of this article examines changes in the economy with a focus on wage growth—and stagnation—within certain demographic groups and on the impact on employment and wages due to advancing technological innovations in the field of artificial intelligence, robotics, and automation. This section ends with some recommendations for policy makers and adult probation departments to prepare for the radical changes that

they will be facing. Finally I conclude with an assessment of the future of the criminal justice system in Texas if the status quo remains and the public policy continues to rely on offenders to support the criminal justice system.

A History of Court-Imposed Probation Fees in Texas

The State of Texas, like many other states, relies heavily on offender payments to fund adult probation services. However, historically it has not always been the case that probationers, in addition to paying an assessed fine, were also expected to pay a monthly fee for the operation of adult probation departments. Ironically, in recent years one of the selling points in promoting efforts to reform the probation system in Texas has been that by adding various fees and costs the reforms would pay for themselves. In this article I will first examine how this situation came about and how Texas has now reached the point that the overreliance on court-imposed fees has hurt not only impoverished probationers but also the state’s criminal justice system. In fact, overreliance on fees has distorted the system by providing probationers with incentives to recidivate and avoid probation; it has also made it less likely that probation in Texas could serve as an agent of rehabilitation.

Probation in Texas has existed in some form since 1913. Prior to this date, if a defendant was convicted of a criminal offense the sentencing authority had one of two options—the judge could assess penitentiary time or a jury could recommend that no punishment be

assessed. Since 1913 the laws establishing and regulating the probation system in Texas have undergone several significant revisions.

In 1935 an amendment was added to the Texas Constitution to affirm what prior case law had already authorized and state statute had codified under the Suspended Sentence Act of 1925, i.e., that the Courts of the State of Texas having original jurisdiction of criminal actions had the power, after conviction, to suspend the imposition or execution of sentence, place the defendant on probation, and re-impose such sentence, under such conditions as the legislature prescribed. The State Legislature continued to modify the adult probation system with the Adult Probation and Parole Law of 1947 and of 1957.

In 1965 the state legislature completely rewrote the Texas Code of Criminal Procedure, including the laws applicable to adult probation. As written in 1965, probation departments were wholly creatures of local government bodies. The district judges, with the advice and consent of the commissioners court, were responsible for employing department personnel, designating titles, and fixing salaries. Salaries and other expenses were paid from the funds of the county. However, the new Code of Criminal Procedure did not authorize a court to impose a monthly fee on probationers for the operation of the adult probation department. Moreover, the new Code specified only nine conditions that a judge could impose, although the judge was

not limited to imposing other conditions.¹

It was in the next legislative session in 1967 that the legislature created a statute authorizing a trial judge to impose a supervision fee on a probationer as a condition of probation. The new statute provided that a court granting probation could fix a fee not exceeding \$10.00 per month to be paid to the court by the probationer during the probationary period. The legislature further stated that the court could make payment of the fee a condition of granting or continuing probation. Finally, the legislature specified that the court had to distribute the fees received under this new measure to the county or counties in which the court had jurisdiction for use in administering the probation laws.

Then in 1977 the legislature established the Texas Adult Probation Commission (TAPC). The changes made in 1977 made it clear that providing adequate probation services was no longer the county's responsibility; instead, the district judge or district judges trying criminal cases in each judicial district were directed to establish a probation office and employ district personnel. Moreover, the 1977 changes authorized the state to contribute funds for the operation of the probation departments in addition to mandating that TAPC establish minimum standards for caseloads, programs, facilities, and equipment, and other aspects of the operation of a probation office necessary to provide adequate and effective probation services. In addition, the 1977 legislation limited counties in their financial obligations to providing physical facilities, equipment, and utilities to adult probation departments. Finally, the monthly probation fee was now to be fixed in an amount not to exceed \$15.00.²

¹ These statutorily recommended conditions were as follows:

1. Commit no offense against the laws of this State or of any other State or of the United States;
2. Avoid injurious or vicious habits;
3. Avoid persons or places of disreputable or harmful character;
4. Report to the probation officer as directed;
5. Permit the probation officer to visit him (sic) at his home or elsewhere;
6. Work faithfully at suitable employment as far as possible;
7. Remain within a specified place;
8. Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the court shall determine; and
9. Support his (sic) dependents.

² The changes made in 1977 to the 1965 Code added new statutory conditions that the trial judge

The statutory changes made in 1977 to the probation system would serve as the template for further reform efforts. Not only was State funding first injected into the system along with new regulations to standardize the operation and practice of probation in the State, but the legislature also began adding more and more statutory conditions of probation and additional costs on probationers to support the system.

In the 1980s Texas, along with many other states in the country, began to see the effects of mass incarceration. In 1980 the state had 35,000 prison beds and could not confine all the new inmates being sentenced to prison. The result was a decade-long crisis in state corrections. The two methods for dealing with the prison strain were to drastically reduce the amount of time served in prisons through the parole process and to refuse to accept inmates, leaving them confined in county jails. Also in 1980 a final written decision in *Ruiz v. Estelle* was handed down by a federal district judge ruling that conditions in Texas prisons constituted cruel and unusual punishment and therefore violated the constitutional rights of the plaintiffs in the suit. This ruling led to years of continuing litigation and placed pressure on the state to rectify certain prison practices and conditions.³ A second lawsuit, *Alberti v. Sheriff of*

could impose, to wit:

1. Participate in any community-based program;
2. Reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for defending him (sic) in the case, if counsel was appointed;
3. Remain under custodial supervision in a community-based facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board;
4. Pay a percentage of his income to his dependents for their support while under custodial suspension in a community-based facility; and
5. Pay a percentage of his income to the victim of the offense, if any, to compensate the victim for any property damage or medical expenses sustain by the victim as a direct result of the commission of the offense.

In addition, a separate provision for misdemeanor probation continued the first nine statutory conditions, with the assessed fine not to exceed \$1,000 but added a tenth recommended condition that the misdemeanor probationer submit a copy of his fingerprints to the sheriff's office of the county in which he was tried.

³ See 503 F. Supp. 1265 (S.D. Tex. 1980); see also,

Harris County, Texas, although initially filed in 1972, was litigated throughout the 1980s; it contested the jail conditions in the Harris County Jail, the most populous county in Texas.⁴ Harris County in turn argued that the jail conditions were a result of the State of Texas's failure to accept inmates, i.e., paper-ready felons being held in the county jail for transport to the state's penitentiary system, and thus the State became part of the litigation. In addition to being a legal issue, the *Alberti* case became a political imbroglio as local officials across the state began to demand that the state accept paper-ready felons sentenced to prison in a timely manner.⁵

During the period of the 1980s the state legislature also addressed the imposition of supervision fees on several occasions. In 1985 the state legislature increased the amount that a court could order paid to a fee, not to exceed \$40.00 per month. There was no minimum fixed monthly amount. However, in the following legislative session in 1987 the legislature stated that a court granting probation *must* (emphasis added) fix a fee of not less than \$25.00 and not more than \$40.00 per month. The legislature further provided that a court could waive or reduce the fee or suspend monthly payment of the fee if it determined that payment of the fee would cause the probationer a significant financial hardship.

As a result of these legislative changes, not only was the monthly supervision fee increased and a minimum specified amount established by law, but the imposition of the fee was now the "default" position in all supervision cases. Instead of leaving it to the discretion of the court to impose any fee, it was now expected that the court would impose a supervision fee unless the court made the further determination that imposing a fee would cause the probationer a significant financial hardship.

The crises facing the state's correctional system led to the next great reform efforts in 1989, designed to divert more people who otherwise would be sent to prison. The reforms allowed adult probation departments to offer pre-trial diversion programs, added funding for substance abuse treatment, offered courts the means to use local community corrections facilities for short-term confinement,

550 F. 2d 238 (5th Cir. 1977).

⁴ See 406 F. Supp. 649 (S.D. Tex. 1975).

⁵ Both the state and county were eventually found liable for the unconstitutional conditions in the Harris County Jail. See 937 F. 2d 984 (5th Cir. 1991); see also, 978 F. 2d 893 (1992).

and included options for modifying probation instead of revoking the probation for a violation of the conditions of probation and confining the person in a prison. The reforms also required departments to collaborate with other local agencies and authorities to develop a community justice plan to identify the criminal justice needs of the community and to request funding from the state. The legislature created a new formula to allocate funding to departments across the state based on population and the number of felony cases being supervised, increased grant funding, and provided more funding for the supervision of felony cases. The legislature also increased funding to establish more community corrections facilities in the state, including restitution centers. Funding was also directed toward the use of electronic monitoring devices and batterers' intervention programs.

Unfortunately, the reforms made by the Texas Legislature in 1989 to improve probation increased the financial burdens on probationers. A good example of this was the creation of restitution centers in 1989. The intent was that the restitution centers could serve as an alternative to incarceration in prisons while at the same time making the victims of crime financially whole and providing rehabilitation and employment programs to probationers. As originally conceived, a judge could require as a condition of probation that the defendant serve a term of not less than three months or more than 12 months in a restitution center. However, the director of the facility had to deposit whatever salary was earned by the probationer working outside the center into a fund after deducting:

1. The cost to the center for the probationer's food, housing, and supervision;
2. Necessary travel expenses to and from work and community-service projects and other incidental expenses of the probationer;
3. Support of the probationer's dependents; and
4. Restitution to the victims of the offense committed by the probationer.

The statute provided that after making these deductions the remainder of money in the fund would be given to the probationer on his or her release. As one might reasonably expect, there was generally nothing left in the fund to give the probationer upon discharge from the center. Moreover, upon release the probationer often owed more fees than he or she did when accepted into the facility. Making this worse, these facilities were often located in

rural areas where jobs were scarce; in such cases, probationers were being transported for much of the work day to larger urban areas for employment. It is not surprising that outcome studies showed very poor success rates for persons confined in these facilities and that restitution centers were gradually phased out in the early 2000s.

Another example of the negative financial consequences of these reform efforts on probationers was the number of additional conditions of probation. A trial judge could now impose a condition of probation requiring a probationer to:

- Remain under custodial supervision in a community-based facility . . . and pay a percentage of his income to the facility for room and board;
- Pay a percentage of his income to his dependents for their support while under custodial suspension in a community-based facility; and
- Make a onetime payment in an amount not to exceed \$50 to a local crime stoppers program.
- For probationers convicted of certain sexual offenses, upon a finding that the probationer was financially able to make a payment, the judge could require the probationer to pay all or a part of the reasonable and necessary costs incurred by the victim for psychological counseling made necessary by the offense or for counseling and education relating to acquired immune deficiency syndrome or human immunodeficiency virus made necessary by the offense.
- Regarding fees and costs as part of the conditions of probation in intoxication offenses, the legislature provided that if a court required as a condition of probation that the defendant participate in a prescribed course of conduct necessary for the rehabilitation of the defendant's drug or alcohol dependence, the court had to require that the defendant pay for all or part of the cost of such rehabilitation based on the defendant's ability to pay.⁶
- Moreover, regarding intoxication offenses, the legislature authorized the court to require as a condition of probation that the defendant not operate a motor vehicle unless the vehicle was equipped with a device that used a deep-lung breath analysis mechanism that prevented the

operation of the motor vehicle if ethyl alcohol was detected in the breath of the operator. The legislature further provided that the court had to require the defendant to obtain the device at his own cost.⁷

The legislature did add a provision that a court could not order a probationer to make any payments as a term and condition of probation except for fines, court costs, restitution to the victim, payment to a local crime stoppers program, and other terms and conditions expressly authorized by statute. In 1991 the legislature amended the language of this provision to clarify that the court could impose a condition ordering the probationer to make a payment if the condition was related personally to the rehabilitation of the probationer.

At this same time the legislature authorized the trial court to impose a condition ordering a probationer to reimburse a law enforcement agency for the agency's expenses for the confiscation, analysis, storage, or disposal of raw materials, controlled substances, chemical precursors, drug paraphernalia, or other materials seized in connection with the offense. In addition, in 1991 the legislature added a provision that a person in a pretrial intervention program could be assessed a fee equal to the actual cost to an adult probation department, henceforth re-designated as a community supervision and corrections department (CSCD), not to exceed \$500, for supervision of the defendant by the department or programs provided to the defendant by the department as part of the pretrial intervention program.⁸ Finally, in 1991 the legislature added a \$30 court cost for persons convicted of driving while intoxicated to reimburse the costs for a breath alcohol testing program.

⁷ Subsequent legislation would make the imposition of an interlock device as a condition of community supervision mandatory for certain intoxication offenses.

⁸ In 2005 as a result of a Texas Attorney General's opinion, (GA-0114) the legislature modified this statute to provide that a court that authorized a defendant to participate in a pretrial intervention program could order the defendant to pay the court a supervision fee in an amount not more than \$60 per month as a condition of participating in the program. The legislature further provided that in addition to or in lieu of the supervision fee authorized under this amendment to the statute, the court could order the defendant to pay or reimburse a community supervision and corrections department for any other expense incurred as a result of the defendant's participation in the pretrial intervention program or that was necessary to the defendant's successful completion of the program.

⁶ In this same provision the legislature also stated that the court could, in its discretion, credit such cost paid by the defendant against the fine assessed.

Since the reforms of 1989 and 1991, the following conditions have been authorized that expose the probationer to additional fees:

- If the court grants probation to a person convicted of certain sex offenses, the court had to require as a condition of probation that the person pay to the probation officer supervising the person a probation fee of \$5 each month during the period of probation. This fee was in addition to court costs or any other fee imposed on the person. This fee was to assist in funding a state-wide sexual assault program (1993).
- If a defendant was granted community supervision for an intoxication offense and the person's driver's license was suspended and subsequently reinstated, pay to the Texas Department of Public Safety a \$50 reinstatement fee (1993).
- Reimburse the crime victims compensation fund for any amounts paid to a victim for the defendant's offense, or if no reimbursement was required, make one payment to the fund in an amount not to exceed \$50 if the offense was a misdemeanor or not to exceed \$100 if the offense was a felony (1995).
- Allow a judge who granted community supervision to a person charged with or convicted of indecency with a child or sexual assault of a child to order the probationer to make one payment in an amount not to exceed \$50 to a children's advocacy center (1999).
- Provide that if a judge granted community supervision to a person for an offense involving family violence, the judge could require the person to make one payment in an amount not to exceed \$100 to a family violence shelter that received state or federal funds and that served the county in which the court was located (1999).
- Provide that a judge granting community supervision had to fix a fee of not less than \$25 and not more than \$60 per month to be paid as a condition of community supervision, thus raising the maximum supervision fee from \$40 to \$60 (2001).
- Provide that a judge who granted community supervision to a sex offender could require the sex offender as a condition of community supervision to submit to treatment, specialized supervision, or rehabilitation. On a finding that the defendant was financially able to make payment, the judge had to require the defendant to pay all or part of the reasonable and necessary costs of the treatment, supervision, or rehabilitation (2003).
- Add a statutory condition allowing a judge to order a defendant to reimburse the county in which the prosecution was instituted for compensation paid to any interpreter in the case (2005).⁹
- Increase the reinstatement fee for the re-issuance of a suspended driver's license from \$50 to \$100 (2007).
- Provide that if a judge granted community supervision to a defendant younger than 18 years of age for certain possession offenses under the Controlled Substances Act, the judge could require the defendant as a condition of community supervision to attend an alcohol awareness program or a drug education program that was designed to educate persons on the dangers of drug abuse. Moreover, unless the judge determined that the defendant was indigent and unable to pay the cost of attending the program, the judge had to require the defendant to pay the cost of attending the program (2015).
- Provide that if a judge granted community supervision to a defendant convicted of certain cruelty to animal offenses, the judge could require the defendant to complete an online responsible pet owner course or attend a responsible pet owner course. Further provide that the Texas Department of Licensing and Regulation could charge a fee for course participation certificates and other fees necessary for the administration of the course or course providers (2017).¹⁰

Likewise, since the reforms of 1989 and 1991 the following court costs have been added, having an adverse impact on probationers:

- For persons convicted of an intoxication offense the court must impose as a cost of court on a defendant an amount that is equal to the cost of an alcohol or substance abuse evaluation conducted by an adult supervision officer (1994).
- A community supervision and corrections

⁹ A previous Texas Attorney General's opinion (DM-245) had opined that a trial court could require a defendant to reimburse the county for paying for a foreign language interpreter in a court proceeding. However the United States Supreme Court's decision in *Tennessee v. Lane*, 541 U. S. 509 (2004) would probably invalidate the applicability of this provision to hearing-impaired defendants under the Americans with Disabilities Act.

¹⁰ Although this condition was enacted into law in 2011, no fees for attendance of this course were specified by the Legislature until 2017.

department may assess an administrative fee for each transaction made by the officer or department relating to the collection of fines, fees, restitution or other costs imposed by the court. The fee may not exceed \$2 for each transaction (Applicable only to Harris County CSCD in 1995 and to all other CSCDs in 1999).

- Provide that a defendant convicted of the offense of graffiti must pay a \$5 graffiti eradication fee as a cost of court (1997). The assessed court cost was later ordered to be placed in a juvenile delinquency prevention fund in 2003.
- An additional \$100 cost of court imposed on a person convicted of an intoxication offense without regard to whether the defendant was placed on community supervision after being convicted of the offense or received deferred disposition or deferred adjudication for the offense to be used for emergency medical services, trauma facilities, and trauma care systems (2003).
- Provide that a person pay \$250 as a court cost on conviction of certain felony sex offenses and \$50 on conviction of certain offenses against a person that is punishable as a Class A misdemeanor or a higher category or certain misdemeanor sex offenses. Thirty-five percent of this court cost is dedicated to the state highway fund and 65 percent is dedicated to the criminal justice planning fund (2003).¹¹
- Provide that if a court requires that a defendant make restitution in specified installments, in addition to the specified installments, the court may require the defendant to pay a one-time restitution fee of \$12.00, \$6.00 of which the court shall retain for costs incurred in collecting the specified installments and \$6.00 of which the court must order to be paid to the State-operated victims compensation fund (2005).
- In addition to other costs on conviction, a person must pay \$50 as a court cost on conviction of an intoxication offense or an

¹¹ Since the creation of this new court cost, the Legislature added an additional provision that a person must pay as a court cost \$34.00 on placement of the person on community supervision if the person is required to submit a DNA sample as a condition of community supervision. Moreover this new separate court cost is dedicated to the Texas Department of Public Safety to help defray the cost of any analyses performed on DNA samples provided by defendants who are required to pay a court cost under this statute (2009).

offense under the Controlled Substances Act punishable as a Class B misdemeanor or any higher category of offense. This court cost is to be used to fund specialty courts, include drug and veterans treatment courts, both at the State and local level (2007).¹²

- Provide that a person convicted of certain sex offenses must pay \$100 on the conviction of the offense, without regard to whether the defendant was placed on community supervision after being convicted of the offense or received deferred adjudication. The fund designated by this measure can be used only to fund child abuse prevention programs in the county where the court was located (2009).
- Increase the court cost to fund specialty courts in the state from \$50 to \$60 (2009).

The Collections Improvement Program (CIP)

In 2005 the Texas Legislature made sweeping changes to the collections improvement program in order to increase collections for fines, fees, and costs assessed throughout the criminal justice system. These changes applied only to counties with a population of 50,000 or greater and municipalities with a population of 100,000 or greater. Under this new law, unless granted a waiver,¹³ each such county and municipality had to develop and implement a program that complied with the prioritized implementation schedule by the Texas Office of Court Administration (OCA). The legislature specified that the program must consist of:

1. A component that conformed with

¹² At the same time as this court cost was authorized to fund specialty courts, the legislature also created the first of several statutorily described specialty courts. In creating these specialty courts the legislature authorized these drug court, veterans treatment court, and prostitution court programs to collect from a participant in the program a reasonable program fee not to exceed \$1,000 along with other participant fees.

The legislature further stated that fees collected under this measure could be paid on a periodic basis or on a deferred payment schedule at the discretion of the judge, magistrate, or coordinator. The Legislature also provided that the fees must be: (1) based on the participant's ability to pay; and (2) used only for purposes specific to the program.

¹³ In order to obtain a waiver a county or municipality must provide the Office of Court Administration, in consultation with the Texas Comptroller of Public Accounts, sufficient information for OCA to determine whether it was not cost-effective to implement a program in a county or municipality and grant a waiver to the county or municipality.

a model developed by OCA and designed to improve in-house collections through application of best practices; and

2. A component designed to improve collection of balances more than 60 days past due.

In addition, the Texas Comptroller of Public Accounts, in cooperation with OCA, must develop a methodology for determining the collection rate of counties and municipalities affected by the law and periodically audit counties and municipalities to verify information reported under this law and confirm that the county or municipality was conforming with requirements relating to the program. Finally, each county and municipality affected by the law had to at least annually submit to OCA and the comptroller a written report that included updated information regarding the program, as determined by OCA in cooperation with the comptroller.

Are Changes Coming in Texas regarding the Adverse Effects of Court-imposed Fines, Fees and Costs on Indigent Defendants?

As explained in this article, there has been a trajectory over the last four decades in Texas to create more and more costs on criminal defendants, often in the name of criminal justice reform. Unfortunately, Texas is not alone in this long-term trend. However, in recent years advocates of reform on the national level have begun to decry the financial burdens placed on indigent defendants as well as the lack of oversight, training, and monitoring of courts of state and local government in following constitutional mandates regarding the imposition, enforcement, and collection of court-ordered fines, fees, and costs on indigent defendants. Such defendants often seem caught in a system more interested in generating revenue to operate multiple facets of government than in seeking justice. Texas is not immune to this new national awareness of the harm caused by unduly burdening indigent defendants with unreasonable fines, fees, and costs.

Since 2005, the Office of Court Administration has struggled in implementing the terms of the Collections Improvement Program, while also recognizing the substantive and constitutional rights of indigent defendants. The most recent standards to the CIP adopted by the OCA recognize this

dilemma.¹⁴ The newest rules acknowledge that the CIP is designed to improve the enforcement of a defendant's compliance with the court-ordered payment of costs, fees, and fines without imposing an undue hardship on the defendant or the defendant's dependents. Thus OCA affirms that the CIP components should not be interpreted to conflict with or undermine the protections afforded to defendants of full procedural and substantive rights under the constitution and laws of this State and of the United States.

Hence these rules affirm that CIP does not alter a judge's legal authority or discretion to design payment plans for any amount of time; to convert costs, fees, and fines into community service or other nonmonetary compliance options as prescribed by law; to waive costs, fees, and fines, or to reduce the total amount a defendant owes at any time; or to adjudicate a case for noncompliance at any time. These rules recognize that CIP applies to criminal cases in which the defendant is ordered to pay costs, fees, and fines under a payment plan. Moreover these rules state that CIP does not apply to cases in which: 1) the court has waived all court costs, fees, and fines; 2) the court authorizes discharge of the costs, fees, and fines through non-monetary compliance options; 3) the defendant has been placed on deferred disposition or has elected to take a driving safety course; or 4) the defendant is incarcerated, unless the defendant is released and payment is requested. Finally, the rules provide that CIP does not apply to the collection of community supervision fees assessed as a condition of community supervision.

The rules changes of the OCA to the CIP were explicitly made in response to certain national incidents that have brought the problem of the burden of financial penalties on indigent defendants to light, such as the situation found in Ferguson, Missouri, and the recent letter from the United States Department of Justice regarding the obligation of the courts in the United States to conform their practices to the decisions of the United States Supreme Court regarding the constitutional rights of indigent criminal defendants. Therefore, the changes made to the rules to the CIP, effective January 1, 2017, were designed to make the criminal defendant aware of the implications of entering into a payment plan, to require CIP staff to ascertain the ability to make payments in accordance

¹⁴ See 1 Texas Administrative Code 174, effective January 1, 2017.

with the plan, to ensure that the payment plan did not result in an undue burden to defendants and their dependents, and to inform defendants who were having difficulties in complying with a payment plan of their right to petition the court and request a hearing for the judge to consider the defendant's ability to pay and any nonmonetary compliance options available for the defendant to satisfy the judgment.

The Texas Legislature has also started showing a concern about the adverse impact of court-imposed fees on criminal defendants. In 2017 the legislature passed two similar bills relating to the imposition of certain fines and costs. Both bills amended Article 42.15, Code of Criminal Procedure, by adding a subsection (a-1) to provide that during or immediately after imposing a sentence in a case where the defendant entered in open court a plea of guilty or "nolo contendere" or refused to enter a plea, the court had to inquire whether the defendant had sufficient resources or income to immediately pay all or part of the fine and costs. If the court determined that the defendant did not have sufficient resources or income to immediately pay all or part of the fine and costs, the court had to determine whether the fine and costs should be:

- (1) required to be paid at some later dates or in a specified portion at designated intervals;
- (2) discharged by performing community service;
- (3) waived in full or in part; or
- (4) satisfied through any combination of methods under these Acts.¹⁵

Article 43.05, Code of Criminal Procedure was also amended by adding subsections (a-1) and (a-2) to provide that a court could not issue a *capias pro fine* for the defendant's failure to satisfy the judgment according to its terms unless the court held a hearing on the defendant's ability to satisfy the judgment and:

- (1) the defendant failed to appear at the hearing; or
- (2) based on evidence presented at the hearing, the court determined that the *capias*

¹⁵ Prior to the passage of these bills, judges in Texas had to fine an individual, wait for the person to default, issue a warrant, wait for the person to be picked up or come in voluntarily on the warrant, and then the judge could determine indigence and offer community service. In other words, even though everyone in court knew that a defendant was indigent and could not pay a fine or costs, the judge was still legally obligated to impose a fine and costs and could not take any further actions until the defendant defaulted on making a payment.

pro fine should be issued.¹⁶

Newly added Subsection (a-2) stated that the court had to recall a *capias pro fine* if, before the *capias pro fine* was executed:

- (1) the defendant voluntarily appeared to resolve the amount owed; or
- (2) the amount owed was resolved in any manner authorized by this code.

The fiscal note to this legislative initiative stated that it would have a negative, but indeterminate, fiscal impact to the state due to anticipated revenue decreases resulting from an unknown number of defendants that would be determined to be indigent or unable to pay receiving a waiver or discharge from fines, fees, and court costs. These concerns about revenue loss have not been borne out in practice. In testimony in August 2018 before the Texas House of Representatives Criminal Jurisprudence Committee, the Director of the Texas Office of Court Administration testified that:

- The number of warrants for failure to appear is declining.
- The number of warrants for failure to pay is also declining.
- The number of cases resolved through jail credit is declining.
- The number of cases resolved through community service is increasing.
- The number of defendants getting on payment plans has increased.
- Collections per case have increased by 6.7 percent at the local level and 7.3 percent at the state level.

Despite these positive signs, there continues to be resistance to offsetting the reliance on court-imposed probation fees and costs to fund the operation of adult probation departments in Texas. This is primarily because the state appropriations to fund community supervision and corrections departments

¹⁶ However there was a variance in the language to this new Subsection (a-1) in another bill. This new Subsection (a-1) read as follows:

before a court could issue a *capias pro fine* for the defendant's failure to satisfy the judgment according to its terms:

- (1) the court had to provide by regular mail to the defendant notice that included:

(A) a statement that the defendant had failed to satisfy the judgment according to its terms; and

(B) a date and time when the court would hold a hearing on the defendant's failure to satisfy the judgment according to its terms; and

- (2) either:

(A) the defendant failed to appear at the hearing; or

(B) based on evidence presented at the hearing, the court determines that the *capias pro fine* should be issued.

across the State as well as the locally generated fees to support these departments rely so heavily on offender fees. It has been estimated that if the State were to replace the probation supervisory fees that support the operation of CSCDs across the State with state-generated revenue, the legislature would have to appropriate between \$320 and \$340 million additional dollars per biennium.

The Future Prospects of Reliance on Court-Imposed Fees, Fines, and Costs

The driving factors in the increase in imposition of court-imposed fines, fees, and costs have very little to do with notions of punishment or justice and all too much to do with the need to generate revenues for the operation of the criminal justice system, as well as other facets of government. And while much of the well-justified criticism of the overreliance on court-imposed fees, fines, and costs to support governmental operations has been based on fairness and sound public policies, another pertinent question worth exploring is whether this practice is economically sustainable in the future.

The economy has been going through profound changes in the last several decades that are likely to increase exponentially in the years to come. Wages and individual wealth have been shifting in line with educational attainment, generational birth, and such demographic factors as gender, ethnicity, and race. Moreover, the acceleration in the use of artificial intelligence, automation, and robotics will likely have a serious adverse impact for those at the bottom of earnings potential. Because so many persons in the criminal justice system live in poverty, are poorly educated, are disproportionately younger, and are overrepresented by racial minorities, the continued reliance on these individuals to fund the operations of probation is unlikely to be economically viable.¹⁷

Economists have debated when the post-World War II decline in wage growth and increase in income inequality began. While some economists see this trend occurring as early as the late 1950s and early

¹⁷ In Texas reliance on court-imposed fines, fees, and costs to operate a community supervision and corrections department varies from jurisdiction to jurisdiction. For the Bell/Lampasas Counties CSCD, approximately one-half of the funds to operate the department comes from the State and the other one-half comes from probationer paid court-imposed fees.

1960s, declining income growth rates and an increase in wealth inequality became a topic of widespread concern beginning in the 1970s. Likewise, economists have long noted the effects of automation on employment. However, only fairly recently have industries, governments, and academics begun to stress the profound economic changes that will arise from emerging technologies incorporating artificial intelligence, robotics, and new forms of automation.

Although arguably these changes in the economy have been occurring for well over 50 years, the second section of this article will examine changes in income levels since 1980—the same period in which mass incarceration and the heavy reliance on court-imposed fees began. One of the best sources for income trends over this period is *The Demographics of Wealth*, a series of studies by the Federal Reserve Bank of St. Louis. These reports are based on a series of surveys of income trends of 40,000 families in three-year waves from 1989 to 2018. The three reports for 2015 examine race, ethnicity, and wealth; education and wealth; and age, birth year, and wealth.

The first report, dated February 2015, examined race, ethnicity, and wealth.¹⁸ This report found that, adjusted for inflation, the median wealth of a white family in 1989 was \$130,102 and in 2013 was \$134,008. For an Asian family the two medians were \$64,165 in 1989 and \$91,440 in 2013. For a Hispanic family they were \$9,229 and \$13,900, and for a black family, they were \$7,736 and \$11,184.¹⁹ The report concluded that “viewing the period 1989-2013 as a whole, it would be difficult to assert that there had been any meaningful change in the relationship among the wealth of typical white, Hispanic, and black families.”²⁰ This report also found that median family incomes for blacks and Hispanics, as opposed to median wealth, “have remained about 40 percent lower than the median white family income since the early 1990s.”²¹

The Federal Reserve Bank of St. Louis’s second report, dated May 2015, examined

education and wealth.²² Not surprisingly, there is a strong correlation between educational attainment and wealth. What is surprising is the vast and growing disparity in educational attainment and wealth over the years. Adjusted for inflation, the median income for a head of family without a high school diploma in 2013 was \$22,320, down one percent from 1989. For those heads of family households with a high school diploma, the median income in 2013 was \$41,190. However, that meant that median income for persons with a high school diploma was down 16 percent from 1989. For heads of families with a two- or four-year degree, the median income was \$76,293, or down 5 percent from 1989. Only those heads of families with an advanced degree had seen an increase in income from 1989 by four percent—a median income in 2013 of \$116,265.²³

However, when this report looked at median wealth (net worth), the numbers were even more drastically uneven. The net worth of a head of a family without a high school diploma in 2013 was 44 percent lower than that of the same person in 1989. A head of family in 2013 with a high school diploma had a net worth 36 percent less than that of someone with the same education level in 1989. A head of family with a two- or four-year degree in 2013 was up 3 percent from 1989, and a head of family with an advanced degree in 2013 had a net worth up 45 percent from 1989.²⁴ In all, 24 percent of all U.S. families in 2013 owned 67 percent of the economy’s wealth.²⁵

Possibly the one bright lining in this report was the acknowledgement that fewer heads of households have less than a high school diploma in 2013 than in 1989: Heads of families without a high school diploma decreased from 31 percent in 1989 to 12 percent in 2013. The share of families headed by high school graduates increased from 44 percent to 50 percent, college graduates increased from 16 percent to 25 percent, and graduate-degree holders increased from 10 percent to 13 percent.²⁶

Nevertheless, these improvements do not

reflect the numbers in the criminal justice system. Twenty-five percent of the probationers being supervised by the Bell/Lampasas Counties Community Supervision and Corrections Department in Texas do not have a high school diploma or a general equivalency diploma (GED). In a survey appearing in March 2018 of women incarcerated in prisons in Texas conducted by the Texas Criminal Justice Coalition, 52 percent of incarcerated women reported that they had a total household income immediately before entering prison of less than \$10,000 per year. Eighty percent reported it was less than \$30,000 per year, and only 10 percent of women reported \$50,000 or more per year.²⁷

The third report by the Federal Reserve Bank in St. Louis is in many ways the most interesting and makes the most compelling point about the futility of relying on court-imposed fines, fees, and costs in the future to fund the operation of the criminal justice system, especially adult probation. This report, issued in July 2015, examines age, birth year, and wealth.²⁸ In dividing heads of households into four age groups, i.e., the silent generation (born between 1925 and the end of World War II); baby boomers (born from 1946 to 1964); Generation X (those who followed the baby boomers); and Millennials (those born in the twenty-first century), what researchers have found is that each preceding generation has done better financially than later generations and the Generation Xers are doing quite poorly, while Millennials are projected to do even worse.

It is an obvious economic fact that there is an age curve to wealth creation. Young people finishing school, getting married and starting a family, and purchasing a home are going to accumulate a lot of debt in their 20s and early 30s. Yet, according to traditional economic thought, as they age they will increase their earnings and savings and thus will accumulate wealth into their 60s when they look at retirement. Then after retirement they will

¹⁸ See *The Demographics of Wealth: How Age, Education and Race Separate Thrivers from Strugglers in Today’s Economy. Essay No. 1: Race, Ethnicity and Wealth*, February 2015. <https://www.stlouisfed.org/household-financial-stability/the-demographics-of-wealth>

¹⁹ *Ibid.* page 4.

²⁰ *Ibid.* page 9.

²¹ *Ibid.* page 9.

²² See *The Demographics of Wealth: How Age, Education and Race Separate Thrivers from Strugglers in Today’s Economy. Essay No. 2: Education and Wealth*, May 2015. <https://www.stlouisfed.org/household-financial-stability/the-demographics-of-wealth/essay-2-the-role-of-education>

²³ *Ibid.* page 4.

²⁴ *Ibid.* page 4.

²⁵ *Ibid.* page 3.

²⁶ *Ibid.* page 18.

²⁷ See *An Unsupported Population: The Treatment of Women in Texas’ Criminal Justice System*, dated April 2018 pages 6-7. Texas Criminal Justice Coalition. <https://www.texasajc.org/system/files/publications/TCJC%20Womens%20Report%20Part%202.pdf>

²⁸ See *The Demographics of Wealth: How Age, Education and Race Separate Thrivers from Strugglers in Today’s Economy. Essay No. 3: Age, Birth Year and Wealth*, July 2015. <https://www.stlouisfed.org/household-financial-stability/the-demographics-of-wealth/essay-3-age-birth-year-and-wealth>

tend to spend down at least some of what they have acquired in assets. However, despite the widespread belief that each generation of Americans has generally done better than preceding generations, the opposite has been true for recent generations. This report finds that each past generation has accumulated greater wealth than each following generation, with the silent generation actually doing better than the baby boomers, baby boomers doing better than Generation X, and Millennials projected to do worse than Generation X.

Thus the median wealth of a family headed by someone at least 62 rose 40 percent between 1989 and 2013, from just under \$150,000 to about \$210,000. However, the median wealth of a family headed by an individual between the ages of 40-61 was 31 percent lower than in 1989, declining from \$154,000 to about \$106,000. Finally the median wealth of a young family dropped more than 28 percent from \$20,000 to just over \$14,000.²⁹

As noted earlier, this decline in generational wealth, as well as declines for persons with less than a graduate-level degree and for racial minorities, is not a recent phenomenon and cannot be attributed to the Great Recession of 2008 and the decade-long recovery. Instead this report states that the evidence gathered supports the hypothesis that levels of income and wealth rose during the first several decades of the 20th century, but then stopped rising for most families around mid-century.³⁰ And that “the members of Generation X stand out for having low incomes and wealth for a given set of demographic characteristics.” As for Millennials, the authors state that as of 2013, there is no convincing evidence that they will do appreciably better than the members of Generation X.³¹

Nevertheless even though the economic phenomena described in this paper are long in the making, it also appears that certain economic factors are accelerating rapidly, thus making imprudent and unrealistic a continued reliance on court-imposed fees, fines, and costs for funding the criminal justice system, including probation. Part of support for this argument is the widely uneven distribution of economic growth, wealth, and employment in the United States. For example, the Metropolitan Policy Program at the Brookings Institution has found that since the Great Recession, 53 of the largest metro areas in the

country (those with populations of over one million residents) have accounted for 93.3 percent of the nation’s population growth since the economic crisis in 2008, even though they only account for 56 percent of the overall population.³² Moreover, the biggest metro areas generated two-thirds of economic growth and 73 percent of employment gains between 2010 and 2016. In addition, as the economy has improved since the Great Recession, these numbers have not leveled off but are actually increasing. Since 2014, economic growth in these metro areas reached nearly 72 percent of the nation’s overall growth and 74 percent of employment growth.³³

In contrast, smaller metropolitan areas with less than 250,000 people have seen a -6.5 percent economic growth. The decline in rural areas is even greater.³⁴ Finally, even the suburban areas are experiencing an increase in poverty rates. What makes poverty in suburbs particularly troubling is that more of the social services that assist the poor are located in cities than in suburbs.³⁵ What is also increasing the distress for people in these areas is that, according to the Hamilton Project, in recent decades American workers have become less likely to move to new places and to new jobs. Since 1990, interstate mobility has declined from 3.8 percent to less than 2 percent in 2016.³⁶ The Hamilton Project states that under normal economic conditions, job-to-job mobility generates about 1 percent earnings growth per quarter.³⁷

While lack of mobility does not in itself explain the wage stagnation that has been occurring over the last several decades, it does indicate that probation departments in rural and small metropolitan areas are going to have an increasingly difficult time attempting to fund their departments by relying on

probationers tied to their communities but seeing their wages decrease or having difficulty obtaining meaningful employment. Likewise, these same departments cannot rely on an influx of new employees into their communities and an increase in economic growth that would raise the salaries of probationers on whose wages departments have come to depend.

The Impact of New Technologies on Wages and Employment

If the last several decades have been fairly grim regarding income inequality, the future is forecast to be even more so. This is due to the revolution in artificial intelligence, robotics, and automation, which will replace large numbers of traditional forms of employment. These changes will have a particularly adverse impact on the people who are generally placed on probation. One of the leading research institutes on how emerging new technologies will impact employment and wages is the Oxford Martin Programme on Technology and Employment at the University of Oxford. Established in 2015, this program is investigating the implications of a rapidly changing technological landscape for economies and societies. The program also provides in-depth understanding of how technology is transforming the economy and helping leaders create a successful transition into new ways of working in the twenty-first century.

A report issued in January 2016 by Oxford Martin estimated that 47 percent of U.S. jobs are at risk from automation.³⁸ However, as previously noted, the economic structure in the United States is very unevenly balanced. Just as with uneven economic growth in various parts of the country, this report points out that not all cities in the United States have the same job risks. While cities such as Boston, New York, Denver, and San Francisco are least at risk, others such as Houston, Los Angeles, Oklahoma City, Sacramento, and Fresno are most at risk. This greater risk/lesser risk divide should be unsurprising, since economic growth in the United States is far greater in those places that heavily rely on technological innovation and labor-based cognitive skills and is far less in places that rely on extraction industries, agriculture, and manufacturing.

Much of the work by Oxford Martin is based on earlier work by Carl Benedikt Frey

²⁹ Ibid. page 4.

³⁰ Ibid. 17.

³¹ Ibid. page 20.

³² See *The Avenue Geographic Gaps Are Widening while U. S. Economic Growth Increases* by Mark Muro and Jacob Whiton, dated January 23, 2018. <https://www.brookings.edu/blog/the-avenue/2018/01/22/uneven-growth/>

³³ Ibid.

³⁴ Ibid.

³⁵ See Slate Magazine, March 22, 2018. In the Suburbs, social Services Can’t Keep Up with Families’ Needs by Alieza Durana. <https://slate.com/human-interest/2018/03/in-the-suburbs-social-services-cant-keep-up-with-families-needs.html>

³⁶ See The Hamilton Project. *Thirteen Facts about Wage Growth* by Jay Shambaugh, Ryan Nunn, Patrick Lie, and Greg Nantz. page. 7. http://www.hamiltonproject.org/papers/thirteen_facts_about_wage_growth

³⁷ Ibid.

³⁸ See *TECHNOLOGY AT WORK v2.0 The Future Is Not What It Used to Be*, January 2016, Citi GPS: Global Perspectives and Solutions, based on the findings of Berger, Frey and Osborne (2015).

and Michael A. Osborne, whom they cite in *Technology at Work v2.0*. In “The Future of Employment: How Susceptible Are Jobs to Computerisation?” dated September 17, 2013,³⁹ Frey and Osborne note that with the first commercial use of computers around 1960 there has been an increasingly polarized labor market, with growing employment in high-income cognitive jobs and low-income manual occupations, accompanied by a hollowing-out of middle-income routine jobs. Moreover, they observe that while historically computerization has largely been confined to manual and cognitive routine tasks involving explicit rule-based activities, following recent technological advances, computerization is now spreading to domains commonly defined as non-routine. As such, the authors state that “computerisation is no longer confined to routine tasks that can be written as rule-based software queries, but is spreading to every non-routine task where big data becomes available.” It is in this paper that the authors first stated that 47 percent of total United States employment is in the high-risk category of being automated perhaps over the next decade or two.⁴⁰

Unlike past trends in computerization in which middle-income employees were most at risk of being replaced or downgraded to a lower income level, Frey and Osborne believe that in this new technical revolution lower income employees will be the most adversely impacted group, with the first wave affecting “most workers in transportation and logistics occupations, together with the bulk of office and administration support workers, and labour in production occupations” being substituted by computer capital.⁴¹ The authors also believe that a substantial share of employment in services, sales, and construction occupations exhibit high probabilities of computerization.

On the other hand, the authors predict that “most management, business, and finance occupations, which are intensive in generalist tasks requiring social intelligence, are largely confined to the low risk category.” They also state that the same is true of most occupations

in education, healthcare, the arts, and media jobs. In addition, there is a low susceptibility of engineering and science occupations to computerization, largely due to the high degree of creative intelligence these occupations require. Although lawyers are also in the low-risk category, paralegals and legal assistants are in the high-risk category.⁴²

Not everyone sees the revolution in artificial intelligence, robotics, and automation as having such dire employment consequences. The McKinsey Global Institute, an American-based global management consulting firm, recognizes the profound changes to employment that the rapid development in AI, robotics, and automation will have on employment worldwide. In a discussion paper dated May 2018, the Institute predicts that over the next 10 to 15 years, “the adoption of automation and AI technologies will transform the workplace as people increasingly interact with ever-smarter machines.” Moreover, this paper predicts that the demand for technological skills will gather pace in the 2016 to 2030 period, the need for social and emotional skills will similarly accelerate, and, by contrast, the need for both basic cognitive skills and physical and manual skills will decline.⁴³

However, McKinsey does not believe that as many jobs as, for example, Oxford Martin estimates are at high risk of being eliminated due to AI, automation, and robotics. But even they believe that between 2016 and 2030 in the United States, up to 32 percent of the work force will need to move out of current occupational categories to find work.⁴⁴

Nevertheless, for those persons who typically are seen caught up in the criminal justice system and for those who rely on them to support the operation of criminal justice agencies the McKinsey predictions may be of little comfort. Even McKinsey notes that in general the current educational requirements of the occupations that may grow are higher than those for the jobs displaced by automation, predicting that “in advanced economies, occupations that currently require only a secondary education or less see a net decline from automation, while those occupations

requiring college degrees and higher grow.”⁴⁵

McKinsey argues for more job training, for displaced employees to obtain higher education degrees, and for implementation of lifelong learning for most future workers. However, from a practical standpoint, it is not certain that most of today’s workers have the inclination, much less the financial means, to go back to school and obtain a college or technical degree. From a policy standpoint, both at the state and national levels, there is little interest in providing the necessary funding to educate the current workforce. For example, the federal government is currently set to spend a mere \$17 billion on job training.⁴⁶ Over the past decade state funding for public education in Texas has declined rather than risen.⁴⁷

Thus criminal justice agencies must make a realistic assessment of the future prospects of a continued reliance on court-ordered fines, fees, and costs for their operating costs. For adult probation departments, the issue of demographics is destiny. In the Bell/Lampasas CSCD, as previously noted, approximately 25 percent of the offender population does not have a high school diploma. Approximately another 25 percent of the offender population has had at least some college education.⁴⁸ Thirty-one percent of the offender population are females and 23 percent of the persons being supervised are between the ages of 17 and 25.

Seventy-nine percent of the probationers in Bell and Lampasas Counties are employed.⁴⁹ Those female probationers who are employed generally find work in nursing homes, as home health care providers, in retail, or in food services. Male probationers in the two counties who are employed generally find work in construction, manufacturing, retail, truck driving, or food services. For the vast majority of the work force on probation, their

⁴⁵ See McKinsey Global Institute *Jobs lost, jobs gained: What the future of work will mean for jobs, skills, and wages*, dated November 2017 page 8.

⁴⁶ See *Foreign Policy*, dated July 11, 2018, “Learning to Work with Robots: AI will Change Everything. Workers must Adapt or Else” by Molly Kinder, page 9.

⁴⁷ What has happened in Texas is that the portion of funding for education at the state level has dropped and the portion of funding at the local level through property taxes has risen.

⁴⁸ Approximately 30% of the general population in the United States has a college or post-graduate degree.

⁴⁹ The remaining 21% are either unemployed, students, retired or disabled.

³⁹ See “The Future of Employment: How Susceptible Are Jobs to Computerization?” by Carl Benedikt Frey and Michael A. Osborne dated September 17, 2014 at page 38.

⁴⁰ *Ibid.* page 38.

⁴¹ A World Economic Forum study predicts that by 2025 52% of office tasks could be performed by a machine. See *Time Magazine*. October 1, 2018 at page 4.

⁴² See “The Future of Employment: How Susceptible Are Jobs to Computerization?” at pages 40 and 41.

⁴³ See McKinsey Global Institute Discussion Paper dated May 2018. “Skill Shift: Automation and the Future of the Workforce” by Jacques Bughin, Eric Hazan, Susan Lund, Peter Dahlstrom, Anna Wiesinger, and Amresh Subramaniam.

⁴⁴ *Ibid.* page 86.

occupations would be considered at a high risk of being replaced by automation, either in the near future or in the next decade or two. The only occupations that would be considered low risk would be those in the health care industry, i.e., nursing homes and home health care. With an aging population, these last two occupations are deemed to expand in the future and are not considered easily replaceable by automation. Finally, at least 75 percent of the employed probation population in Bell and Lampasas Counties have occupations whose wages have stagnated or declined in the last three decades and will in all likelihood continue to stagnate or decline.

Recommended Reforms to Relieve Overreliance on Court-Imposed Fines, Fees, and Costs

From an economic standpoint, I hope that in this article I have made a convincing case that relying on court-imposed fines, fees, and costs is no longer financially sustainable. Nevertheless, it is unrealistic to believe that the State of Texas will assume the complete cost for funding community supervision and corrections departments across the State. However, perhaps over a more extended period of time, the State can gradually assume a greater financial obligation. Failure to do so is likely to lead to increased probation caseloads, diminished specialized caseloads, and a decline in programs and services for probationers. The result will be more probationers revoked and sentenced to prison, especially for technical violations, at a great cost to the State.

The second recommendation is for court-imposed fines, fees, and costs to be tailored to the economic circumstances of the individual. It seems patently unfair for a single mother making a minimum wage to be fined the same amount as a millionaire. What may pose a minor inconvenience to a wealthy defendant may be economically devastating to a poor one. While some stakeholders will strongly object to any efforts to make court-imposed fines, fees, and costs more equitable, there needs to be a greater effort in Texas, as well as the rest of the country, to stop relying on the poor to fund the operations of the criminal justice system.

The third recommendation is based on the assumption that revenues supporting the operation of adult probation departments in Texas will continue to decline, and those departments must therefore make major changes to their operations. As with any

organization that depends on outside revenue to support its functions, there are only three ways to deal with declining revenues: seek new sources of revenue, decrease costs, or improve productivity. Assuming that there will be no additional revenues either through state appropriations or offender fees, an adult probation department must either decrease costs, improve productivity, or both.

While it is not the place for this article to discuss organizational restructuring, it is pertinent to mention that the new technologies described in this article can streamline the operation of adult probation departments and improve efficiencies in their operations. In 2014 representatives from community supervision and corrections departments in Texas and their state oversight agency held a series of meetings to examine how emerging technologies could assist adult probation in the state. This committee identified potential changes in interactions with probationers via telecommunication, social media, and other electronic interfaces; ways to incorporate new technologies to deliver programs and services for probationers and develop new supervision strategies; and ways to use technologies to improve the delivery of training to probation officers.

This series of meetings resulted in a report making the following recommendations:

- There should be greater reliance on technology that allows officers to spend more time in the field. Thus tablets and laptops should be issued to all staff that go into the field with access to WiFi, the department's case management system, and the county's computerized criminal justice records.
- Cell phones should be issued to officers to communicate with probationers so that they do not have to rely on personal cell phones. The use of personal cell phones should be discouraged if not outright prohibited.
- Cell phones, laptops, tablets, and PCs should be used for sending text messages to offenders.
- Officers should use laptops or tablets to testify in court. They should be able to mark portions of their electronic files so that they can immediately access information pertinent to the issues at the hearing. Officers should be able to instantly communicate with clerical staff or court officers during a hearing and also instantaneously access information such as eligibility for placements or referrals so that this information can be considered as part of the sentence.

- Telecommunication systems should be used for jail visits, interviewing defendants for presentence investigation reports, and conducting assessments in lieu of requiring the defendant to travel to a central location to conduct interviews.
- Officers should have access to remote desktops so that they can work at any location in their jurisdiction and still be able to access their office computer.
- For safety considerations, liability concerns, and the collection of evidence, officers conducting field or home visits should wear a body camera.
- Departments, especially those in remote or rural areas, should consider using a telecommunication system for counseling sessions, treatment, or for tele-health.

CSCD's state oversight agency's standards and regulations regarding contacts should be revised to reflect that interactions between officers, probationers, collaterals, and treatment providers can now be conducted by several forms of telecommunication or technological messaging and not just by face-to-face interactions.

Emerging technologies should be used to support evidence-based practices, such as cognitive/behavioral therapy, motivational interviewing, and core correctional practices. Social media and interface communication devices can be used to reinforce positive behavior, enhance the relationship between the officer and probationer, remind probationers of appointments, follow up on scheduled events, etc. Social media and interface communication devices can also be used to facilitate and speed up interventions.

Departments should strongly consider on-line training opportunities in lieu of sending staff long distances for training and incurring expenses. On-line training should also be considered for increasing the variety of training opportunities for staff.⁵⁰

Perhaps the most important recommendation in this paper may be the most challenging but also the most necessary. That is to retrain probationers for jobs of the twenty-first century. This is actually being done in certain parts of the country. There are a number of organizations, both for-profit and non-profit, springing up to train people for employment in the new economy. Some of these are

⁵⁰ I am aware of the irony that the same economic and technological forces affecting the general population and justice-involved population will apply equally to staffing of adult probation departments in the future.

training low-income, low-skilled laborers and others are training people involved in the criminal justice system.

One of these organizations is 70MillionJobs, a for-profit recruiting firm located in the Silicon Valley for people with a criminal record. Another is Mile High Workshop in Aurora, Colorado. It is an employment and training program for individuals rebuilding from incarceration, addictions, and/or homelessness. Program participants receive job readiness skills, life skills, basic needs resources, hands-on training, and supported future job search. Also, The Last Mile (TLM) is a non-profit organization founded in San Francisco. In 2014, TLM launched the first computer coding curriculum in a United States prison (Code.7370), in partnership with the California Department of Corrections and Rehabilitation and the California Prison Industry Authority (CalPIA). The men learn HTML, JavaScript, CSS, and Python. In addition to these front-end skills, the curriculum will expand to include web and logo design, data visualization, and UX/UI. Finally, Rowdy Orbit Impact in Baltimore, Maryland, trains black and Latino ex-prisoners for programming and quality assurance tech jobs.

Other initiatives are focusing more on policy initiatives to deal with workers at a high risk of losing their jobs due to artificial intelligence, automation, and robotics. For example, the nonprofit organization Markle Foundation in 2017 established the Rework America Task Force. Rework America is a coalition of influential leaders with diverse backgrounds and experience who have joined together in service of modernizing the nation's outdated labor market and unlocking economic opportunity for American job seekers, workers, and businesses. The task force seeks to use the same digital technology that is disrupting the economy today to rewire the labor market; connecting relevant stakeholders, trainers and educators, and bringing new clarity and transparency to the job-search process so workers develop in-demand skills. Rework America will highlight successful existing training programs and deploy new training experiments to create practical solutions with the aim of transforming America's labor market from one based largely on traditional credentials, such as degrees and work history, to one rooted in the skills valued in the digital economy.⁵¹

Community supervision and corrections departments alone cannot develop these training opportunities that will assist people in Texas on supervision to transition to the new economy. This will require the support and vision of political leaders and policy makers. However, Texas, especially in its large urban centers, is fortunate to have many high-tech industries. There is no reason why these companies could not sponsor a non-profit organization, especially in Houston, Austin, and Dallas to provide training, similar to training described above in other parts of the country to assist those with a criminal record to find employment in the new economy. Moreover, it is imperative that local CSCDs be aware of employment training opportunities that will allow probationers being supervised to find meaningful employment in the twenty-first century. These are challenges that are not unique to Texas. Probation departments in other parts of the country must do the same thing.

Conclusion

The overreliance on fines, fees, and costs to support the criminal justice system in Texas over the last three decades has also led to worse performance outcomes than before offender payments became such a popular way to finance government operations. In the early 2000s the then-Executive Director of the Texas Department of Criminal Justice (TDCJ) sent a survey to all the local adult probation departments in Texas regarding the rising trend in technical revocations to prison. In his cover letter he explained that in 1988, revocations for only technical violations comprised 38 percent of all felony revocations. He further stated that by 1993 the percentage was 42 percent and by 1999 revocations for only technical violations were 55 percent of all revocation. In its report on revocations to prison for fiscal year 2018, the Community Justice Assistance Division (a division of TDCJ and the successor organization of the TAPC) stated that slightly more than one-half (50.9 percent) of all felony revocations were for technical reasons only.

Part of the reason for the increase in technical revocations is that probation in the Texas, especially with its heavy demand for various court-imposed payments, has created a situation where probationers give up and become absconders. Thus even in those

circumstances where the reason for the technical revocation was a failure to report, the underlying motive for not reporting was that the fees had become impossible to pay and for the probationer, the better choice was to not report or leave the jurisdiction instead of having to repeatedly explain to his or her officer why a payment could not be made or face a sanction for failure to pay.

Thus probation has become so onerous that prison has often become a more preferable option for criminal defendants than probation. This is particularly true in misdemeanor cases, where the state as a whole over the last several years has seen a marked drop in the number of misdemeanants on probation. In Bell County, while historically the ratio of felony and misdemeanor probation cases was roughly 50/50, it is now two-thirds felony cases and only one-third misdemeanor cases. The reality is that it is far easier to accept a misdemeanor sentence to the county jail than to abide by all the requirements of community supervision.

A recent study by the Community Justice Assistance Division examining felony probationers who were revoked for technical violations to TDCJ Correctional Institutions Division during fiscal year 2017 found that almost a quarter of probationers in the study chose revocation in lieu of having their probation continued.⁵² Moreover, among state jail felons, a category of fourth-degree felony offenses created by the Texas Legislature in 1993, the vast majority of inmates are directly sentenced to state jail prisons. As originally designed, it was contemplated that the vast majority of state jail felons would be sent to a state jail felony facility would be probationers placed in the facility for a short period of time as an initial or modified condition of probation. However, the most recent Statistical Report by TDCJ for fiscal year 2018 states that of the 7,400 now received to a state jail felony facility, only five were sent there on a revocation and only 28 were placed there as a condition of probation. In other words, over 99 percent, mostly through a plea bargain agreement, showed a strong preference to doing upfront jail time instead of accepting probation.⁵³

⁵¹ See Rework America press release dated September 27, 2017. In addition to support by the Markle Foundation, Rework America Task Force is

also supported by Carnegie Corporation, Microsoft Philanthropies, the Pritzker Traubert Foundation, and the Rockefeller Brothers Fund.

⁵² See "Technical Revocations Among Felons: Unraveling the Process," by the Texas Department of Criminal Justice – Community Justice Assistance Division, dated February 9, 2019 at page 11.

⁵³ State jail felony offenses comprise mainly low-level drug offenses and property offenses. While an offender can spend up to 24 months in a facility,

Assuming that the status quo continues in Texas, one can easily predict an increase in commitments to prison and a decrease in revenue generated to operate adult probation departments in the State. Departments will be diverting more of their resources away from treatment and other services to probationers

while devoting much more time to grinding out payments from the shrinking number of probationers who have the means to pay. More and more potential probationers will elect prison over probation as the cheaper and less onerous means to be punished. Prison costs will in turn go up, and the legislature

will probably search for new ways to generate additional revenue from defendants. This scenario obviously is not sustainable, and it is unlikely that Texas will be the only state in the country facing this dilemma.

over 15 percent will spend six months or less in a facility and 43 percent will spend seven to twelve months in a facility. Once release there is no form of supervision so it is impractical to enforce the payment of court-ordered fees, fines, and costs. Therefore there is a really strong incentive to accept prison time in lieu of probation.