

Blood from a Turnip:

How Delaware's Misdemeanors Compound Poverty (and How to Fix It)

BY MERYEM Y. DEDE, ESQUIRE

People make mistakes. It is a fact of life as true as that the sun will rise tomorrow. Luckily, most mistakes are not life-altering. Certainly, that is how our state's criminal law is designed. Over 97 percent of criminal or traffic filings in Delaware in 2019 were for non-felony offenses.¹ Most of these misdemeanors and violations are not supposed to result in long-term ramifications — sentencing guidelines recommend instead that people be given a small fine or low-level probation,² and Delaware continues to develop new diversionary courts so that low-level offenders receive treatment rather than punishment.³ Many people who come through Delaware's courts move on to lead full and productive lives. However, others do not. Who can move on and who cannot often comes down to one thing: money.

It is not unique to Delaware that most of its criminal cases are misdemeanors. However, Delaware is unique in *how many* of these minor arrests it processes. There were more than 479,000 criminal or traffic filings in Delaware courts in 2019,⁴ and we in fact have the highest per capita misdemeanor arrest rate in the country.⁵ Our State's prominence in this regard cannot be explained by its size⁶ or geography.⁷ It is a unique attribute that is resulting in uniquely large problems.

Many defendants in Delaware leave the courtroom with financial obligations to the State that they have little hope of ever meeting. Most misdemeanor sentenc-

ing guidelines call for short-term sentences — even a violent Class A misdemeanor (the highest level of misdemeanor) has a presumptive sentence of only one year of probation for a first offense.⁸ Lesser offenses call for a fine-only sentence,⁹ and many misdemeanors and violations result in a \$100 fine or less. However, all sentences in Delaware also come with “court costs” and other fees. Where a defendant has hurt a victim in a way that costs the victim money, the defendant is ordered to pay restitution to recompense for the victim's loss. However, even where there is no restitution, defendants leave courtrooms owing large fees. These fees make it so that a \$100 fine can actually cost a defendant almost \$400 (see sidebar).

A defendant sentenced to probation (which comes with a \$200 fee) and no fine, is charged \$482. To receive a \$100 fine and probation would cost a defendant almost \$600. Lastly, all of these court costs are *per charge*. Therefore, a defendant sentenced to two crimes (even when they are from the same incident) is often charged around \$1,000 in court costs.

As lawyers, many of us would be able to foot these bills without much trouble — not so for many of our fellow citizens. A U.S. Federal Reserve Report found that 27 percent of Americans would have to borrow or sell something to pay for an unplanned \$400 expense, and 12 percent would simply be unable to cover the expense at all.¹⁸ It is a safe assumption that, mirroring the rest of the country, a large percentage of Delawareans would not be able to afford an unexpected \$400 or \$500 expense. In fact, our poverty rate is above the national average, and Delaware was one of only two states to report an increased poverty rate in 2018.¹⁹ Defendants are not asked their ability to pay court debt before it is levied on them.

Were these unpayable expenses civil judgments, there would be no problem — such debtors are simply “judgment-proof.” However, criminal law is not as forgiving, and it has tools civil law does not. When people cannot pay their criminal and traffic court debts, they can be issued late fees, their driver's licenses can be indefinitely revoked, their business licenses can be revoked, and they can receive arrest warrants.²⁰

\$100 Fine

- + \$135 “Non-Jury Trial Fee”¹⁰
- + \$10 Court Security Assessment¹¹
- + \$1 Videophone Fund¹²
- + \$1 DELJIS Fund¹³
- + \$15 Fund to Combat Violent Crimes¹⁴
- + \$10 Volunteer Ambulance Company Fund¹⁵
- + \$10 Victim Compensation Fund¹⁶
- + \$100 Public Defender Fee¹⁷

= \$382

Consider the wisdom of these measures. Late fees are charged to individuals *who already have not been able to pay their debts*, and revoking business and drivers' licenses often *effectively forecloses the ability of these individuals to earn income to pay off their debt*. In 2017, Delaware suspended 20,679 driver's licenses for failure to pay court-ordered fines and fees.²¹ Delaware Courts currently have no statutory mechanism for forgiving such debt.

It gets worse. In 2017, Delaware issued 44,889 warrants for failure to pay, with an average of \$338.55 owed for each warrant.²² And in just the first six months of 2018, 129 people were sentenced to prison in Delaware purely for failing to pay Delaware court-ordered fines and fees.²³ Of total prison²⁴ admissions in the same time period, 12.5 percent of all admissions had at least one charge of failure to pay.²⁵ The majority (69 percent) of failure to pay prison-admissions were from charges in the Court of Common Pleas, a misdemeanor court. Only 7 percent were from Superior Court, which has jurisdiction over felonies.²⁶ Our state is *spending* money to punish these people, and while incarcerated such debtors obviously have little or no ability to earn income to pay off these bills.

Exacerbating the inequity of this system, some of these fees are not accurately tracked or have actually been documented as having been illegally spent. Most all of the costs added to criminal and traffic citations in Delaware have specific funds that they support.²⁷ Most support vital components of our society — everything from some financial support for the police through the Fund to Combat Violent Crimes,²⁸ to tools for the entire justice system through the Videophone Fund.²⁹ At the end of last year, the Town of Newport was found to have been diverting money earmarked for the Victim Compensation Fund, which is collected as an 18 percent surcharge on all criminal and traffic cases.³⁰ Newport had diverted over \$100,000 over the course of several years

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from the Victim Compensation Fund to instead cover its own city expenses.³¹

To look at just one other example, \$100 is added to every defendant's court costs if a court-appointed attorney represents her. This is often referred to as the "Public Defender's Fee." Unlike other named fees, this expense does not actually directly fund the Public Defender's Office. Instead, it is directed into the State's General Fund.³² Delaware Courts each fiscal year are required to report to the State Auditor how much they assessed in Public Defender Fees, how much was collected, and any unpaid assessments.³³ Quizzically, in 2019, the Court of Common Pleas reported that it assessed \$223,870 in Public Defender Fees.³⁴ In fact, for the past three years *almost every*³⁵ court in Delaware has reported, according to the State Auditor, Public Defender Fees not divisible by \$100. When asked, the Auditor's Office provided no explanation for this discrepancy.³⁶

Luckily, this small state's giant problem has a solution. Currently pending in the General Assembly is Senate Bill 39, which as written last year promises to make five key changes to our state's debt system:

1. Allows judges to analyze a person's ability to pay before issuing fines and fees and allows for the waiving of costs where appropriate.³⁷
2. Ceases the suspension of drivers' licenses for inability to pay court fines and fees.
3. Bans the issuing of late fees for unpaid court fines and fees.
4. Requires municipalities, law enforcement agencies, and the courts to track and disclose how much of their budgets come from court fines and fees.

5. Creates a consolidated system by which people can see how much they owe in court costs and easily make payments.

SB39 is a commonsense approach to most all of these problems. Especially now that COVID-19 has put at-risk communities at even greater risk of health and financial troubles, it is important to advocate for changes so that next time our society is tested, we will be better prepared. These policy changes would help eliminate a system where individuals are caught in a Dickensian nightmare of ever-increasing debt and ever-decreasing ability to pay. They would help the courts return to their core purpose of sentencing: imposing fair punishment on individuals tailored to the crimes they committed. And they would allow these individuals to pay for and move on from their mistakes, and in doing so, move on with their lives. 🍎

Notes:

1. Administrative Office of the Courts, The 2019 Annual Report of the Delaware Judiciary, <https://courts.delaware.gov/aoc/AnnualReports/FY19/doc/AnnualReport2019.pdf>. For purposes of these statistics, all Family Court criminal filings were considered felony-offenses, as Family Court did not include in its annual report a breakdown of felony versus misdemeanor filings.
2. Delaware Sentencing Accountability Commission, Benchbook 2020, <https://cjc.delaware.gov/wp-content/uploads/sites/61/2020/02/Benchbook-2020F.pdf> (hereinafter "SENTAC").
3. E.g., Department of Labor, First Phase of Community Court Launched (Aug. 19, 2019), available at <https://news.delaware.gov/2019/08/19/first-phase-of-community-court-launched/>.
4. Administrative Office of the Courts, The 2019 Annual Report of the Delaware Judiciary, <https://courts.delaware.gov/aoc/AnnualReports/FY19/doc/AnnualReport2019.pdf>.
5. Alexandra Natapoff, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal, 42-43 (2018).
6. Wyoming (smallest population) is ranked twenty-two out of fifty-one states and the District of Columbia, and Rhode Island (smallest geographic size) is ranked thirty-seven. *Id.*
7. Our neighbors Pennsylvania, Maryland, and New Jersey rank thirty-nine, twenty, and eleven, respectively. *Id.*
8. SENTAC at 75.
9. E.g., A first or second offense Class B misdemeanor has a presumptive sentence of "Fine, Cost, Restitution Only," and the most common recommendation is a flat \$100. SENTAC at 85. While there are some exceptions, e.g., 21 Del. C. §4177(d)(1) (driving under the influence comes with a \$500 mandatory minimum fine for a first-offense), most criminal and traffic fines are \$100 or less.

10. This is how much Delaware's Court of Common Pleas charges. CCP Crim. R. 58(A)(1)-(2); see also 10 Del. C. § 8504 ("A court may, in its discretion, make a reasonable allowance for any service not expressly provided for[.]). In the Court of Common Pleas, Defendants are charged a \$135 fee if they are on a jury trial calendar, even when they do not have a trial. If at arraignment a defendant waives their constitutional right to a jury trial, they are instead charged a \$55 "non-jury trial fee." In this way, our Courts encourage people without means to waive their constitutional rights. CCP Crim. R. 58(A)(1)-(2). These fees may be more or less, depending on the court. See e.g., Sample Traffic Cases, Fines, Costs and Statutory Assessments, <https://courts.delaware.gov/help/traffic/SampleTrafficCaseFinesCostsAndAssessments.pdf>.
11. "All state courts shall assess as part of court costs a supplemental court security assessment not to exceed \$10 on each initial [charge] for which

- there is a conviction or finding of delinquency or responsibility, or voluntary assessment paid." 10 Del. C. § 8505(a). The assessment funding shall be deposited in a Court Security Fund, maintained separately from the General Fund of the State, and shall be used to "provide supplemental funding for personnel, equipment and/or training expenses related to judicial branch security." *Id.* at (b). See also CCP Crim. R. 58(A)(8).
12. Fees are deposited into a "Videophone Fund," which is administered by the Criminal Justice Council to "cover line charges, maintenance costs and purchase and upgrade of videophone systems used by state and local agencies in the criminal justice system." 11 Del. C. § 4101(d).
13. Funds are paid to the prothonotary or clerk of courts, who transmits the money to the State Treasury, where it is deposited into a "DELJIS Fund." 11 Del. C. § 4101(f).
14. One half of collection is distributed to the Department of Safety and Homeland Security "for

- use in connection with initiatives to combat violent crime." 11 Del. C. § 4101(h)(1). The other half is "distributed to local law-enforcement agencies for use in connection with initiatives to combat violent crime." 11 Del. C. § 4101(h)(2).
15. The Volunteer Ambulance Company Fund is administered by the State Fire Prevention Commission and pays moneys directly to volunteer ambulance companies in the State. 11 Del. C. § 4101(j).
16. A 18 percent penalty or \$10 per offense of conviction is added to "any criminal defendant or any child adjudicated delinquent" and deposited in the Victim Compensation Fund. 11 Del. C. § 9016(a-b). See also Fam. Cr. R. 32(h) (imposing 15 percent fine on adults).
17. "Each court of this State shall assess an administrative fee in the amount of \$100 against any defendant on whose behalf an appearance is made by the Office of Defense Services... This fee shall be payable even though the criminal proceedings do not result in conviction but are instead terminated by a guilty plea, nolle prosequi or order of the court." 29 Del. C. § 4607. This money is deposited into the State's General Fund. *Id.* at (f).
18. Board of Governors of the Federal Reserve System, Reports on the Economic Well-Being of U.S. Households in 2018, 2 (May 2019) <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf>
19. Jessica Bies, Delaware is One of Only Two States Where Poverty Rate Went Up, The News Journal (Sep. 18, 2018), <https://www.delawareonline.com/story/news/2018/09/18/delaware-one-only-two-states-where-poverty-rate-went-up/1335395002/>.
20. Judicial Branch Fiscal Policies And Procedures, (Aug. 12, 2015), <https://courts.delaware.gov/aoc/operating-procedures/op-budget.aspx#fiscal>.
21. Reports provided by Katherine Parker, formerly with the Delaware Center for Justice, on file with author.
22. Reports provided by Katherine Parker, formerly with the Delaware Center for Justice, on file with author.
23. Report provided by the Delaware Department of Correction, on file with author.
24. "Prison" here refers only to "Level V" Detention Centers. Information on Level IV admissions is not available.
25. *Id.*
26. *Id.*
27. Supra notes 10-17.
28. Supra note 14.
29. Supra note 12.
30. Cris Barrish, Delaware Town Diverts Money Meant for Crime Victims to Pay Other Bills, WHY?, October 15, 2019, <https://why.org/articles/delaware-town-diverts-money-meant-for-crime-victims-to-pay-other-bills/>.
31. *Id.*
32. 29 Del. C. § 4607
33. *Id.* at (g)
34. Report provided by the Chief of Staff of the Delaware Auditor of Accounts, on file with author.
35. The Justice of the Peace Courts, in which Public Defenders and court-appointed counsel do not appear, reported no assessments in 2019 and 2018, although they did report assessing \$22.50 in Public Defender Fees in 2017. *Id.*
36. Email on file with author.
37. SB39 would not affect how restitution is paid to victims — it would only allow judges to waive court costs outside of direct victim compensation.

You May Call Your Best Witness



William A. Santora, CPA



Robert S. Smith, CPA



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