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TAMMY KIM / AL JAZEERA AMERICA

Poor clients pay just to apply for a public defender

A fee hike in New Jersey's largest municipal court points to a national trend in offender-funded justice

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NEWARK, N.J. — Newly elected Mayor Ras J. Baraka, a former high school principal and son of the late poet Amiri Baraka, ran on promises of compassionate reform (<http://america.aljazeera.com/articles/2014/5/13/newark-baraka-winsmayor.html>). He would strengthen the public schools, alleviate poverty and use community policing to bring peace to his majority-African American hometown. But in November, a few months into his term, Baraka quietly helped pass a law that criminal justice advocates say will hurt the city's most vulnerable: He quadrupled the fee (http://www.nj.com/essex/index.ssf/2014/11/newark_council_approves_public_defender_fee_increase.html) Newark Municipal Court can charge poor defendants applying for free legal representation.

The fee hike, from \$50 to \$200, is the latest notch in the national trend of charging “user fees” to fund struggling courts. The Sixth Amendment and a long line of Supreme Court cases promise a lawyer to every person accused of a crime, even those who cannot pay. In practice, though, indigent clients often do pay for their attorneys, particularly in lower-level courts.

Around the same time as the fee increase in Newark, New Jersey's superior courts raised a raft of fees (<http://www.app.com/story/news/local/new-jersey/2014/09/22/nj-court-fees-increase/15905707/>) to file and respond to civil cases. And the Office of the Public Defender, or OPD, which works in the superior courts, announced that it would charge a flat fee per case (<http://www.law360.com/articles/530103/nj-public-defender-proposes-flat-fee-schedule>), instead of an hourly sum, to encourage more clients to pay.

Baraka's office has said that judges can waive the \$200 application fee if they determine a client cannot pay, and that the increase brings the city's municipal court — the busiest in the state — in line with those of other jurisdictions. Legal groups, including the Brennan Center for Justice and the American Bar Association, however, warn that public-defender application fees can deter the accused from seeking counsel.

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“For the most part, [my clients] don’t have [the application fee]. It’s a lot of money,” said Anthony Cowell, an OPD staff attorney who previously represented defendants in the Mercer County municipal courts. “It’s been said it’s a revenue-generator, but you’re charging people who absolutely can’t afford it. They’re homeless, they’re mentally ill, they’re in shelters.... Maybe they collect [Social Security Disability] income, but it’s all spoken for.”

“ Over the past few years, criminal justice advocates and journalists have uncovered a trend of ‘cash register’ courts more focused on padding local budgets than carrying out judicial functions. ”

According to New Jersey’s interpretation of Gideon vs. Wainwright, the 1963 Supreme Court case guaranteeing the right to counsel regardless of income, poor defendants facing a “consequence of magnitude” — the possibility of jail time, suspension of a driver’s license or a fine of \$800 or more — are eligible for a public defender. (The income threshold is 125 percent of the federal poverty level.) Legal services, though, do not come cheap, and New Jersey’s local courts, like those across the United States, have been underfunded for decades.

The budget gap is partly attributable to the war on drugs. When the United States resolved, in the 1980s, to pursue an aggressive policy of crime and punishment, it funneled lavish resources to police forces and prisons. But as for the step between enforcement and incarceration — that is, the courts — “They forgot the middle,” said Tim Young, director of the Ohio’s office of the public defender. As a consequence, judicial systems became dependent on fees and fines.

Public defender application fees arose in the early 1990s (PDF (http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001_narrative.authcheckdam.pdf)) and have grown steadily, both in the amounts paid and the number of municipalities that charge them. Some experts question the fees’ basic budgetary rationale, but proponents say they are cost-effective and lessen the stigma associated with free legal services. The OPD says the \$50 application fee it charged in the superior courts (until the recent switch to a flat payment) brought in about \$3 million per year. A representative of the New Jersey Courts could not provide similar revenue figures for the state’s 540 municipal courts. Newark, meanwhile, faces a fiscal crisis (http://www.nj.com/essex/index.ssf/2014/05/write_through_of_newark_budget_story.html): In April, officials disclosed that the city would need to find some \$93 million (http://www.nj.com/essex/index.ssf/2014/08/newark_mayor_ras_baraka_seeks_transitional_aid_state_oversight.html) to balance its 2014 budget.

Over the past few years, criminal justice advocates and journalists have uncovered a trend of “cash register” courts (<http://www.npr.org/series/313986316/guilty-and-charged>) more focused on padding local budgets than carrying out judicial functions. Municipal courts in states including Alabama, California, Mississippi, Missouri and Texas have pursued a fiscal strategy of offender-funded justice (<http://www.hrw.org/reports/2014/02/05/profitting-probation-0>), cutting back on indigent defense, increasing fees, fines and interest rates, hiring for-profit companies to collect debts and privileging jail time over community service for those too poor to pay. It was reported after the shooting death of teenager Michael Brown that as much as 40 percent of town revenues in St. Louis County were drawn from fines for traffic tickets and petty crime (<http://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>). Last year, McLennan County, Texas, hired a full-time detective to perform home visits of defendants claiming poverty (<https://www.texastribune.org/2014/07/22/strains-show-county-based-public-defense-system/>).



In December, Eric Schwab, a public defender in the Middlesex County municipal courts, represented two clients at night court in Carteret, New Jersey. Tammy Kim / Al Jazeera America

Newark City Hall, though, says not to worry. Although Baraka and members of the municipal council declined to speak about the fee increase, the mayor’s office, in an emailed statement, emphasized that judges can waive or reduce the \$200 maximum. Yet a high-ranking employee of the Newark Municipal Court, who asked not to be identified, said that most judges do not bother making decisions about the application fee. The New Jersey Courts could not say how often a public defender is appointed or how much the average person pays to apply.

Carteret Municipal Court, in central New Jersey, charges a public-defender application fee of up to \$200. Jose Gonzalez, a warehouse supervisor, appeared at the court on December 8, accused of driving with an expired license. He had qualified for legal assistance in other cases, but opted this time to handle it himself. “If you’re applying for a public defender because you can’t afford a private

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attorney, why are you charging me?” he said. However, Eric Schwab, the public defender on duty that night, said he doesn’t think the fee has posed a burden to his clients.

Paul Kamel, a part-time public defender in Newark Municipal Court, says the fee is often waived or neglected in the bureaucratic shuffle. Weeks after the fee increase, six outdated notices were posted on the third floor of the courthouse: “Defendants applying for representation by the Municipal Public Defender must pay a fee of \$50.”

“They don’t never tell you about the fee,” said Barshir Edwards, who had a court date in Newark on New Year’s Eve. A 28-year-old father and laid-off factory worker, he’d been summoned to appear at least a dozen times on the same handful of tickets. His driver’s license had been suspended and he was facing hundreds of dollars in fines.

Edwards stood before Judge Marvin C. Adames to discuss his application for a public defender. The judge asked him a few questions — where he lived, how old his child was — before granting the application, but there was no mention of a fee. “When your case is all over, that’s when they tell you about the fees,” Edwards said, based on previous experience.

He’d recently interviewed for a couple retail jobs and was waiting to hear back. The court’s \$200 maximum fee was the equivalent of half a week’s wages.

🗨️ Newark Municipal Court already handles tens of thousands of cases every year – 26,000 from July to October 2014. 🗨️

The American Bar Association has warned courts of the dangers of charging public-defender application fees. “A fixed fee as high as \$200 may represent a substantial financial burden,” the group said in a 2004 report (PDF (<http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/rec110.authcheckdam.pdf>)), and could heighten the risk that the accused will “forgo the assistance of counsel, thereby increasing the possibility of wrongful conviction.”

“When people think about Gideon or even the Miranda right — ‘an attorney will be provided to you’ — no one thinks this is how the system goes,” said Alex Shalom, senior staff attorney at the ACLU of New Jersey and a former OPD lawyer. “This is a terrible way to recover fees,” and, as a public defender, “you’re already facing an uphill battle to get your client to believe you’re a real lawyer. Then, to go, ‘By the way, I know you think I’m a shitty lawyer. Can you pay me \$50?’ ”

New Jersey’s municipal courts are not as notorious as those of Alabama, Georgia or Texas, which explains why Newark’s fee hike went mostly unnoticed. In Alabama, there is no statewide public defender’s office and “most people in municipal court don’t have [an attorney],” said Sara Zampierin, a lawyer at the Southern Poverty Law Center. “They face fines, court costs, and then the added fees of probation services, where the probation provider is a debt collector (<http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/8/12/alabama-private-probation.html>.)” Texas’s indigent-defense system is split between full-time public defenders and, more commonly, private counsel appointed at the court’s discretion — an arrangement prone to corruption (<http://www.texastribune.org/2013/03/26/donations-judicial-campaigns-spur-ethics-worries/>).

The National Legal Aid and Defender Society recommends (http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense) that public defenders be employed full-time, adequately compensated and given access to office space, investigators and expert witnesses. But few towns and cities have the resources or political will to meet these standards. Newark Municipal Court employs a few full- and part-time public defenders, but most such courts in New Jersey rely on contract lawyers.

In recent years, as public opinion has turned against the war on drugs, Attorney General Eric Holder, along with state and local officials, has taken steps to shrink prison populations (<http://america.aljazeera.com/articles/2014/4/23/justice-departmentseekstoundothousandsofoldsentences.html>) and reduce penalties for low-level drug crimes. This could take pressure off the courts, especially when it comes to felony cases. But “the shift toward decriminalization — where you have [mostly] misdemeanor offenses or certain offenses being reclassified as misdemeanors — while that will lead to less incarceration, that will also lead to less protections,” said David Carroll, executive director of the Sixth Amendment Center, an advocacy group. An increase in misdemeanor cases could put even more stress on under-resourced, understaffed municipal courts and public defenders.

Newark Municipal Court already handles tens of thousands of cases every year —26,000 from July to October 2014. In its crowded courtrooms, jailed defendants routinely appear without counsel, night court yawns past 10 p.m. and families wait hours for a

two-minute colloquy with a judge. Judges adjourn cases repeatedly, forcing parents with young children and low-wage workers like Edwards to keep coming back, and police officers refuse to let anyone read or rest their arms on the back of courtroom benches.

The country's municipal courts enjoy little of the esteem reserved for the federal judiciary, but they are, in a sense, the miner's canary of the criminal justice system. Dale Jones, New Jersey's assistant public defender and an attorney with the office since 1974, recalled a time when full-time, professional public defenders staffed the state's larger municipal courts. Today, he said, these courts are seen as handling "minor crimes, and there's a lot that simply doesn't meet the public eye; it goes unreported. [Municipal court] is looked at as a revenue stream."

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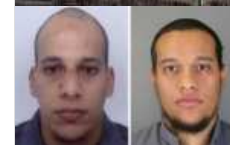
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