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Ability to Pay: Closing the Access to Justice Gap with Policy Solutions for Unaffordable Fines and Fees

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ABILITY TO PAY: CLOSING THE ACCESS TO JUSTICE GAP WITH POLICY SOLUTIONS FOR UNAFFORDABLE FINES AND FEES

*Lauren Jones**

State, city, and local laws impose fines as punishment for everything from traffic and municipal code violations to felonies, and charge people extra fees as a means of financing law enforcement, the court system, and other government operations. Typically imposed without regard to a person's ability to pay, the fines and fees for even a single incident can add up to thousands of dollars. People unable to pay the sums may face steep penalties and suffer a wide range of harms, including additional fees, civil judgments, driver's license suspensions, revocation of voting rights, and even incarceration.

Constitutional and public policy imperatives support the judiciary conducting meaningful determinations of ability to pay before imposing fines and fees. This paper examines those imperatives and interrogates a set of selected policies — innovative laws and practices already in place across the country — that have been adopted to increase access to justice by reducing the harms caused by unaffordable fines and fees. Building on the research of the National Center for Access to Justice's Fines and Fees Justice Index, the paper explores state laws and practices: (i) authorizing judges to waive or modify fines and fees; (ii) requiring judges to conduct ability to pay determinations at critical times, including when courts impose fines and fees, or when a person requests a re-hearing, fails to pay, or has completed a period of incarceration; (iii) creating procedural protections during ability to pay hearings; (iv) establishing an indigence standard for determining when judges should waive fines and fees; (v) setting guidelines

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on how courts should determine ability to pay; (vi) creating tools that help judges to assess ability to pay and advocates to argue for reduced fines and fees; (vii) providing alternatives to paying fines and fees, including through community service broadly defined; and (viii) allowing for payment plans. In analyzing procedural and substantive laws governing determinations of ability to pay, the paper offers hope of reshaping the fines and fees policy environment in ways that can increase access to justice and improve the quality of people's lives.

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I. THE FINES AND FEES CRISIS IN AMERICA

Brooke Bergen spent almost a year in the Dent County, Missouri jail for stealing an \$8 tube of mascara from Walmart.¹ At the end, she had a \$15,900 bill, primarily for “pay-to-stay” fees — the sums many states charge as “room-and-board” for a night in jail.² Ms. Bergen had never held more than a minimum wage job.³ The judge required her to appear in court once a month to report on her debt payments, spending half a day there each time.⁴ There was no official payment plan in place, but each month Ms. Bergen

1. See TONY MESSENGER, *PROFIT AND PUNISHMENT: HOW AMERICA CRIMINALIZES THE POOR IN THE NAME OF JUSTICE* xii–xiv (2021).

2. *See id.*

3. *Id.*

4. *Id.*

would have to pay what she could scrounge together.⁵ If she did not appear for court or had no money that month, the judge could send her back to jail, a common practice, where she could have incurred even more debt.⁶ If she managed to pay \$100 per month — no small feat on a minimum wage salary — it would still take her more than 13 years to pay off the debt.⁷

Ms. Bergen’s story was profiled in a Pulitzer Prize-winning series in the *St. Louis Post-Dispatch* and later a book.⁸ But thousands of stories just like hers go unreported. State and local governments across the country impose *finer* as punishment for everything from traffic and municipal code violations to felonies.⁹ They then tax people with extra *fees* to fund law enforcement, the courts, and other government operations.¹⁰ In many states, these numerous fees include charges for a “free” public defender, probation and parole supervision, electronic monitoring, court-ordered drug testing, counseling, community service participation, and more.¹¹ In Washington State alone, there are 156 different fines and fees that judges can — and sometimes must — impose.¹²

The policy scourge of fines and fees came into the national spotlight in 2014, after a police officer killed Michael Brown in Ferguson, Missouri.¹³ A Department of Justice investigation revealed that the police department in Ferguson had engaged in racially discriminatory, aggressive policing practices driven in part by its reliance on fines and fees for revenue.¹⁴ The Department of Justice issued this scathing critique of policing practices

5. *See id.*

6. *See id.*

7. *Id.*

8. *See generally id.* *See also The 2019 Pulitzer Prize Winner in Commentary: Tony Messenger of the St. Louis Post-Dispatch*, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/tony-messenger-st-louis-post-dispatch> [<https://perma.cc/B48E-Q65P>] (last visited Aug. 15, 2024).

9. *Fines and Fees*, NAT’L CTR. FOR ACCESS TO JUST. [hereinafter *Fines and Fees*, NAT’L CTR. FOR ACCESS TO JUST.], <https://ncj.org/state-rankings/justice-index/fines-and-fees> [<https://perma.cc/DE7V-JYQU>] (last visited Aug. 16, 2024).

10. *See id.*

11. *See National Fee Surveys*, END JUST. FEES, <https://endjusticefees.org/fee-surveys/> [<https://perma.cc/Q7F8-ENM9>] (last visited Aug. 16, 2024).

12. WASH. STATE SUP. CT. MINORITY AND JUST. COMM’N, THE PRICE OF JUSTICE: LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 1, 13 (Jan. 2022), https://www.courts.wa.gov/subsite/mjc/docs/MJC_LFO_Price_of_Justice_Report_Final.pdf [<https://perma.cc/DE7U-5SZU>]

13. *See, e.g.*, Josh Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NPR (Aug. 25, 2014, 5:56 PM), <https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger> [<https://perma.cc/E3W5-CDS9>].

14. *See generally* U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/5MUG-Y2ZD>].

there: “Partly as a consequence of City and FPD priorities, many officers appear to see some residents, especially those who live in Ferguson’s predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue.”¹⁵

In the decade since the tragedy in Ferguson, it has become clear that the city’s fines and fees practices, while egregious, were far from unique among American cities. A recent lawsuit filed by the National Center for Law and Economic Justice, for example, alleges that Buffalo, New York’s “thirst for revenue translated into aggressive ticketing practices that targeted drivers in neighborhoods populated predominantly by poor people of color.”¹⁶ A 2017 Pro Publica investigation found that in the Northern District of Illinois — which includes Chicago and its suburbs — more than 10,000 people had to file for bankruptcy, at least in part as a result of debt they owed to the government for traffic tickets and other fines and fees.¹⁷ And a report by the New York City Comptroller — where judges must impose up to \$375 in mandatory surcharges and fees for everyone who pleads guilty or is found guilty at trial of a felony, misdemeanor, or violation — found that in 2017, New York City Criminal Courts issued more than 103,000 civil judgements for failure to pay fines and fees and 11,200 warrants for non-payment.¹⁸ In 161 cases, judges ordered people to be jailed immediately for non-payment of fines and fees.¹⁹

When it comes to fines and fees, access to justice depends on a person’s finances. People with means who can pay fines and fees outright can resolve their cases and move on, whereas people who cannot afford to pay immediately often face late fees, high interest rates, and other financial penalties.²⁰ They may also face ruined credit, suspension of driver’s licenses, loss of voting rights, bankruptcy and even incarceration for failure to pay, leading to cycles of debt and incarceration that can last years or even

15. *Id.* at 2.

16. Geoff Kelly, *Lawsuit: Aggressive Ticketing of Black Drivers*, NAT’L CTR. FOR L. & ECON. JUST. (Feb. 2, 2023), <https://nclj.org/news/lawsuit-aggressive-ticketing-of-black-drivers> [<https://perma.cc/6G2A-TH7E>].

17. Melissa Sanchez & Sandhya Kambhampati, *How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA (Feb. 27, 2018), <https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/> [<https://perma.cc/ABQ9-P3W9>].

18. See N.Y.C. COMPTROLLER, FEES, FINES AND FAIRNESS (2019), <https://comptroller.nyc.gov/reports/fees-fines-and-fairness/> [<https://perma.cc/5S6N-GXKX>].

19. *Id.*

20. See Jessica Brand, *How Fines and Fees Criminalize Poverty: Explained*, THE APPEAL (July 28, 2018), <https://theappeal.org/the-lab/explainers/how-fines-and-fees-criminalize-poverty-explained/> [<https://perma.cc/EV94-QPCC>].

decades.²¹ For example, a person arrested for theft in the third degree in Iowa would be required to pay \$1,133 in fines, fees, victim restitution, and collection fees.²² If they pay immediately, they can avoid jail.²³ If the person cannot pay, however, they face 30 days in jail — with a pay-to-stay fee of \$2,100, charged at a rate of \$70 per day — plus an additional \$1,260 “indigent defense fee” for the appointment of a public defender — and an increase in the collection fees, which are calculated as a percentage of the total.²⁴ In the end, the person who could not afford to pay owes a total of \$4,497, a 441% increase compared with what a person who can afford to pay up front owes.²⁵ In Washington State, if the debt is turned over to a collection agency, that agency can charge up to a 50% “collection fee” if the outstanding obligations are under \$100,000 and up to a 35% fee if the outstanding debt is more than \$100,000.²⁶ The letter of the law thus provides for people with limited means to pay more.

Meaningful ability to pay assessments, through which judges set fines and fees according to a person’s means, could go a long way to creating more equity and greater access to justice. Yet, meaningful assessments are almost always elusive. “Few states require judges to conduct ability to pay determinations, and fewer still provide any meaningful guidance about what to do once a judge has considered a person’s ability to pay.”²⁷ This Article is about ability to pay: what it means, when it is considered, how it is determined, and whether it could be determined better.

Although no state’s policies and practices are worthy of replication in full, this Article explores the laws in place across the United States that are ameliorating the problem of unaffordable fines and fees by engaging with the question of ability to pay. Using research from statutes, caselaw, judicial bench cards, and more, this Article will explore best policies for: (i) authorizing judges to waive or modify fines and fees; (ii) requiring judges to

21. See NAT’L CONF. OF STATE LEGISLATURES, *ASSESSING FINES AND FEES IN THE CRIMINAL JUSTICE SYSTEM* (2020), <https://www.ncsl.org/civil-and-criminal-justice/assessing-fines-and-fees-in-the-criminal-justice-system> [https://perma.cc/8S95-68TW].

22. See Alex Kornya, *Ability-to-Pay: Why It Matters, When to Do It, and Some Ideas for How to Get It Done*, PUB. DEFS. ASS’N OF IOWA (July 5, 2022), <https://www.pda-iowa.org/conference-recordings/v/alex-kornya-abilitytopay-why-it-matters-when-to-do-it-and-some-ideas-for-how-to-get-it-done> [https://perma.cc/D8FS-GLGV].

23. See *id.*

24. See *id.*

25. See *id.*

26. WASH. REV. CODE § 19.16.500(1)(b) (2011).

27. See LAUREN JONES, NAT’L CTR. FOR ACCESS TO JUST., *ABILITY TO PAY: CLOSING THE ACCESS TO JUSTICE GAP WITH POLICY SOLUTIONS FOR UNAFFORDABLE FINES AND FEES 2* (Apr. 24, 2024), <https://ncaj.org/sites/default/files/2024-05/NCAJ%27s%20Ability%20to%20Pay%20Report%2C%20authored%204-24-24%2C%20designed%205-10-24.pdf> [https://perma.cc/ZP84-ZAE9].

conduct ability to pay determinations at critical times, including when courts impose fines and fees, or when a person requests a re-hearing, fails to pay, or has completed a period of incarceration; (iii) creating procedural protections during ability to pay hearings; (iv) establishing an indigence standard for determining when judges should waive fines and fees; (v) setting forth standards to waive or reduce fines and fees when a person is not indigent under the definition but nonetheless unable to afford to pay;²⁸ (vi) creating tools that help judges to assess ability to pay and advocates to argue for reduced fines and fees; (vii) providing alternatives to paying fines and fees, including through community service broadly defined; and (viii) allowing for payment plans. In the absence of meaningful ability to pay requirements in the law, the paper also explores creative, replicable tools that lawyers have created to advocate for a reduction in fines and fees for their clients.

A. A National Policy Scourge

There are wide gaps in data that make it difficult to estimate how much people owe in outstanding fines and fees. A recent study of the 25 states that do collect and report data found that in those states alone, people collectively owed at least \$27.6 billion in fines and fees debt in 2021.²⁹ Research has found that 6% of adults in America — more than one in 17 — owe fines and

28. The states that set forth indigence standards below which judges should presume that a person who is unable to afford to pay and, therefore, judges should waive all fines and fees usually use three sets of criteria to determine indigence: income, as defined as a percentage of the federal poverty level; receipt of public benefits; and life circumstances, such as being involuntarily committed to a state mental health facility. *See, e.g.*, 725 ILL. COMP. STAT. 5/124A-20(a)–(b)(1) (2021); *see also* WASH. REV. CODE § 10.01.160(3) (2022); *see also* ENROLLED H.B. 2259, 2023 Leg., 59th Sess. (Okla. 2023). Illinois has the highest threshold, providing that judges should waive fines and fees if a person’s income falls below 200% of the federal poverty level. *See* 725 ILL. COMP. STAT. 5/124A-20(a)(2) (2021). Even people whose incomes are well above this cutoff, however, may be unable to afford to pay. The Federal Poverty Level is hopelessly outdated. The threshold was developed in the 1960s with an assumption that American households spent approximately one third of their income on food, which does not reflect today’s economic reality. In 2018, there were 38.1 million people living below the federal poverty line, but experts estimate that almost 51 million households are struggling to pay for basic necessities, including housing, food, and medical bills. *See* Areeba Haider & Justin Schweitzer, *The Poverty Line Matters, but It Isn’t Capturing Everyone It Should*, CTR. FOR AM. PROGRESS (Mar. 5, 2020), <https://www.americanprogress.org/article/poverty-line-matters-isnt-capturing-everyone/> [<https://perma.cc/DD7H-PZYY>]. This means that people whose income is well above the Federal Poverty Level may have little to no disposable income every month after paying for necessities like housing, food, medication, and other daily expenses.

29. *See* Briana Hammons, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?*, FINES & FEES JUST. CTR. 4 (Apr. 28, 2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf [<https://perma.cc/Q6A3-XT5B>].

fees.³⁰ A survey of people who owed fines and fees by the Ella Baker Center found that the average court-related debt was \$13,607.³¹ To put that into context, a person earning the federal minimum wage working 40 hours per week and taking no time off makes only \$15,080 per year.³²

Most people cannot afford to pay these large — and sometimes even comparatively small — court debts. The Federal Reserve found that nearly four in ten Americans cannot afford to pay for a \$400 emergency.³³ Furthermore, as a result of systemic racism and generational wealth gaps spanning centuries, fewer than half of Black adults say they have any emergency funds at all.³⁴ Across the country, between 80 and 90% of people in criminal court are indigent.³⁵ Nearly half of incarcerated people have individual incomes below \$10,000.³⁶ But too often, courts impose fines and fees on people who cannot afford payment, without taking their ability to pay into consideration.

Imposing fines and fees that people are unable to afford can cause grave harms. Surveys in both Alabama and New Mexico have found that eight in ten people who owe fines and fees sacrifice basic necessities like food, rent, car payments, and child support in their attempts to pay them off.³⁷ In

30. See Brittany Friedman et al., *What Is Wrong with Monetary Sanctions? Directions for Policy, Practice, and Research*, NAT'L LIBR. OF MED. (June 20, 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10281253/> [https://perma.cc/U4BL-MGLX].

31. In addition to fines and fees, this includes restitution and attorney's fees. See SANETA DE VUONO-POWELL ET AL., ELLA BAKER CTR. FOR HUM. RTS., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 9, 13 (Sept. 2015), <https://ellabakercenter.org/who-pays-the-true-cost-of-incarceration-on-families/> [https://perma.cc/QT98-NY6T].

32. The federal minimum wage has been \$7.25 per hour since July 24, 2009. See *Minimum Wage*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/minimum-wage> [https://perma.cc/FT9K-XF93] (last visited Aug. 2, 2024).

33. See Will Daniel, *'Turbulence Ahead': Nearly 4 in 10 Americans Lack Enough Money to Cover a \$400 Emergency Expense, Fed Survey Shows*, FORTUNE (May 23, 2023, 12:37 PM), <https://fortune.com/2023/05/23/inflation-economy-consumer-finances-americans-cant-cover-emergency-expense-federal-reserve/> [https://perma.cc/B8LK-PWMP].

34. See Khadijah Edwards, *Most Black Americans Say They Can Meet Basic Needs Financially, but Many Still Experience Economic Insecurity*, PEW RSCH. CTR. (Feb. 23, 2022), <https://www.pewresearch.org/short-reads/2022/02/23/most-black-americans-say-they-can-meet-basic-needs-financially-but-many-still-experience-economic-insecurity/> [https://perma.cc/PLW8-TUTX].

35. See ROCHELLE SPARKO ET AL., CTR. FOR RESPONSIBLE LENDING, WAIVING CRIMINAL COURT FEES PREVENTS HARMS OF CIVIL DEBT 5 (2023), <https://www.ncjustice.org/wp-content/uploads/2023/10/crl-waive-crim-ct-fees-oct2023.pdf> [https://perma.cc/BA5Q-4WEK].

36. See Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. MIA. RACE & SOC. JUST. L. REV. 1, 13 (2020).

37. See *The Impact of New Mexico's Fines and Fees*, FINES & FEES JUST. CTR. 2 (Jan. 2023) [hereinafter *New Mexico's Fines and Fees*], <https://finesandfeesjusticecenter.org/content/uploads/2023/01/New-Mexico-Survey->

Alabama, two-thirds of respondents said they had to turn to faith-based charities or churches for food as a result of the court debt.³⁸

These harms can last for years or even a lifetime. Many people face ruined credit that makes it hard to rent a home or buy a car.³⁹ Fines and fees can prevent people from pursuing higher education or building wealth, deepening intergenerational poverty.⁴⁰ In more than half of states, people can have their driver's licenses suspended for failure to pay, ironically making it harder to get to work to pay off the debts.⁴¹ In 20 states, outstanding fines and fees can block some people from exercising their right to vote.⁴² And some surveys show that as many as one in two people with outstanding fines and fees debts have gone to jail because they could not afford to pay.⁴³ In short, unaffordable fines and fees can trap people in cycles of poverty and incarceration that are nearly impossible to escape.

The harms are not limited to the individuals who owe fines and fees. Often, people who are incarcerated — where the average pay for regular prison jobs is between \$0.14 and \$0.63 per hour — owe fines and fees during their time in prison.⁴⁴ The money comes out of their commissary accounts,

DIGITAL_2023.pdf [https://perma.cc/62CE-SLBT]; see also ALA. APPLESEED CTR. FOR L. & JUST., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE 1, 3, https://alabamaappleseed.org/underpressure/ [https://perma.cc/3GVG-XGLZ] (last visited Aug. 12, 2024).

38. See ALA. APPLESEED CTR. FOR L. & JUST., *supra* note 37, at 4.

39. See Chris Horymski, *How Many Americans Have an 800 Credit Score or Greater?*, EXPERIAN (Apr. 17, 2024), https://www.experian.com/blogs/ask-experian/how-many-americans-have-800-credit-score/ [https://perma.cc/CY47-XTGF]; see also Daniel Kurt, *The Side Effects of Bad Credit*, INVESTOPEDIA (Aug. 29, 2023), https://www.investopedia.com/the-side-effects-of-bad-credit-4769783 [https://perma.cc/2HPL-RJXV].

40. See Sarah Shannon et al., *The Broad Scope and Variation of Monetary Sanctions: Evidence from Eight States*, 4 UCLA CRIM. JUST. L. REV. 269 (2020), reprinted in *Money and Punishment, Circa 2020*, FINES & FEES JUST. CTR. 41, 45 (2020), https://law.yale.edu/sites/default/files/area/center/liman/document/money_and_punishment_circa_2020.pdf [https://perma.cc/3LP7-9B8K] (2020); see also FINES & FEES JUST. CTR., DEBT SENTENCE: HOW FINES AND FEES HURT WORKING FAMILIES, 17 (May 2023) [hereinafter DEBT SENTENCE], https://finesandfeesjusticecenter.org/content/uploads/2023/05/Debt_Sentence_FFJC-Wilson-Center-May-2023.pdf [https://perma.cc/723F-TQ5A].

41. See FREE TO DRIVE, https://www.freetodrive.org/maps/#page-content [https://perma.cc/TV3R-VSEW] (last visited Aug. 4, 2024).

42. See *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

43. See *New Mexico's Fines and Fees*, *supra* note 37, at 6; ALA. APPLESEED CTR. FOR L. & JUST., *supra* note 37, at 42.

44. See Lauren-Brooke Eisen, *America's Dystopian Incarceration System of Pay to Stay Behind Bars*, BRENNAN CTR. FOR JUST. (Apr. 19, 2023), https://www.brennancenter.org/our-work/analysis-opinion/americas-dystopian-incarceration-system-pay-stay-behind-bars [https://perma.cc/C3Z4-DAG2].

meaning that money families have scraped together to send to their incarcerated loved ones goes to fines and fees instead of food to supplement meager prison diets, hygiene products, and stamps or phone calls to stay in touch.⁴⁵ Studies show that 63% of the time, family members are the ones who pay back court debts for their loved ones who are incarcerated.⁴⁶ Of the people who pay, 83% are women.⁴⁷ Even after incarceration, family members often pay court debts because they know that failure to do so could send their loved ones back to jail. Families paying fines and fees report struggling to afford basic necessities like rent and food.⁴⁸ One survey estimated that 25.4 million people “could be facing shortfalls in food, housing, healthcare, or other essential needs because their spouse was assessed a court debt.”⁴⁹

B. Societal Impacts of Unaffordable Fines and Fees

Since the 1980s — when costs to run courts, law enforcement, and corrections ballooned along with the rise of mass incarceration — states have increasingly turned to fines and fees to foot the bill.⁵⁰ In 1986, for example, just 12% of people who were incarcerated were also ordered to pay fines.⁵¹ By 2014, 66% were ordered to pay.⁵² The number and types of fees have also risen substantially.⁵³

Fines and fees, however, are an incredibly inefficient source of revenue for states and localities. A study by the Brennan Center for Justice found that to collect one dollar in fines and fees, counties in Texas and New Mexico

45. *See, e.g., id.*

46. *See* DE VUONO-POWELL ET AL., *supra* note 31, at 9.

47. *See* DE VUONO-POWELL ET AL., *supra* note 31, at 9.

48. *See* DE VUONO-POWELL ET AL., *supra* note 31, at 14.

49. *See* DEBT SENTENCE, *supra* note 40, at 22.

50. *See* Foster, *supra* note 36, at 9–10.

51. *See* WHITE HOUSE COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 3 (Dec. 2015),

https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/U7JB-6WAE>].

52. *See id.*

53. *See id.* In Florida, for example, between 1996 and 2007 the state legislature created, authorized counties to impose, or increased amounts for 20 categories of fees, surcharges, and other monetary obligations tied to criminal cases and violations. These fees include a new fee to apply for a public defender (which a person must pay, regardless of whether the charges are later dropped, or they are acquitted), and a new fee for the cost of prosecution, which must be imposed on anyone convicted of a crime, regardless of ability to pay. *See* REBEKAH DILLER, BRENNAN CTR. FOR JUST., THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES 1, 5–6 (2010), <https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf> [<https://perma.cc/HC2P-2C44>].

on average spent \$0.41 on court costs and jail expenses alone.⁵⁴ One county in New Mexico spent at least \$1.17 for every dollar it brought in, meaning that it actually lost money trying to collect fines and fees.⁵⁵ By contrast, the Internal Revenue Service spends well under a penny for every dollar it collects in taxes.⁵⁶

When police focus on fines and fees, they have less time for their other duties, undermining public safety. Cities that rely heavily on fines and fees for revenue tend to solve violent and property crimes at a lower rate.⁵⁷ Unaffordable fines and fees can drive crime as well. Surveys in Alabama and New Mexico show that roughly four in ten people who owe court debt say they have committed a crime to help pay it off.⁵⁸ The U.S. Department of Justice (DOJ) has recognized the problem. In a Dear Colleague letter that the Department sent to state and local courts across the country in April 2023, the Department cautioned:

[A]ssessment of unaffordable fines and fees often does not achieve the fines' and fees' stated purpose. In many cases, unaffordable fines and fees undermine rehabilitation and successful reentry and increase recidivism for adults and minors. And to the extent that such practices are geared toward raising general revenue and not toward addressing public safety, they can erode trust in the justice system.⁵⁹

There are, however, glimpses of hope in innovative models, strategies, and practices that are emerging across the country to address unaffordable fines and fees.

54. See Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [<https://perma.cc/CGT3-Q7EL>].

55. See *id.*

56. See generally *IRS Releases Fiscal Year 2022 Data Book Describing Agency's Activities*, IRS (Aug. 4, 2024), <https://www.irs.gov/newsroom/irs-releases-fiscal-year-2022-data-book-describing-agencys-activities> [<https://perma.cc/DB6L-ZR9B>] (showing that in FY 2022 the IRS spent \$0.29 for every \$100 it collected).

57. See Cortney Sanders & Michael Leachman, *Step One to an Antiracist State Revenue Policy: Eliminate Criminal Justice Fees and Reform Fines*, CTR. ON BUDGET AND POL'Y PRIORITIES (Aug. 4, 2024), <https://www.cbpp.org/research/state-budget-and-tax/step-one-to-an-antiracist-state-revenue-policy-eliminate-criminal> [<https://perma.cc/Q9L5-H3X8>].

58. See *New Mexico's Fines and Fees*, *supra* note 37; ALA. APPLESEED CTR. FOR L. & JUST., *supra* note 37.

59. See Dear Colleague Letter from Kristen Clarke et al., Assistant Att'y Gen., U.S. Dep't of Just., Crim. Div. 3 (Apr. 20, 2023) [hereinafter Dear Colleague Letter], <https://www.justice.gov/opa/press-release/file/1580546/dl> [<https://perma.cc/8QP2-DBCW>].

II. ABILITY TO PAY DETERMINATIONS

The government may not punish people simply for their poverty.⁶⁰ Beyond constitutional imperatives, considering people's ability to pay when setting fines and fees creates greater equity in the system. Across the country, states are making progress in reducing the harms of unaffordable fines and fees by eliminating fees altogether and right-sizing fines. To reduce grave harms, in the meantime — and even after the elimination of fees — it is important for states to adopt best policies in assessing ability to pay.

A. Constitutional Underpinnings of Ability to Pay Determinations

The government's power to collect fines is not infinite. The Eighth Amendment to the U.S. Constitution prohibits the government from imposing excessive fines, and the U.S. Supreme Court has held that this prohibition extends to the states as well.⁶¹ In 1998, in *United States v. Bajakian*, the Supreme Court held that a fine is unconstitutional when it "is grossly disproportional to the gravity of the defendant's offense," but litigation focused on the Excessive Fines Clause has otherwise been limited.⁶² Exactly what constitutes an excessive fine has largely been left open to interpretation by lower courts, as has the question of whether the Excessive Fines Clause applies to fees.⁶³ Some state courts have interpreted the Excessive Fines Clause to mean that courts must consider not only the offense but also the person's individual financial circumstances when setting fines. As the Washington Supreme Court has described, a "number of modern state and federal courts have joined the chorus of legal scholars to conclude that the history of the clause and the reasoning of the Supreme Court strongly suggest that considering ability to pay is constitutionally required."⁶⁴

60. *See* *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

61. The U.S. Supreme Court has held that this prohibition extends to the states. *Timbs v. Indiana*, 586 U.S. 146, 149–51 (2019).

62. *See* *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). In *Bajakajian*, the respondent and his family were preparing to board an international flight when inspectors discovered that he was carrying \$357,144 without reporting it, in violation of 31 U.S.C. § 5316(a)(1)(A) (which requires people to report when they are carrying more than \$10,000 out of the country). Pursuant to 18 U.S.C. § 982(a)(1), which provides that a person convicted of willful violation of § 5316 shall forfeit "any property . . . involved in such an offense," the government sought forfeiture of all \$357,144. The U.S. Supreme Court held that forfeiture of the full amount would be grossly disproportionate to the offense because the crime was simply the respondent's willful failure to report the money, punishable under the Federal Sentencing Guidelines by a maximum of 6 months in jail and a fine of \$5,000. Furthermore, the failure to report caused minimal harm to the government. *Id.*

63. *See* *Foster*, *supra* note 36, at 27.

64. *See* *Seattle v. Long*, 493 P.3d 94, 112 (Wash. 2021).

The Fourteenth Amendment provides an additional limit on fines and fees. The Supreme Court has held that the Due Process and Equal Protection Clauses bar courts from “punishing a person for his poverty.”⁶⁵ In *Bearden v. Georgia*, the Court held that the government may not incarcerate a person solely because they are unable to pay fines or fees.⁶⁶ Some lower courts have interpreted *Bearden* narrowly, while others have interpreted it more broadly.⁶⁷ According to the DOJ, the holding means that at a minimum, “[s]tate and local courts have an affirmative duty to determine an individual’s ability to pay and whether any nonpayment was willful before imposing incarceration as a consequence.”⁶⁸ Further, in its Dear Colleague letter, the Department took this view about conducting ability to pay determinations for all fines and fees, stating:

Regardless of whether it is constitutionally required, consideration of an individual’s economic circumstances is a logical approach because fines and fees will affect individuals differently depending on their resources. When a person already cannot afford a basic need, such as housing, a fine or fee of any amount can be excessive in light of that person’s circumstances, and thus may not be appropriate even if it were legally permitted.⁶⁹

B. Abolition of Fees and Right-Sizing of Fines: The Most Direct Approach to Ending Harms

The most direct approach to eliminating the harms of unaffordable fines and fees is to abolish fees altogether and to right-size fines. As a result of

65. See *Bearden*, 461 U.S. at 671.

66. See *id.*

67. In *Bearden* the U.S. Supreme Court held that determining “the reasons for non-payment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection.” *Id.* at 668. Courts, however, have different interpretations of what constitutes willfulness. A judge in Benton County, Washington, for example, described that to assess a person’s ability to pay he looks at whether they are wearing expensive-looking clothing. If they are, he asks if it was a gift. If it was, he says they should have asked instead for cash. Jack Furness, *Willful Blindness: Challenging Inadequate Ability to Pay Hearings Through Strategic Litigation and Legislative Reforms*, 52 COLUM. HUM. RTS. L. REV. 957, 988 (2021). Further, some courts have held that a trial court may imprison a person for failure to pay — even if the failure was not willful — if the person agreed to pay legal financial obligations during a plea deal. Compare *State v. Nordahl*, 680 N.W.2d 247 (N.D. 2004) (holding that a court need not find that a defendant was financially able to make restitution payments before imposing incarceration if the defendant agreed to pay restitution as part of his plea agreement), with *State v. Myles*, 882 So. 2d 1254, 1256–57 (La. Ct. App. 2004) (finding that a trial court must inquire into ability to pay before revoking probation in a plea bargained case).

68. See Dear Colleague Letter, *supra* note 59, at 6.

69. See Dear Colleague Letter, *supra* note 59, at 5.

tireless work by advocates, many states in recent years have taken important steps in this direction. The Debt Free Justice Campaign, for example, has successfully limited or ended fines and fees in juvenile courts in a dozen states, and the End Justice Fees Campaign is building momentum to end legal system fees, as distinct from fines, across the country.⁷⁰

In many jurisdictions, however, abolition of fees is far-off; fines are routinely unaffordable, and stakeholders — such as advocates, members of the judiciary, the bar, and the legislature — have an interest in taking interim steps to reduce the harms of unaffordable fines and fees, including implementing meaningful ability to pay determinations. Millions of people are being harmed every day by unaffordable fines and fees, and the recommendations that follow seek to mitigate these harms. These are important, interim steps towards the ultimate elimination of fees and right-sizing of fines so that punishments are measured, just, and equitable.

C. The Justice Index’s Best Policies for Determining Ability to Pay

Recognizing the deep harms caused by unaffordable fines and fees, in 2020, the National Center for Access to Justice at Fordham Law School (NCAJ) created the Fines and Fees Justice Index, a measure of the degree to which states protect — or fail to protect — people’s rights when imposing fines and fees.⁷¹ In consultation with experts from around the country, NCAJ identified 17 policies that are critical to creating a fairer system for fines and fees, which respects people’s rights and does not criminalize poverty.⁷² In 2020 — and again in 2022 — NCAJ researched state and local laws in all 50 states and Washington, D.C., graded the jurisdictions on a scale of 0 to 100 according to their policies, and posted their findings and rankings online to empower and encourage state officials to establish the selected policies as law.⁷³

70. A study found that repealing fees for juveniles “meaningfully reduced the financial burden that families experienced” when a child was placed on probation. Jaclyn Chambers et al., *Effect of Juvenile Justice Fee Repeal on Financial Sanctions Borne by Families* 26 (Sept. 14, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923878 [<https://perma.cc/QC7Q-VNVU>]. See also *Our Impact*, DEBT FREE JUST. (Aug. 4, 2024), <https://debtfreejustice.org/our-impact> [<https://perma.cc/KT5A-VBDB>]; END JUST. FEES, *supra* note 11.

71. See *Fines and Fees*, NAT’L CTR. FOR ACCESS TO JUST., *supra* note 9.

72. See NAT’L CTR. FOR ACCESS TO JUST., *FINES AND FEES IN AMERICAN COURTS* (Aug. 4, 2024), <https://ncaj.org/sites/default/files/2021-05/Fines%20and%20Fees%20in%20American%20Courts.pdf> [<https://perma.cc/6AZV-JPW6>].

73. See *Fines and Fees*, NAT’L CTR. FOR ACCESS TO JUST., *supra* note 9.

Many of the benchmarks in the Fines and Fees Justice Index identify essential elements of ability to pay determinations. These best policies include:

Judicial Discretion. Does the state ensure that judges have discretion to waive or modify all fines, fees, costs, surcharges or assessments based on ability to pay, at imposition or at any point afterwards?⁷⁴

Mandatory Ability to Pay Determinations. Does the state require courts to conduct an ability to pay determination whenever they impose fines, fees, costs, surcharges, or other assessments?⁷⁵

Indigence Presumptions. Has the state codified standards that trigger a presumption that a person is indigent and, therefore, unable to pay fines, fees, costs, surcharges or assessments?⁷⁶

Ability to Pay Standards. Has the state codified substantive standards and required all state and local courts to use them to give clear guidance to judges on how ability to pay should appropriately be determined?⁷⁷

Payment Plans. Does the state allow anyone to choose to pay fines and fees on a payment plan if they cannot afford to pay immediately, without incurring any additional fees or interest charges?⁷⁸

Day Fines. Has the state taken one or more specific steps to mandate, encourage or facilitate courts' use of individualized fines ("day fines") that are scaled according to both the severity of the offense and the individual's economic status?⁷⁹

Proof of Willfulness. Does the state require the government to prove that a person's failure to pay any fine, fee, cost surcharge or assessment was willful before incarcerating or imposing any other sanction on an individual for failure to pay?⁸⁰

Using these benchmarks as a starting point, this Article seeks to set out policy models — the features of ability to pay determinations that provide the critical protections to people charged with unaffordable fines and fees. Its findings are based on a deep dive into the laws on the books for each state that received credit in the Fines and Fees Justice Index; a survey of state caselaw requiring judges to conduct ability to pay assessments to understand what factors courts use and the tests that appellate courts have set forth; an extensive literature review; an analysis of bench cards that provide guidance

74. *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

75. *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

76. *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

77. *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

78. *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

79. *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

80. *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

to judges about fines and fees; and interviews with practitioners across the country.

In short, no state or locality is doing well overall when it comes to determining ability to pay in the fines and fees context. There are, however, elements of states' policies that stand out as more protective of people's rights than others. Additionally, in the absence of states requiring meaningful ability to pay determinations, practitioners have created innovative, effective advocacy strategies that could be replicated in other places.

Inclusion of a particular policy or part of a law on ability to pay determinations does not constitute an endorsement of the state's laws on fines and fees overall. Nor does it mean that the law as written on paper is being implemented in a robust and fair manner. No matter how good a law is, it will still be important for communities, advocates, and officials to hold their governments accountable to follow laws that are on the books. But accountability begins with the law itself, and what follows are examples of strong, rights-protective language from various statutes, cases, bench cards, and other sources of instruction on determining ability to pay.

III. DISCRETION: JUDICIAL AUTHORITY TO WAIVE OR REDUCE FINES AND FEES

A monetary amount that might be a slap on the wrist to a wealthy person can create great suffering for a person living paycheck to paycheck. Setting fines and fees in line with people's ability to pay can reduce harms to low-income individuals, create greater equity in the system, and benefit state and local government revenue. When people are unable to pay the total charge, they often pay nothing. Research has found that when fines and fees are pegged to a person's means, total revenue for the government increases because people are more likely to pay fines and fees when they can afford to do so.⁸¹

To limit harms and increase equity, states should give judges authority to set, waive, or modify fines and fees according to a person's ability to pay. When states make fines and fees mandatory — leaving judges with no authority to waive or reduce them — they remove judges' power to consider the individual circumstances of a case. Two out of three states impose at least some mandatory fines and/or fees that judges have no ability to waive

81. Research, for example, has shown that day fines, which peg fine amounts to the severity of the offense and the person's income rather than setting a default amount for a fine regardless of income, increase collection rates and total revenue. See COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL 5 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/U6W8-7XSG>].

or modify, regardless of the specific circumstances of the case.⁸² In some jurisdictions, mandatory fines can be as high as \$750,000.⁸³ Without judicial discretion to waive or modify all fines and fees, ability to pay determinations may have limited utility. A survey of judges in Washington State, for example, found that, before the state eliminated mandatory fines and fees, an online “ability to pay calculator” had limited impact because judges recognized the financial circumstances of the people who appeared before them and thus, already waived all discretionary fines and fees.⁸⁴ A study found that roughly 70 percent of people in Washington were unable to pay statutorily set mandatory fines and fees.⁸⁵

Of the states that give judges the authority to waive or modify all fines and fees, only some allow judges discretion prior to setting them.⁸⁶ In other states, judges have the authority to waive or modify fines and fees, but only after the person has failed to pay and is facing sanctions.⁸⁷ The latter approach provides some protection but is inferior to laws that provide discretion from the outset.

State laws are most protective when they: (1) eliminate mandatory fines and fees, giving judges authority to waive or modify according to the particular circumstances of the case; and (2) give judges authority to waive or modify all fines and fees prior to setting them, and again at any point thereafter. No single statute stood out as exemplary in all regards, but portions of statutes in two states stood above the rest:

82. *See Fines and Fees*, NAT’L CTR. FOR ACCESS TO JUST., *supra* note 9.

83. *See, e.g.*, FLA. STAT. § 893.135(c)(2)(d) (2023).

84. *See* CYNTHIA DELOSTRINOS ET AL., WASH. STATE SUP. CT. MINORITY AND JUST. COMM’N, THE PRICE OF JUSTICE: LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 63 (Jan. 2022), https://www.courts.wa.gov/subsite/mjc/docs/MJC_LFO_Price_of_Justice_Report_Final.pdf [<https://perma.cc/M5CS-UA9J>].

85. *See* MARIA RAFAEL, VERA INST. OF JUST., THE HIGH PRICE OF USING JUSTICE FINED AND FEES TO FUND GOVERNMENT IN WASHINGTON STATE 5 (2021), <https://www.vera.org/downloads/publications/the-high-price-of-using-justice-fines-and-fees-washington.pdf> [<https://perma.cc/WT4Q-D2XV>] (citing Alexes Harris). As of January 1, 2023, Washington State eliminated mandatory non-restitution fines and fees. H.R. 1412, 2021 Leg., Reg. Sess. (Wash. 2022). Before the change, for example, there was a mandatory Victim Penalty Assessment in the amount of \$250 for all misdemeanors and \$500 for all felony convictions, as well as a \$100 mandatory DNA collection fee. *See also* MARIA RAFAEL, VERA INST. OF JUST., THE HIGH PRICE OF USING JUSTICE FINED AND FEES TO FUND GOVERNMENT IN WASHINGTON STATE 2 (June 2021), <https://www.vera.org/downloads/publications/the-high-price-of-using-justice-fines-and-fees-washington.pdf> [<https://perma.cc/WT4Q-D2XV>].

86. *See, e.g.*, TEX. CODE CRIM. PROC. ART. 45.0491 (2023); MONT. CODE ANN. §§ 46-18-232(2), 46-18-231(3) (2023). *But see* OR. REV. STAT. §§ 161.685(5) (2024), 161.665(5) (2024), 151.505(4) (2024).

87. *See, e.g.*, MD. CODE CTS. & JUD. PROC. § 7-504(a) (2024).

Montana — Judicial Duty to Make Ability to Pay Determination. Montana not only authorizes but requires judges to waive or modify fines and fees according to ability to pay. It provides that a judge *may not* sentence a person to pay costs or fines “unless the offender is or will be able to pay [them].”⁸⁸

Rhode Island — Judicial Authority to Waive or Modify Fines and Fees Before Setting Them — and at Any Point After. Rhode Island provides clear instructions for judges about how to proceed:

- (a) The payment of court costs, assessments, and fees in criminal cases shall, upon application or sworn testimony, presented during sentencing or any time thereafter, be remitted in whole based on a determination that a defendant is indigent pursuant to the standards set forth in this section . . .
- (b) If a defendant is not indigent, the payment of court costs, assessments, and fees in criminal cases may, upon sworn testimony or application during sentencing or any time thereafter, be remitted in whole or in part by any justice of the superior or district court or the justice’s designee pursuant to a determination of limited or inability to pay.⁸⁹

IV. TIMING: A JUDICIAL DUTY TO HOLD ABILITY TO PAY HEARINGS AT CRITICAL TIMES

Giving judges the authority to waive or modify all fines and fees without requiring them to make ability to pay determinations means that people could still be ordered to pay fines and fees that are well outside of their means. To create greater consistency across courts and judges and to limit harms, it is important to require all judges to assess ability to pay before imposing fines and fees. Further, judges should be required to consider ability to pay at other critical junctures, including when a person requests a new determination, before imposing sanctions for failure to pay, and after incarceration.

A. Judicial Duty to Make an Ability to Pay Determination Prior to Imposing Any Fines or Fees

The DOJ has clearly outlined the benefits of requiring judges to make ability to pay determinations before imposing fines and fees: “This approach can conserve court resources by avoiding subsequent hearings, prevent low-income litigants from experiencing unnecessary hardship when attempting to make payments they cannot afford, decrease the risk of unnecessary

88. MONT. CODE ANN. §§ 46-18-232(2) (2019), 46-18-231(3) (2023).

89. R.I. GEN. LAWS § 12-20-10 (2020).

adverse consequences, and increase the likelihood that litigants have legal representation when navigating these processes.”⁹⁰

Fewer than one in four states, however, require courts to conduct these determinations prior to imposing fines and fees.⁹¹ An additional one in five states require courts to conduct ability to pay determinations before setting fines — as opposed to both fines and fees — and nine other states allow defendants to request an ability to pay determination but do not require courts to conduct one as of right.⁹² These latter schemes are better than no judicial requirement, but they are not as protective as requiring courts to conduct ability to pay determinations before they may order any fines or fees.

Laws — including statutes and case-law requirements — are most protective of people’s rights with regard to initial ability to pay determinations when they: (1) require judges to conduct an ability to pay determination before setting any fines, fees, surcharges, assessments, or other costs; (2) create an affirmative obligation for judges to conduct such assessments, rather than giving litigants the right to request one; and (3) require judges to do more than just a *pro forma* recitation about having considered a person’s ability to pay. Washington State stands out as more protective than others. The Washington State Supreme Court has created a clear rule about ability to pay determinations: “[A] trial court has [the] obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes [legal financial obligations].”⁹³

B. Judicial Duty to Make a New Ability to Pay Determination Upon Request at Any Time

In Colorado, Dario Alvarez was pulled over on his way to work for having tinted windows. A judge ordered Mr. Alvarez to pay \$140 in fines for the tinted windows and \$350 in court fees.⁹⁴ At the time, he was making \$20 an hour at a food safety lab, so he requested a payment plan to pay off the fines and fees.⁹⁵ Shortly thereafter, the lab closed down and Mr. Alvarez lost his job — and with it, the ability to make the payments on time.⁹⁶ Mr. Alvarez

90. See OFF. FOR ACCESS TO JUST., ACCESS TO JUSTICE SPOTLIGHT: FINES & FEES 25 (2023), <https://www.justice.gov/d9/2023-11/doj-access-to-justice-spotlight-fines-and-fees.pdf> [<https://perma.cc/V47F-PGHM>].

91. *Fines and Fees*, NAT’L CTR. FOR ACCESS TO JUST., *supra* note 9.

92. *See id.*

93. *See State v. Blazina*, 344 P.3d 680, 681 (Wash. 2015).

94. *See Dario Alvarez, My Life Was Derailed by a Traffic Ticket*, ACLU (Oct. 21, 2021), <https://www.aclu.org/news/criminal-law-reform/my-life-was-derailed-by-a-traffic-ticket> [<https://perma.cc/N84G-XRAQ>].

95. *Id.*

96. *Id.*

fell behind on his payments.⁹⁷ He found another job and thought he would be able to get back on track, but soon after, he was pulled over during his morning commute.⁹⁸ He learned then that his driver's license had been suspended for failing to make payments on his fines and fees during the time he was out of work, and was sent to jail.⁹⁹ Ten years later, he still had no job and his fines and fees had ballooned to \$3,000 with late fees.¹⁰⁰ In a piece for the ACLU, he wrote that he had little prospect of paying off the fines and fees because he was making \$12 an hour working as a dishwasher in a restaurant.¹⁰¹

Like Mr. Alvarez, people often face financial emergencies. They lose their jobs or get sick, rent prices increase, families have new babies, grocery bills go up, and couples get divorced. For any number of reasons, people's financial circumstances change — sometimes quite substantially. In other instances, a person's financial circumstances may remain the same, but the court's initial ability to pay determination was simply wrong, and the person cannot actually afford to pay what was ordered.¹⁰² For all of these reasons, it is important for litigants to have the right to request new ability to pay determinations after a judge initially orders payments of costs.

It is also critical for judges to inform people of the right to request such a rehearing, and to have a formal, easily accessible process in place to do so. In a survey of judges in Washington State — where litigants have the right to request an ability to pay determination if they cannot afford to pay — 75% of judges reported that litigants only “sometimes” or “rarely” ask them to reconsider fines and fees after imposition.¹⁰³ Given the low rate of re-determination requests, it is perhaps unsurprising that fewer than half of judges said that they inform defendants at the time of sentencing that they may request a new determination if their financial circumstances change.¹⁰⁴ Further, 85% of defense attorneys surveyed in the state said there was no

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. New Mexico, for example, has required judges to conduct ability to pay hearings before imposing fines and fees. *See* N.M. R. CRIM. P. MAGIS. CT. § 6-207.1 (2024). A survey of people ordered to pay fines and fees in New Mexico, however, found that 80% of respondents had foregone basic needs (including food, rent, and car payments) to pay off court debt; 41% admitted they had committed a crime to help pay off court fines and fees; and 48% had gone to jail to “pay off” fines and fees. *New Mexico's Fines and Fees*, *supra* note 37, at 2.

103. *See* DELOSTRINOS ET AL., *supra* note 84, at 14.

104. DELOSTRINOS ET AL., *supra* note 84, at 14.

clear practice for making a new ability to pay determination in the courts in which they practice.¹⁰⁵

Laws that are most protective of people’s rights to request a new ability to pay determination: (1) allow litigants to request a re-determination at any point after the initial setting of fines and fees; (2) require judges to inform people of their right to request such a hearing; and (3) have a clear, easily accessible process in place for people to make such a request. The following laws are exemplary:

Oklahoma — Notice and Right to Request Ability to Pay Hearing at Any Time. In 2023, Oklahoma passed HB 2259, which provides that at the time of plea or sentencing, courts must inform individuals that they may request a cost hearing “if at any time he or she is unable to pay the court financial obligations, at which point the court may waive all or part of the debt owed.”¹⁰⁶ The bill later provides that if there is any change in circumstances that affects the person’s ability to pay, “the defendant may request a cost hearing before the court by contacting the court clerk. The district court for each county and all municipal courts shall provide a cost hearing for any defendant upon request, either by establishing a dedicated docket or on an as-requested basis.”¹⁰⁷

Texas — Standardized Form and Instructions for Litigants to Request a New Ability to Pay Determination. Although it does not apply to everyone who owes fines and fees, Texas provides that when a person is on community supervision — commonly referred to as probation elsewhere — and cannot afford to pay, they can ask a supervision officer to provide them with a form to request a new ability to pay determination. The law specifies:

The Office of Court Administration of the Texas Judicial System shall adopt a standardized form that a defendant may use to make a request . . . for the reconsideration of the defendant’s ability to pay. The form must include:

- (1) detailed and clear instructions for how to fill out the form and submit a request to the court; and
- (2) the following statement at the top of the form, in bold type and in any language in which the form is produced: “If at any time while you are on community supervision your ability to pay any fine, fee, program cost, or other payment ordered by the court, other than restitution, changes and you cannot afford to pay, you have the right to request that the court review your payments and consider changing or waiving your payments. You can

105. DELOSTRINOS ET AL., *supra* note 84, at 14.

106. ENROLLED H.B. 2259, 2023 Leg., 59th Sess. 10 (Okla. 2023).

107. *Id.*

use this form to make a request for a change in your payments. You cannot use this form to request a change in restitution payments.¹⁰⁸

C. Judicial Duty to Suspend Collection During Incarceration and Determine Ability to Pay After Release

Many states require incarcerated individuals to pay fines and fees during their incarceration — meaning that the money comes out of their commissary accounts or from their extremely meager wages. The Texas Supreme Court, for example, has upheld the state’s ability to garnish incarcerated individuals’ commissary accounts to recover court fees and costs — without even notifying the person until after the garnishment has begun.¹⁰⁹ Many other states garnish commissary accounts for fines and fees, which creates hardships not only for the person but for their families as well.¹¹⁰ Some states, however, pause some or all payments until after a person exits jail or prison — a far less harsh policy. But people exiting prison often have little to no ability to pay fines and fees. Research has found that fines and fees owed by people returning from prison can lead to cycles of incarceration and poverty — and further distrust of the legal system.¹¹¹

Rights protective laws require states to: (1) pause payment of fines and fees during incarceration; and (2) mandate courts to conduct ability to pay determinations after people exit prison, before requiring them to begin post-incarceration payments.

Indiana — Suspension of Fines and Fees Payments During Incarceration and Ability to Pay Determination. Indiana’s law is better than others, although it is not mandatory and only applies to fines. The law provides that:

A court may impose a fine and suspend payment of all or part of the fine until the convicted person has completed all or part of the sentence. If the court suspends payment of the fine, the court shall conduct a hearing at the time the fine is due to determine whether the convicted person is indigent.¹¹²

108. TEX. CODE CRIM. PROC. art. 42A.655(h).

109. See Harrell v. State, 286 S.W.3d 315, 321 (Tex. 2009).

110. A study by the Ella Baker Center found that 63% of the time, family members were responsible for paying off loved ones’ court-related costs. Nearly half reported that their families could not afford to pay fines and fees. Many people surveyed said their families struggled to pay for basic necessities like rent and food. See SANETA DE VUONO-POWELL ET AL., *supra* note 31, at 13–14.

111. See Annie Harper et al., *Debt, Incarceration, and Re-entry: A Scoping Review*, 46 AM. J. CRIM. JUST. 250, 252 (2021), <https://doi.org/10.1007/s12103-020-09559-9> [<https://perma.cc/93FL-L24G>].

112. IND. CODE § 35-38-1-18(b) (2023).

D. Judicial Duty to Determine Ability to Pay Before Imposing Sanctions for Failure to Pay

The U.S. Supreme Court has held that “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”¹¹³ The DOJ’s interpretation of the Court’s ruling is: “[s]tate and local courts have an affirmative duty to determine an individual’s ability to pay and whether any nonpayment was willful before imposing incarceration as a consequence.”¹¹⁴ Beyond incarceration, the Department recommends that courts conduct an assessment of whether a person’s failure to pay was willful before imposing any sanctions for failure to pay. Specifically, it has advised courts:

[W]e recommend that courts conduct a willfulness analysis and apply *Bearden*’s balancing framework before imposing other adverse consequences that implicate liberty or property interests on an indigent criminal defendant for nonpayment. As the U.S. Supreme Court has recognized, non-carceral penalties “may bear as heavily on an indigent accused as forced confinement.”¹¹⁵

As with the elimination of fines and fees, the most direct approach to addressing the harms of incarceration for failure to pay is to eliminate incarceration as a possible sanction. State laws that are most protective of people’s rights in this area: (1) prohibit incarceration as a possible sanction for failure to pay fines and fees, whether willful or not; and (2) require courts to conduct meaningful ability to pay determinations before ordering other sanctions for failure to pay:

Delaware — Elimination of Incarceration as a Sanction for Failure to Pay Fines and Fees. Delaware law provides, clearly and simply: “No person sentenced to pay a fine, costs or restitution upon conviction of a crime shall be ordered to be imprisoned in default of the payment of such fine, costs or restitution.”¹¹⁶

Oklahoma — Judicial Requirement to Conduct an Ability to Pay Assessment If a Person Fails to Pay on Time. Oklahoma law provides that if a court clerk finds that a person is delinquent on paying fines and fees,

113. *See Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983).

114. *See* Dear Colleague Letter, *supra* note 59, at 6.

115. Dear Colleague Letter, *supra* note 59, at 8.

116. DEL. CODE ANN. tit. 11, § 4105(a) (2023).

rather than imposing penalties, the court shall set a cost hearing “to determine if the defendant is able to pay.”¹¹⁷

Washington — Prohibiting Sanctions for Contempt for Failure to Pay Absent a Finding That Failure was Willful. Washington State law provides:

The court shall not sanction a defendant for contempt based on failure to pay fines, penalties, assessments, fees, or costs unless the court finds, after a hearing and on the record, that the failure to pay is willful. A failure to pay is willful if the defendant has the current ability to pay but refuses to do so.¹¹⁸

V. PROCEDURE: JUDICIAL DUTY TO PROVIDE PROCEDURAL PROTECTIONS DURING ALL ABILITY TO PAY HEARINGS

Procedural protections are important to ensure that any time judges make an ability to pay determination, they consider the person’s individual circumstances and finances. Otherwise, judges could simply check a box to indicate that they had considered ability to pay without undertaking a meaningful assessment.

A. Judicial Duty to Put Ability to Pay Findings on the Record

Until recently, judges in Texas could — and often did — include boilerplate language to indicate that they had considered the person’s ability to pay, such as, “After having conducted an inquiry into Defendant’s ability to pay, the Court [orders the] Defendant to pay the fines, court costs, reimbursement fees, and restitution as indicated above and further detailed below.”¹¹⁹ This established the presumption that a judge had conducted an ability to pay determination. To rebut that presumption, the person “had to affirmatively prove that the ability-to-pay inquiry was not held off the

117. See ENROLLED H.B. 2259, 2023 Leg., 59th Sess. 10 (Okla. 2023). See OKLA. STAT. ANN. tit. 22, § 983(G)(2) (2023); see also OKLA. STAT. ANN. tit. 19, §§ 514.4(B) (2023), 514.5(A) (2023).

118. WASH. REV. CODE § 10.01.180(3)(a) (2023).

119. See *Cruz v. State*, No. 14-21-00454-CR, 2023 WL 3236888, at *3–4 n.3 (Tex. App. May 4, 2023) (“Bill analysis prepared by the Senate Research Center, citing the original author’s statement of intent, explains the amendment is intended to close a loophole created by boilerplate language used in criminal judgments: ‘Although court orders have boilerplate language stating that they conducted such an inquiry, some courts are not asking defendants about their inability to pay despite the law’s requirements. When some public defenders have appealed the issue, courts of appeal [sic] have ruled that due to the boilerplate language, they will assume the inquiry happened, even when the inquiry is not in the record. Under this framework, unless the record proves that the inability to pay inquiry did not occur or an objection or statement that the inquiry has not been made, courts of appeal [sic] would assume the inquiry did occur. This interpretation of the law threatens to create a loophole defeating the legislative intent of *S.B. 1913 [Act of May 28, 2017]*.” (citation omitted)).

record.”¹²⁰ To address this issue, in 2021, Texas amended its law to require judges to conduct ability to pay determinations on the record before ordering people to pay fines.¹²¹

Requiring judges to put their findings on the record helps people to understand the ruling and makes the ruling easier to appeal. Laws that are more protective of people’s rights, therefore, require judges to put their ability to pay findings on the record:

Oklahoma — Judicial Duty to Consider Evidence and Put Findings on the Record. Oklahoma helps ensure that ability to pay determinations are meaningful by providing that judges must put their findings on the record, including the person’s ability or inability to pay, the amount of installments and due dates if ordered, and “all other findings of facts and conclusions of law necessary to support the order of the court.”¹²² Oklahoma also provides a good example of the ways judges may gather evidence to make ability to pay determinations:

In determining the ability of the defendant to pay court financial obligations, the court may rely on testimony, relevant documents, and any information provided by the defendant. In addition, the court may make inquiry of the defendant and consider any other evidence or testimony concerning the ability of the defendant to pay.¹²³

B. Judicial Duty to Make Clear and Definite Findings of Fact

To ensure that judges conduct meaningful ability to pay determinations — and that their decisions are appealable — it is also important for the judge to include their findings of fact in the record.

Ohio — Judicial Duty to Make Clear Findings of Fact Based on Evidence. Ohio law specifies that if a court finds that the person is able to pay, “the determination shall be supported by findings of fact set forth in a judgment entry that indicate the offender’s income, assets, and debts, as presented by the offender, and the offender’s ability to pay.”¹²⁴

C. Judicial Duty to Appoint Counsel for Party Facing Potential Incarceration or Other Sanction

An important procedural protection for litigants who appear in court is the right to have an attorney appointed free of charge. A meta-analysis looking at research on the impact of counsel in civil cases generally found that people

120. *Id.*

121. *See* TEX. CODE CRIM. PROC. ANN. art. 42.15(a-1) (West 2021).

122. *See* OKLA. STAT. tit. 22, § 8.7.

123. *See* OKLA. STAT. tit. 22, § 983(D) (2024).

124. OHIO REV. CODE ANN. § 2947.14(B) (West 2002).

with an attorney were anywhere from eight to 200 times more likely to prevail than people without a lawyer.¹²⁵ In ability to pay proceedings, an attorney can help people to present evidence about their inability to pay; understand often complex rules, including whether they have a right to request a reduction or an alternate method of payment; protect their constitutional and other legal rights; and understand any orders from the judge. However, a national survey found that only one in three people had an attorney with them at any point during a court or administrative process in which fines and fees were imposed.¹²⁶ Half of states do not provide a right to counsel in fines and fees cases even when someone is facing incarceration for failure to pay.¹²⁷ Laws that are most protective of people's rights, therefore, provide a right to counsel.

Massachusetts — Judicial Duty to Appoint Counsel, as of Right. Although it does not apply to other potential sanctions, Massachusetts provides an example of a strong right to counsel law when a person faces incarceration for failure to pay:

A court shall not commit a person to a correctional facility for non-payment of money owed if such a person is not represented by counsel for the commitment proceeding, unless such person has waived counsel. A person deemed indigent for the purpose of being offered counsel and who is assigned counsel for the commitment portion of a proceeding solely for the nonpayment of money owed shall not be assessed a fee for such counsel.¹²⁸

A stronger protection still would be the codification of a right to counsel for all fines and fees hearings — or, at least, for every hearing in which sanctions are possible, not just when a person faces incarceration.

VI. STATUTORY GUIDELINES: JUDICIAL CONSIDERATIONS FOR DETERMINING HOW MUCH A PERSON SHOULD PAY

Even when states authorize judges to waive or modify fines and fees or require them to make ability to pay determinations, the laws often provide little guidance about what factors to consider — and how to set appropriate fines and fees once a judge has heard all the evidence. Hawaii, for example, simply provides that, “[i]n determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.”¹²⁹

125. See Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOCIO. REV. 909, 920–24 (Sept. 2015).

126. See DEBT SENTENCE, *supra* note 40, at 4, 26, 35.

127. See *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

128. MASS. GEN. LAWS ch. 127, § 145(b) (2022).

129. HAW. REV. STAT. § 706-641(4) (2024).

Similarly, most states do not set a bright line standard that would direct an outcome.

Without codified rules on how judges must conduct such inquiries, specific factors they must take into consideration, and how they must determine ability to pay, judges could reach wildly different conclusions. When there is little to no standardization, justice can depend not on equity or fairness, but on where a person happens to get a ticket, which particular judge happens to be hearing cases the day of their hearing, or even the judge's mood at the time. Without clear rules, judges can use *ad hoc* indicators that introduce unfair presumptions about individuals' ability to pay.¹³⁰ One judge in Illinois, for example, routinely asked the people who came before him if they smoked.¹³¹ If they answered yes and had not paid anything towards their fines and fees since the last court date, he would summarily find that they were willfully refusing to pay and jail them without further inquiry.¹³² A judge in Michigan had a practice of asking people whether they had cable television and presuming that they could pay if they did.¹³³

A lack of clear rules can also exacerbate racial disparities. One study in Virginia, for example, found that cities, towns, and counties with the highest percentages of Black and low-income residents tend to charge higher fines and fees compared to the state average.¹³⁴ Research in Washington State shows that Black, Latinx and Native American litigants are more likely to be charged higher fines and fees than their peers charged with the same offense.¹³⁵

A. Indigency: Judicial Duty to Waive Fines and Fees When a Person Cannot Afford to Pay

Tens of millions of Americans are poor. In 2022, 37.9 million Americans — or 11.5% of the total U.S. population — were living below the federal

130. See, e.g., Jack Furness, *Willful Blindness: Challenging Inadequate Ability to Pay Hearings through Strategic Litigation and Legislative Reforms*, 52 COLUM. HUM. RTS. L. REV. 958, 987–88 (2021), https://hrlr.law.columbia.edu/files/2021/02/957_Furness-2.pdf [<https://perma.cc/AQM4-J9TD>].

131. See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 21 (Oct. 2010), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-debt-barrier-reentry> [<https://perma.cc/3JSC-8NJD>].

132. *Id.*

133. *Id.*

134. See CORTNEY SANDERS & MICHAEL LEACHMAN, CTR. ON BUDGET & POL'Y PRIORITIES, STEP ONE TO AN ANTIRACIST STATE REVENUE POLIC: ELIMINATE CRIMINAL JUSTICE FEES AND REFORM FINES, 3 (Sept. 12, 2021), <https://www.cbpp.org/sites/default/files/9-17-21sfp.pdf> [<https://perma.cc/AK4J-GPDL>].

135. See DELOSTRINOS ET AL., *supra* note 84, at 5, 10.

poverty level.¹³⁶ A greater percentage of people who owe fines and fees, however, may be living below the poverty level. In California, for example, of the more than 45,000 people who applied for fines and fees relief online, 88% reported that their income was below the federal poverty level.¹³⁷

Six states — Georgia, Illinois, Mississippi, Oklahoma, Rhode Island, and Washington — have codified a definition of indigence that triggers a presumption that a person is unable to pay some or all fines and fees.¹³⁸ Of those, Illinois, Rhode Island, and Washington direct judges to waive costs if they find that the person is indigent.¹³⁹ Oklahoma law provides that if a person meets the standard set forth for being “unable to pay,” the judge shall waive or reduce the financial obligation.¹⁴⁰ Georgia directs judges to “waive, modify, or convert” to community service fines and fees if a person is found to be indigent; but the law only applies to people on community supervision, also known as probation.¹⁴¹ Mississippi, by contrast, bars incarceration for failure to pay fines and fees if the court finds that the person is “indigent.”¹⁴²

Income is one way to measure indigence. Almost every state that defines indigence for purposes of waiving some or all fines and fees includes the person’s income relative to the federal poverty level as part of the

136. EMILY A. SHRIDER & JOHN CREAMER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2022 1 (Sept. 12, 2023), <https://www.census.gov/content/dam/Census/library/publications/2023/demo/p60-280.pdf> [<https://perma.cc/82EY-Q9GM>]. In 2024, the federal poverty level is \$31,200 for a family of four. U.S. DEP’T HEALTH & HUM. SERV.’S, POVERTY GUIDELINES (Jan. 17, 2024), <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines> [<https://perma.cc/GDS2-ZZJW>].

137. See PATRICIA GUERRERO ET AL., ONLINE INFRACTION ADJUDICATION AND ABILITY-TO-PAY DETERMINATIONS 1, 14 (Feb. 2023), <https://www.courts.ca.gov/documents/lr-2023-online-infraction-adjudication-ability-to-payd-eterminations-Stats.2021-ch-79.pdf> [<https://perma.cc/SN2V-NLEF>]; U.S. DEP’T HEALTH & HUM. SERVS., 2023 POVERTY GUIDELINES (Jan. 2022), <https://aspe.hhs.gov/sites/default/files/documents/1c92a9207f3ed5915ca020d58fe77696/etailed-guidelines-2023.pdf> [<https://perma.cc/V3HJ-U8L5>].

138. See, e.g., GA. CODE ANN. § 42-8-102(e)(1)(B) (2022); 725 ILL. COMP. STAT. 5/124A-20(a) (2022); MISS. CODE ANN. § 99-19-20.1 (2023); ENROLLED H.B. 2259, 2023 Leg., 59th Sess. § 983(B)(3)–(5) (Okla. 2023); 12 R.I. GEN. LAWS § 12-20-10(a)–(b)(1) (2023); WASH. REV. CODE § § 10.01.160(3) (2022), 10.01.010(4) (2022), 10.01.180(3)(b) (2022).

139. See 725 ILL. COMP. STAT. 5/124A-20(b)(1) (2022) (“If the court finds that the applicant is an indigent person, the court shall grant the applicant a full assessment waiver exempting him or her from the payment of any assessments.”); 12 R.I. GEN. LAWS § 12-20-10(a) (2023) (“The payment of court costs, assessments, and fees in criminal cases shall, upon application or sworn testimony, presented during sentencing or any time thereafter, be remitted in whole based on a determination that a defendant is indigent pursuant to the standards set forth in this section.”); WASH. REV. CODE § 10.01.160(3) (2022) (“The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent.”).

140. See OKLA. STAT. ANN. tit. 22, § 983(B)(2) (2023).

141. See GA. CODE ANN. § 42-8-102 (d), (e)(2) (2022).

142. See MISS. CODE ANN. § 99-19-20.1(1) (2023).

definition.¹⁴³ Illinois sets the highest income threshold, defining an “indigent person” as a person whose “available personal income is 200% or less of the current poverty level” unless the court determines that the person’s non-exempt assets are “of a nature and value that the court determines that the applicant is able to pay the assessments.”¹⁴⁴

Critics, however, argue that the federal poverty level is an inappropriate measure of indigence because it is extremely outdated and does not account for differences in cost of living across geographic areas.¹⁴⁵ The federal poverty level is still pegged to “three times the cost of a minimum diet in 1963,” when it was created.¹⁴⁶ Advocates for updating the federal poverty line explain that its spending assumptions are based on people’s lives six decades ago, and it does not take into account that families spend a much higher percentage of their income on rent today than in the past.¹⁴⁷ Experts have found that if the same calculation actually reflected today’s cost of living, the poverty line would be three times higher than it is.¹⁴⁸ As such, many people living above — and even well above — the federal poverty level still have little to no disposable income.¹⁴⁹

For that reason, the Fines and Fees Justice Center recommends that states use the “‘very low’ individual income limit” set by the Department of Housing and Urban Development (HUD) instead of the federal poverty line when setting guidelines about ability to pay.¹⁵⁰ The HUD standard is updated yearly and sets different numbers for each state — and each county

143. GA. CODE ANN. § 42-8-102(e)(1)(B) (2022); 725 ILL. COMP. STAT. 5/124A-20(a) (2022); MISS. CODE ANN. § 99-19-20.1 (2023); ENROLLED H.B. 2259, 2023 Leg., 59th Sess. (Okla. 2023) § 983(B)(5); 12 R.I. GEN. LAWS § 12-20-10(b) (2023); WASH. REV. CODE §§ 10.01.160(3) (2022), 10.101.010 (2022), 10.01.180(3)(b) (2022).

144. See 725 ILL. COMP. STAT. 5/124A-20(a)(2) (2022).

145. See Press Release, Kevin Mullin, Rep., U.S. House of Reps., Rep. Mullin Leads National Coalition to Introduce Legislation to Modernize the Federal Poverty Line (Dec. 6, 2023), <https://kevinmullin.house.gov/media/press-releases/rep-mullin-leads-national-coalition-introduce-legislation-modernize-federal> [<https://perma.cc/GQC2-WTZG>].

146. Claire Thornton, *Decades-Old Us Poverty Level Formula ‘Makes No Sense’ in 2022, Experts Say. Here’s Why It’s Still Used.*, USA TODAY (Dec. 10, 2022), <https://www.usatoday.com/story/news/nation/2022/12/09/whyfederal-poverty-line-not-effective/10827076002/> [<https://perma.cc/XY2T-JJGX>].

147. See *id.*

148. See DEVUONO-POWELL ET AL., *supra* note 31, at 25.

149. See Celine-Marie Pascale, *Op-Ed: Why the Federal Poverty Line Doesn’t Begin to Tell the Story of Poverty in the U.S.*, L.A. TIMES (Sept. 24, 2021), <https://www.latimes.com/opinion/story/2021-09-24/federal-poverty-level-us-families> [<https://perma.cc/VM5P-7KDT>].

150. See FINES & FEES JUST. CTR., FIRST STEPS TOWARDS MORE EQUITABLE FINES AND FEES PRACTICES: POLICY GUIDANCE ON ABILITY-TO-PAY ASSESSMENTS, PAYMENT PLANS, AND COMMUNITY SERVICE 4–5, 11 (2020), https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC_Policy_Guidance_Ability_to_Pay_Payment_Plan_Community_Service_Final_2.pdf [<https://perma.cc/4FR7-8GDS>].

— based on average income in the location.¹⁵¹ To date, however, no state has adopted the HUD income limits as part of their statutory waiver eligibility standard.¹⁵²

States also use means-tested public benefits as a shortcut to determine that a person is indigent.¹⁵³ The federal government and states have created public benefits programs to help those with very low incomes pay for essentials, such as food, housing, health insurance, and more.¹⁵⁴ Receipt of these benefits means that a government agency has tested the person's means and has found that the person needs financial assistance to meet basic needs.¹⁵⁵ As the DOJ has written, waiving fines and fees for people who receive public benefits “is logical” because “individuals who cannot afford to pay for their basic needs also cannot afford to pay fines and fees out of their already insufficient incomes.”¹⁵⁶ Including receipt of public benefits in the definition of indigence for purposes of waiving fines and fees also “conserves court resources by removing the obligation to conduct duplicative ability to pay assessments.”¹⁵⁷

In addition, some states include certain health and living statuses in their definitions of indigence or presumptions that people are unable to pay. Oklahoma, for example, provides that a court should presume a person is unable to pay if they have been “designated as totally disabled by any federal,

151. In 2024, for example, the “very low-income” limit for a family of four in Alabama is \$41,250, but in California it is \$55,650. See *FY 2024 Income Limits Documentation System*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.huduser.gov/portal/datasets/il/il2024/2024summary.odn?inputname=STTLT*0199999999%2BAlabama&selection_type=county&stname=Alabama&statefp=01.0&year=2024 [https://perma.cc/LJ2T-YDPD] (last visited Aug. 13, 2024) (Alabama); *FY 2024 Income Limits Documentation System*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.huduser.gov/portal/datasets/il/il2024/2024summary.odn?inputname=STTLT*0699999999%2BCalifornia&selection_type=county&stname=California&statefp=06.0&year=2024 [https://perma.cc/2LRC-Z689] (last visited Aug. 13, 2024) (California).

152. The Montana Supreme Court has adopted a Bench Card that instructs judges across the state to use the HUD guidelines as the basis for a complete waiver of both fines and fees. Mont. Sup. Ct. Bench Card (on file with National Center for Access to Justice). Although the Bench Card concepts are not yet incorporated into statutory law, they identify an approach that usefully articulates a bright line financial eligibility standard that does not rely on the federal poverty level.

153. See Robert Moffitt, *A Review of U.S. Federal and State Means-Tested Programs* (Univ. Mich. Ret. Rsch. Ctr., Working Paper No. 2018-376, 2018), <https://mrdrc.isr.umich.edu/wp-content/uploads/2024/04/wp376.pdf> [https://perma.cc/F4QH-JPPA].

154. See *id.*

155. See, e.g., *A Quick Guide to SNAP Eligibility and Benefits*, CTR. ON BUDGET & POL’Y PRIORITIES (Oct. 2, 2023), <https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits> [https://perma.cc/6R2H-95QV].

156. See Dear Colleague Letter, *supra* note 59, at 7.

157. Dear Colleague Letter, *supra* note 59, at 7.

state, or tribal disability services program,” and also if they receive “subsidized housing support through the Housing Choice Voucher program, the United States Department of Housing and Urban Development, or other state, local, or federal government housing subsidy program.”¹⁵⁸ Washington State includes in its definition of “indigent” a person who is “involuntarily committed to a public mental health facility,” as well as a person who “is homeless or mentally ill.”¹⁵⁹

Laws that protect people’s rights: (1) require courts to waive all fines and fees if a person is indigent; and (2) provide a generous definition of indigence. The following are examples of strong laws with regard to indigence standards:

Washington — Judicial Duty to Waive Fines and Fees for Indigent People. The law provides: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent.”¹⁶⁰

No Single State Provides the Most Generous Definition of “Indigent.” The following is a compilation of the most generous elements of various state laws. An “indigent person” is a person who meets one or more of the following criteria:

- He or she receives public assistance, including but not limited to¹⁶¹ the following governmental public benefits programs: Supplemental Security Income; Social Security Disability Insurance; Aid to the Aged, Blind and Disabled; Temporary Assistance for Needy Families; Supplemental Nutrition Assistance Program; General Assistance; Transitional Assistance; State Children and Family Assistance;¹⁶² Supplemental Nutrition for Women, Infants, and Children;¹⁶³ Refugee Resettlement Benefits;¹⁶⁴ Medicaid; poverty-related veteran’s benefits;¹⁶⁵ or tribal disability benefits.¹⁶⁶
- “His or her available personal income is 200% or less of the current poverty level.”¹⁶⁷
- He or she is homeless¹⁶⁸ or “receives subsidized housing support through the Housing Choice Voucher program, the United States

158. OKLA. STAT. ANN. tit. 22, § 983(5) (West 2023).

159. WASH. REV. CODE §§ 10.01.160(3) (2022), 10.101.010(3)(b) (2011).

160. *Id.* at § 10.01.160(3) (2022).

161. CONN. GEN. STAT. § 52-259b(b) (2023).

162. 725 ILL. COMP. STAT. 5/124A-20(a)(1) (2021).

163. ENROLLED H.B. 2259, 2023 Leg., 59th Sess. § 983(B)(5)(a)–(b) (Okla. 2023).

164. WASH. REV. CODE § 10.101.010(3)(a) (2011).

165. *Id.*

166. ENROLLED H.B. 2259, 2023 Leg., 59th Sess. § 983(B)(5)(a) (Okla. 2023).

167. 725 ILL. COMP. STAT. 5/124A-20(a)(2) (2021).

168. WASH. REV. CODE § 10.01.160(3)(b) (2022).

Department of Housing and Urban Development, or other state, local, or federal government housing subsidy program[.]”¹⁶⁹

- He or she has been “designated as totally disabled by any federal, state, or tribal disability services program including but not limited to military disability, Social Security Disability Insurance, Supplemental Security Income, or tribal disability benefits[.]”¹⁷⁰
- He or she is mentally ill or has been “[i]nvoluntarily committed to a public mental health facility[.]”¹⁷¹
- He or she is, in the discretion of the court, unable to proceed in an action with payment of fines or fees and whose payment of those fines or fees would result in substantial hardship to the person or his or her family.¹⁷²
- Nothing in this section shall preclude the court from finding that a person whose income does not meet the criteria is indigent and unable to pay.¹⁷³

B. Codified Factors for Determining Ability to Pay When a Person Is Not Indigent

In the absence of an indigency standard, or in circumstances in which the person is not indigent, a person may still be unable to pay the entire sum.¹⁷⁴ However, apart from the few mandates to waive costs when a person is found indigent, as discussed above, there is little to no articulation of a standard of need that directs an outcome about what a person should pay, or be excused from paying.¹⁷⁵ Without codified rules on how judges must conduct such inquiries, the factors they must take into consideration, and the way in which they must determine ability to pay once the evidence is in hand, judges could reach wildly different conclusions.¹⁷⁶

Further, indigence standards based on bright-line income determinations have a troubling cliff effect, meaning that a person who makes just below the

169. ENROLLED H.B. 2259, 2023 Leg., 59th Sess. § 983(B)(5)(c) (Okla. 2023).

170. *Id.* at § 983(B)(5)(a).

171. *See* WASH. REV. CODE § 10.101.010(3)(b) (2011).

172. 725 ILL. COMP. STAT. § 5/124A-20(a)(3) (2021).

173. CONN. GEN. STAT. § 52-259b(c) (2023).

174. *See* DEBT SENTENCE, *supra* note 40, at 3.

175. *See, e.g., infra* note 176.

176. Research shows that in Tennessee, for example, where judges have flexibility to waive or reduce fines and fees but little guidance, judges in 14 counties waived the public defender fees less than 10% of the time, while judges in 19 counties waived those same fees more than 90% of the time. *See* THE SYCAMORE INST., HOW TENNESSEE JUDGES LOOK AT DEFENDANTS’ ABILITY TO PAY FEES AND FINES 4–5 (Dec. 20, 2021), <https://sycamoretn.org/wp-content/uploads/2021/12/2021.12.20-final-how-judges-consider-ability-to-pay-fees-and-fines.pdf> [<https://perma.cc/2RQ6-HDTQ>].

income cut-off might have all of their fines and fees waived, while a person who makes just above that level might be eligible for no relief.¹⁷⁷ As such, it is critical for judges to have discretion to waive fines and fees completely if the person is not indigent but is still unable to afford to pay, reduce fines and fees, set payment plans, and substitute community service for payment when they determine that a person is unable to pay the full amount without undue hardship to themselves or their family — and for states to provide clear guidance about when and how to do so.

A dozen states have codified factors that courts may or must consider in determining ability to pay.¹⁷⁸ In some states, however, these factors only come into play if a court is considering whether to incarcerate people for failure to pay.¹⁷⁹ The factors broadly fall into three categories: (1) income and assets; (2) debts and expenses; and (3) life circumstances. In addition to wages, income sources that some states require judges to consider include public benefits, child support, alimony, retirement income, and income from other family members.¹⁸⁰ Assets include real or personal property, ability to access credit, and assets generally.¹⁸¹ Notably, Oklahoma specifically provides that judges *may not* consider: “(a) child support income; (b) any monies received from a federal, state, or tribal government need-based or disability assistance program; or (c) assets exempt from bankruptcy.”¹⁸²

With regard to debts and expenses, states vary widely in what they require judges to consider. California, for example, does not require judges to consider debts or expenses at all.¹⁸³ Some states provide that judges should consider expenses and debts generally, while others enumerate more specific debts and expenses that judges should factor into their determination. These include: financial obligations to children and other dependents; medical costs; rent or mortgage payments; monthly bills, including food, utilities, and clothing; vehicle expenses; and case-related expenses, including restitution,

177. This is analogous to the “benefits cliff,” wherein when people’s income rises slightly above an income cut-off, they may lose eligibility for public safety net programs and benefits, leaving them worse off financially overall. *See generally* MATHIEU DESPARD, U.S. CHAMBER OF COM. FOUND., *BENEFIT CLIFFS: THE FINANCIAL RISKS OF INCREASED EARNINGS FOR WORKING FAMILIES* (Sept. 29, 2022), <https://www.uschamberfoundation.org/workforce/benefits-cliffs-financial-risks-increased-earnings-working-families> [<https://perma.cc/ZXA7-QB6Y>].

178. *See generally Fines and Fees*, NAT’L CTR. FOR ACCESS TO JUST., *supra* note 9.

179. *See, e.g.*, MICH. COMP. LAWS § 6.425(D)(3) (2024); COLO. REV. STAT. § 18-1.3-702(3)–(4) (2024); WASH. REV. CODE § 10.01.180(3) (2023).

180. *See* 725 ILL. COMP. STAT. 5/124A-20(c) (2021); 12 R.I. GEN. LAWS § 12-20-10(b)(1)(ii) (2022).

181. *See, e.g.*, N.H. R. CRIM. P. 29(e)(1)–(2) (2024).

182. OKLA. STAT. ANN. tit. 22, §§ 983(B)(4)(a)–(c) (West 2023).

183. CAL. GOV’T. CODE § 68645.2 (2023).

costs of court-ordered programs, and more.¹⁸⁴ With regard to life circumstances, states enumerate a broad range of factors. Some require judges to take into account the person's employment status, employment history, earning ability, and/or "employability."¹⁸⁵ A few states require judges to take into consideration a person's physical or mental health conditions.¹⁸⁶ Very few states require judges to consider a person's housing status, including whether the person is unhoused or living in public housing.¹⁸⁷

In certain circumstances, it can be important for judges to consider expenses. When a person with an income well above the poverty line has large medical debts that result in their having no disposable income, for example, they should be able to present that information to the judge for consideration. In general, however, requiring judges to consider expenses when determining ability to pay can raise two issues. First, it can open the door to bias and judgments about how a person spends their money, as was the case in Illinois where the judge routinely assumed that people could afford to pay if they smoke cigarettes, and in Michigan where the judge presumed that a person could pay if they had cable television.¹⁸⁸ Second, requiring people to prove expenses with bills and receipts can mire the process in paperwork, bogging judges down and creating a risk that they will lose the forest for the trees.

Laws that are most protective of people's rights: (1) include the broadest considerations about a person's employment status, health, and other life circumstances; and (2) exclude from consideration income and assets that the government or other courts have already deemed are necessary for the person to pay for basic necessities for themselves and other family members, i.e. public benefits and child support. Although no single state law was exemplary, Oklahoma provides the best example of factors to consider when determining ability to pay:

Oklahoma — Specific Factors Named When Determining Ability to Pay. Oklahoma provides the strongest guidance about what courts must — and may not — consider when determining ability to pay: In determining the ability of a defendant to pay, the court shall consider the following factors:

- individual and household income,

184. *See, e.g.*, 725 ILL. COMP. STAT. 5/124A-20(c) (2021); 12 R.I. GEN. LAWS § 12-21-20(b)(1) (2022).

185. *See, e.g.*, MICH. COMP. LAWS ANN. § 6.425(D)(3)(c)(ii) (2024).

186. *See, e.g.*, OKLA. STAT. ANN. tit. 22, § 983(B)(3)(f) (West 2023); WASH. REV. CODE § 10.01.180(3)(c) (2023).

187. *See, e.g.*, COLO. REV. STAT. § 18-1.3-702(4)(a) (2023); WASH. REV. CODE § 10.01.180(3)(c) (2023).

188. BANNON ET AL., *supra* note 131, at 21–22.

- household living expenses,
- number of dependents,
- assets,
- child support obligations,
- physical or mental health conditions that diminish the ability to generate income or manage resources,
- additional case-related expenses to be paid by the defendant, and
- any other factors relevant to the ability of the defendant to pay.

In determining the ability of a defendant to pay, the following shall not be considered as income or assets:

- child support income,
- any monies received from a federal, state, or tribal government need-based or disability assistance program, or
- assets exempt from bankruptcy.¹⁸⁹

VII. GUIDING JUDGES IN SETTING FINES AND FEES

Even when states set out factors for judges to consider when determining ability to pay, across the country — beyond the few mandates to waive costs when a person is found indigent, as discussed above — there is little to no articulation of a standard that systematizes decision-making about what people should pay, or when they should be excused from paying, once pertinent factors have been considered. Studies show that, without clear standards, decision-making by judges varies widely, as one might expect, which means that justice can depend on where a person is arrested and the judge they go before on a given day.¹⁹⁰ In Tennessee, for example, a state without any such standard, judges in 14 counties waive the fee to appoint a public defender less than 10% of the time, while judges in 19 counties waive it more than 90% of the time.¹⁹¹ North Carolina requires judges to consider ability to pay before imposing restitution, encourages judges to consider ability to pay before imposing fines, and gives judges authority to waive fines and fees if “it would otherwise be unjust to require payment.”¹⁹² A recent study, however, found that judges in that state waive criminal financial obligations less than 4% of the time.¹⁹³ In 16 counties, judges

189. OKLA. STAT. ANN. tit. 22, § 983(B)(3)–(4) (West 2023).

190. *See, e.g., THE SYCAMORE INST., supra* note 176; ROCHELLE SPARKO ET AL., *supra* note 35.

191. THE SYCAMORE INST., *supra* note 176, at 4.

192. N.C. GEN. STAT. §§ 15A-1363 (1973), 15A-1340.36(a) (2021), 15A-1362 (1977).

193. ROCHELLE SPARKO ET AL., *supra* note 35, at 11.

waive these charges less than 1% of the time, making it practically nonexistent.¹⁹⁴

When there is a clear standard in place in the law, judges often abide by it. MyCitations, which began as a pilot in some California courts in 2019 and was implemented statewide in mid-2024, allows people with traffic citations to make online requests for: (1) a reduction in the price of a traffic ticket, (2) a payment plan, (3) community service in lieu of payment, or (4) more time to pay.¹⁹⁵ The tool, developed and maintained by the Judicial Council, asks litigants questions about income, benefits, household size, and expenses.¹⁹⁶ MyCitations is novel not only because of the dynamic aspects of its software, but because it incorporates a standard that determines whether and how much to reduce payments otherwise owed. Thus, it applies standard reduction rates to the amount a person owes if: (1) the person receives public benefits or (2) the person falls below a certain percentage of the federal poverty level.¹⁹⁷ By state law, the tool must recommend at least a 50% reduction in price if the person receives public benefits, but local courts can choose to set it to recommend a greater reduction in price; as a result the reduction levels are slightly different from one locale to another.¹⁹⁸ Furthermore, the law provides that, at minimum, courts must take into consideration whether a person's income is lower than 125% of the federal poverty level.¹⁹⁹ Based on local policy choices a court could, for example, set the tool to reduce the ticket price by 60% if the person is on public benefits or their income falls below 125% of the federal poverty level, and by 50% if their income falls between 125 and 200% of the federal poverty level. The results are then submitted to a judge, who makes a final decision.²⁰⁰ Research shows that 96% of the time judges' orders fell within \$10 of the tool's recommendation.²⁰¹ When people were ordered to pay \$100 or less, the collection rate was 70% but when people were ordered to pay \$500 or more the collection rate fell below 20%.²⁰² Additionally, locales

194. ROCHELLE SPARKO ET AL., *supra* note 35, at 11.

195. CAL. GOV'T CODE § 68645.2 (2023); CARA L. JENKINS ET AL., JUD. COUNCIL OF CAL., ONLINE INFRACTION ADJUDICATION AND ABILITY-TO-PAY DETERMINATIONS: ANNUAL LEGISLATIVE REPORT 8 (Feb. 2, 2024), https://www.courts.ca.gov/documents/Ir-2022-Online-infraction-adjudication-and-Ability-to-Pay-Determinations_2022.pdf [https://perma.cc/G8XB-UERM].

196. *Id.*

197. CAL. GOV'T CODE § 68645.2 (2023).

198. *Id.*

199. *Id.*

200. *Id.*

201. JENKINS ET AL., *supra* note 195, at 8–9.

202. CARA L. JENKINS ET AL., JUD. COUNCIL OF CAL., ONLINE INFRACTION ADJUDICATION AND ABILITY-TO-PAY DETERMINATIONS: ANNUAL LEGISLATIVE REPORT 11 (2024),

were most successful at collecting fines and fees when monthly installments were set at \$25.²⁰³

What follows are different examples of income brackets, ability to pay calculators, bench cards, formulae, and other tools that states or localities have developed to guide judges so that after determining ability to pay, they next decide how to modify fines and fees to be commensurate with the person's ability to pay.

A. Judicial Requirement to Use Income Brackets to Modify Assessments and Eliminate Cliff Effect

Illinois provides clear income brackets for judges to use in modifying assessments when a person does not meet its definition of indigence.²⁰⁴ Specifically, Illinois law provides that the court shall grant a full waiver if the person's income falls below 200% of the federal poverty level.²⁰⁵ If the person's income falls between 200 and 250% of the federal poverty level, the judge shall waive 75% of the fines and fees.²⁰⁶ If the person's income falls between 250 and 300% of the federal poverty level, the court shall waive 50% of fines and fees.²⁰⁷ And if the person's income falls between 300 and 400% of the federal poverty level, the court shall waive 25% of fines and fees.²⁰⁸ For each, the law provides an exception if the person has non-exempt assets that allow the person to pay without undue hardship.²⁰⁹

The exempt assets referenced include, for example, interest in a home up to \$15,000, interest in a motor vehicle up to \$2,400, and up to \$4,000 in other property.²¹⁰ These exemptions seek to ensure that fines and fees do not

<https://www.courts.ca.gov/documents/lr-2024-online-infraction-adjudication-ability-to-pay-determinations-Stats.2021-ch-79.pdf> [<https://perma.cc/YNC9-DGWB>].

203. JENKINS ET AL., *supra* note 195, at 9.

204. 725 ILL. COMP. STAT. 5/124A-20 (2021). This statutory scheme applies to assessments imposed for generic felony offenses (705 ILL. COMP. STAT. 135/15-5); felony drug offenses (705 ILL. COMP. STAT. 135/15-15); felony sex offenses (705 ILL. COMP. STAT. 135/15-20); generic misdemeanor offenses (705 ILL. COMP. STAT. 135/15-25); misdemeanor drug offenses (705 ILL. COMP. STAT. 135/15-35); and misdemeanor sex offenses (705 ILL. COMP. STAT. 135/15-40).

205. 725 ILL. COMP. STAT. 5/124A-20(b)(1) (2021).

206. *Id.* § 124A-20(b)(2)(A).

207. *Id.* § 124A-20(b)(2)(B).

208. *Id.* § 124A-20(b)(2)(C).

209. *Id.* § 124A-20(b)(2)(A)–(C). This statutory scheme applies to assessments imposed for generic felony offenses (705 ILL. COMP. STAT. 135/15-5); felony drug offenses (705 ILL. COMP. STAT. 135/15-15); felony sex offenses (705 ILL. COMP. STAT. 135/15-20); generic misdemeanor offenses (705 ILL. COMP. STAT. 135/15-25); misdemeanor drug offenses (705 ILL. COMP. STAT. 135/15-35); and misdemeanor sex offenses (705 ILL. COMP. STAT. 135/15-40).

210. 735 ILL. COMP. STAT. §§ 12-901 (2022), 12-1001 (2019).

render a person unhoused, unable to keep a vehicle — harming their ability to get to work — or maintain an interest in very modest property. The law also exempts from consideration the money the person receives from public assistance; veteran’s benefits; disability, illness, or unemployment benefits; alimony, support or maintenance “to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;” an award from crime victim’s reparations; a life insurance payment also “to the extent reasonably necessary for the support of the debtor any dependent of the debtor;” and more.²¹¹ These brackets provide one example of how a state may standardize fines and fees reductions when a person is not indigent but nevertheless has very limited income.

B. State-Created Ability to Pay Calculators

Another model, ability to pay calculators, can improve court efficiency by streamlining judicial decision-making, helping tailor fines and fees more closely to what people can afford to pay — as opposed to an across-the-board standard reduction, like in Illinois and in California with MyCitations — and make judicial fines and fees setting more standard across the board, so that justice depends less on the particular court or judge. Very few states, however, provide calculators for judges to use when determining how much to order a person to pay in fines and fees.²¹²

Ability to pay calculators can consider a person’s income, assets, expenses, and life circumstances, and provide judges with a clear recommendation about the amount of fines and fees the person can afford to pay. In 2018, Washington State created a Legal Financial Obligation (LFO) calculator that judges can use when determining ability to pay.²¹³ The tool identifies which fines and fees apply to a given charge, distinguishing between mandatory costs and those which may be waived or suspended under the law.²¹⁴ It then walks judges through an ability to pay evaluation to determine if the person meets the statutory bright-line standard of indigence, requiring them to waive the fines and fees if the person meets the standard.²¹⁵ For those who are not indigent, the tool helps judges “find an

211. *Id.* at § 12-1001.

212. Compare 725 ILL. COMP. STAT. 5/124A-20 and CAL. GOV’T CODE § 68645.2, with MICH. SUP. CT. STATE CT. ADMIN. OFF., ABILITY TO PAY WORKGROUP 2 (Apr. 20, 2015), <https://www.courts.michigan.gov/49d691/siteassets/reports/collections/abilitytopay.pdf> [<https://perma.cc/7VAE-39N2>].

213. See *LFO Calculator Project*, LFO CALCULATOR PROJ., <https://lfocalculator.org> [<https://perma.cc/5N62-DNZ8>]. Washington made the tool public so that prosecutors, defense attorneys, and individuals can use the tool in addition to judges.

214. See DELOSTRINOS ET AL., *supra* note 84, at 61.

215. DELOSTRINOS ET AL., *supra* note 84, at 61.

appropriate payment plan amount. In real time, the user can see the total minimum monthly payment and the time it would take a defendant to pay off the total amount.”²¹⁶

Washington recruited ten judges for a year-long pilot study of the calculator. Judges in the pilot program found the calculator useful in: (1) understanding which legal financial obligations they had to impose for each charge, and which were optional; (2) understanding how long it would take a person to pay off a given amount on a payment plan so they could set a reasonable timeframe; and (3) helping communicate what exactly the person owes.²¹⁷ Judges said the tool helped make their questioning about a person’s ability to pay more formal and consistent across cases.²¹⁸ A judge also said of the tool: “I was always very aware of fines and fees, but now, it really dawned on me how many people in my courtroom can’t pay. This has been very eye opening how dire people’s financial situation is.”²¹⁹ Importantly, though, most Superior Court judges indicated that the calculator itself had limited utility because most people who appeared before them were indigent, so they were going to order them to pay only the mandatory minimums regardless.²²⁰

C. Day Fines: An Alternative Formula for Setting Fines and Fees Amounts Based on Severity of Offense and Income

Instead of the fixed-fine system used in the United States, where people owe the same amount regardless of their financial resources, many places in Europe and South America use a “day fine” system to determine what a person is able and obligated to pay.²²¹ Although the specifics of each system differ, day fines are calibrated to a person’s income.²²² In Germany, for example, each offense is assigned a number of “fine units” — from 5 to 360 — indicating the seriousness of the offense.²²³ To set a fine, a court

216. DELOSTRINOS ET AL., *supra* note 84, at 61.

217. DELOSTRINOS ET AL., *supra* note 84, at 63.

218. DELOSTRINOS ET AL., *supra* note 84, at 64.

219. DELOSTRINOS ET AL., *supra* note 84, at 65.

220. DELOSTRINOS ET AL., *supra* note 84, at 66. In 2023, Washington partially addressed this issue by amending the law to require judges to waive assessments that were formerly mandatory — including a \$500 assessment for each felony conviction — “if the court finds that the defendant, at the time of sentencing, is indigent” See H.R. 1169, 2023–24 Leg., Reg. Sess. (Wash. 2023).

221. EDWIN W. ZEDLEWSKI, NAT’L INST. OF JUST., ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE 3–5 (Apr. 2010).

222. Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 56 (2017).

223. Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 8 U. CHI. L. REV. 1869, 1875 (2018).

determines a person's daily income and multiplies the "fine units" by the amount of income the person brings home in a day.²²⁴ So, for example, a person charged with an offense worth 10 fine units who makes €100 per day would owe €1,000, while a person who makes €50 per day would owe €500.²²⁵ The theory is that day fines create more equity across income levels, ensuring that punishments are felt more equitably.²²⁶ On one end of the spectrum, people with low incomes are harmed less by unaffordable fines. On the other end, day fines create a greater deterrent effect for people with high incomes, who may be able to pay a basic fixed fine with little concern.²²⁷

Starting in the 1980s, some U.S. jurisdictions experimented with day fines, including: Staten Island, New York; Maricopa County, Arizona; Bridgeport, Connecticut; Polk County, Iowa; several counties in Oregon; Milwaukee, Wisconsin; and Ventura County, California.²²⁸ Research on these pilot programs showed that they had potential to increase local revenues by increasing collection rates, reducing the costs of collecting unpaid debt, and enforcing sanctions.²²⁹ Judges were able to ascertain people's income and set fines accordingly.²³⁰ So why did these experiments with day fines largely end in the United States? As one scholar explained, these experiments were launched in the 1980s and 1990s, when tough-on-crime policies reached their peak and there was little appetite for less punitive criminal legal policies.²³¹

Today, Oklahoma is the only state with a statewide day fines law on the books.²³² It provides that when a judge orders a suspended sentence, they may order a person "to pay day fines not to exceed fifty percent (50%) of the net wages earned. For purposes of this paragraph, 'day fine' means the offender is ordered to pay an amount calculated as a percentage of net daily wages earned."²³³ Practitioners, however, report that day fines there are seldom, if ever, ordered.²³⁴ The New York City Council has recently begun

224. *Id.*

225. *Id.*

226. See Colgan, *supra* note 222, at 57.

227. See DAY FINES IN EUROPE: ASSESSING INCOME-BASED SANCTIONS IN CRIMINAL JUSTICE SYSTEMS 1, 13, 48, 74–75 (Elena Kantorowicz-Reznichenko & Michael Faure eds., 2021).

228. See Colgan, *supra* note 222, at 104–11.

229. See Schierenbeck, *supra* note 224, at 1875.

230. Schierenbeck, *supra* note 224, at 1875.

231. See Colgan, *supra* note 222, at 59.

232. See *Fines and Fees*, NAT'L CTR. FOR ACCESS TO JUST., *supra* note 9.

233. 22 OKLA. STAT. ANN. § 991a(A)(1)(y) (2014).

234. Interview with Ed Wunch, Att'y, Okla. Legal Aid (May 4, 2023, 10:00 AM).

to consider making a fresh start of these experiments in the form of a possible day fine program for civil violations in the city.²³⁵

D. Formulae from Bench Cards on Ability to Pay that Direct Certain Outcomes Regarding Amounts to Order or Waive

Few states have statutes that provide indigency standards or lay out factors for judges to consider in setting fines or fees — and fewer still provide guidance in the statutes about what judges must or even may do once they have considered those factors.²³⁶ Bench cards — resources for judges to help them in decision-making — sometimes attempt to fill that void.²³⁷ There are more than 20 bench cards — for all judges statewide or created by smaller jurisdictions — that touch on what a judge should do when considering ability to pay and after determining ability to pay.²³⁸ Bench cards summarize

235. See Eliza Shapiro, *If You Double-Park and You're Rich, Should You Pay a Higher Fine?*, N.Y. TIMES (May 7, 2023), <https://www.nytimes.com/2023/05/04/nyregion/nyc-fines-income.html> [<https://perma.cc/FDE5-GL8N>].

236. See *infra* Sections IV.A, IV.B.

237. See, e.g., Bret Crow, *Bench Card Offers Guidance on Collection of Court Fines, Costs*, CT. NEWS OHIO (Feb. 4, 2014), https://www.courtnewsOhio.gov/happening/2014/benchCards_020414.asp (“The bench card briefly explains the differences between court costs and fines, when enforcing fines by incarceration is appropriate, and the process for a court to substitute community service as payment for court costs. It also includes citations to state statutes and court cases.”).

237. See, e.g., *id.*

238. See *Bench Cards*, NAT’L CTR. FOR CTS. (2024), <https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-management-and-performance/Fines,-Fees-and-Bail-Practices-Resource-Center/bench-cards> [<https://perma.cc/LXL7-URAC>] (listing nine bench cards); see also ARK. ADMIN. OFF. OF THE CTS., DISTRICT COURT BENCHBOOK (2017), <https://www.arcourts.gov/sites/default/files/DistrictCourtBenchbookRev2017.pdf> [<https://perma.cc/4PGY-8K2C>]; CAL. CTR. FOR JUDICIARY EDUC. & RSCH., JUD. COUNCIL OF CAL., CALIFORNIA JUDGES BENCHGUIDE 83: RESTITUTION (2014), <https://victims.ca.gov/uploads/2021/01/Benchguide.pdf> [<https://perma.cc/L2ZC-KQQ9>]; EDUC. COMM. OF THE FLA. CONF. OF CNTY. CT. JUDGES, COUNTY COURT BENCH BOOK: CRIMINAL EDITION (July 2003), <http://davidsilverman.com/Criminal%20Law%20Bench%20Book.htm> [<https://perma.cc/FR2P-JTSD>]; JUD. COUNCIL OF GA., GEORGIA MISDEMEANOR BAIL PRACTICES (May 2021), <https://jcaoc.georgiacourts.gov/wp-content/uploads/sites/6/2021/05/Misdemeanor-Bail-Practices-Bench-Card—May-2021-Revision.pdf> [<https://perma.cc/9ZA5-DGA3>]; BOS. MUN. CT. & DIST. CT. WORKING GRP., THE BOSTON MUNICIPAL COURT AND DISTRICT COURT SENTENCING BENCH BOOK (Apr. 2021), <https://www.mass.gov/doc/sentencing-bench-book-for-the-district-court-and-boston-municipal-court/download> [<https://perma.cc/6DEH-XML8>]; MO. CTS., LAWFUL ENFORCEMENT OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES (2021), [https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/c6942599d39f5bea8625815a0062967e/\\$FILE/Lawful%20Enforcement%20of%20Legal%20Financial%20Obligations%20a%20Bench%20Card%20for%20Judges.pdf](https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/c6942599d39f5bea8625815a0062967e/$FILE/Lawful%20Enforcement%20of%20Legal%20Financial%20Obligations%20a%20Bench%20Card%20for%20Judges.pdf) [<https://perma.cc/VP8L-TSEV>]; MO. CTS., ALTERNATIVE SANCTIONS: A BENCH CARD FOR JUDGES (2021), <https://www.courts.mo.gov/file.jsp?id=168713> [<https://perma.cc/6A4G->

the law, and then often provide further guidance to judges about how to apply the law.²³⁹ Very few bench cards provide clear procedures for what a judge should do once they have considered a person's financial circumstance, but some provide useful guidance:

Mecklenburg County, North Carolina — Guidelines Based on Monthly Income. The bench card in the Mecklenburg County District Court in North Carolina provides guidance for judges on how to calculate ability to pay. It states that, “[t]he monthly payment amount for [legal financial obligations] should be set to a level proportionate to the individual’s ability to pay and to the offense. Guideline: 10% of net monthly income after basic living expenses.”²⁴⁰

Michigan — Guidelines Based on Exempt Money. Michigan’s bench card provides guidance about how much money should be exempted from fines and fees payments. The bench card refers judges to the Michigan Supreme Court Ability to Pay Workgroup ability to pay calculator, which provides that at minimum judges should allow individuals to keep \$217.50 per week, which is 30 times the federal minimum wage.²⁴¹

XAH3]; N.M. JUD. EDUC. CTR., NEW MEXICO TRAFFIC CITATIONS MANUAL: A LEGAL AND PROCEDURAL GUIDE (2004), <https://accesstojustice.nmcourts.gov/wp-content/uploads/sites/32/2023/11/NM-Traffic-Citations-Manual.pdf> [<https://perma.cc/8T9R-8G7P>]; OR. JUD. DEP’T, OREGON JUDGES CRIMINAL BENCHBOOK (2004), http://nfpca.org/Legal/bench/OR_CrimLawBenchBook_11.06.pdf [<https://perma.cc/MQW3-4F3E>]; ALICE BECK DUBOW, ET AL., SUPER. CT. OF PA., PENNSYLVANIA RESTITUTION BENCHBOOK 2020 (July 2020), <https://www.pacourts.us/Storage/media/pdfs/20210526/234952-file-11360.pdf> [<https://perma.cc/B5FW-CHBF>]; S.C., JUD. BRANCH, SUMMARY COURT JUDGES BENCH BOOK, CRIMINAL SECTION § H (2000–2023), <https://www.sccourts.org/summaryCourtBenchBook/HTML/CriminalH.htm> [<https://perma.cc/ZNQ4-2ZAT>]; UTAH STATE CTS., 2023 UNIFORM FINE SCHEDULE (May 16, 2023), https://legacy.utcourts.gov/rules/appendices/Appendix_C/Uniform_Fine_Schedule.pdf [<https://perma.cc/VU4N-ZRJG>]; WIS. SUP. CT., DIR. OF STATE CTS., OFF. OF JUD. EDUC., WISCONSIN MUNICIPAL JUDGE BENCHBOOK (2020), <https://www.wicourts.gov/publications/guides/docs/munibenchbook.pdf> [<https://perma.cc/8ZMD-XKJ4>]; WYO. CONF. OF MUN. CTS. BENCHBOOK COMM., BENCH BOOK (May 2009), <http://www.wymc.net/docs/2009Benchbookcompiled5.pdf> [<https://perma.cc/UJM7-EUFL>].

239. *See, e.g.*, MECKLENBURG CTY. DIST. CT., BENCH CARD: IMPOSITION OF FINES, COSTS, FEES, AND RESTITUTION, https://www.ncsc.org/__data/assets/pdf_file/0026/64493/NC-Mecklenburg.pdf [<https://perma.cc/54W3-367P>].

240. *Id.*

241. MICH. JUD. INST., DETERMINING THE ABILITY TO PAY IN THE COLLECTION OF COURT ORDERED FINANCIAL OBLIGATIONS (Apr. 30, 2021), https://www.ncsc.org/__data/assets/pdf_file/0024/64491/MI-Ability-to-Pay-Benchcard.pdf [<https://perma.cc/MS8W-N96H>]; MICH. STATE CT. ADMIN. OFF., TOOLS AND GUIDANCE FOR DETERMINING AND ADDRESSING AN OBLIGOR’S ABILITY TO PAY (Apr. 20, 2015), <https://www.courts.michigan.gov/49d691/siteassets/reports/collections/abilitytopay.pdf>

Montana — Presumption of Waiver for Indigence. A new bench card in Montana reminds judges that, under the law, they may not impose fines and fees unless the person is or will be able to pay. It lays out a presumption of inability to pay, which requires waiver of all fines and fees, if the person:

- is eligible for representation by a public defender
- receives needs-based public assistance
- earns less than 100% of HUD’s “very low income” limit
- spent time in a residential mental health facility in the last six months
- has a developmental, total, or permanent disability
- is a minor
- has experienced homelessness in the last 12 months
- is “currently in custody, sentenced to custody for at least 6 months, or released from a term of jail/prison within the last 12 months;” or
- is a full-time student.²⁴²

VIII. PRACTITIONER-CREATED TOOLS THAT INCORPORATE A FINANCIAL STANDARD TO ADVOCATE FOR WAIVER OR SPECIFIC REDUCTION OF FINES AND FEES

In the absence of meaningful ability to pay assessments codified in state law, practitioners have created their own tools to assess a client’s ability to pay and advocate for a waiver or a reduction. The following are examples of tools that advocates have created that may be replicable in other jurisdictions.

A. An Ability to Pay Calculator That Lowers the Burden of Proving Expenses

Providing documentation of monthly expenses — which many courts ask about when determining ability to pay — is often difficult, particularly if people are unhoused, moving often, and having trouble keeping documents with them.²⁴³ Even when people do not move often, it can be hard to keep and tally grocery bills and other costs of basic living supplies. Rent bills can be hard to come by for people who pay in cash and have no formal bills

[<https://perma.cc/5JRT-ADCV>]; *id.* at app. A; *id.* at app. E; *id.* at app. F; *id.* at app. H; *id.* at app. I; *id.* at app. J.

242. MONTANA BENCH CARD (on file with Fordham National Center for Access to Justice).

243. See GOV’T ACCOUNTABILITY OFF., HOMELESSNESS: BARRIERS TO OBTAINING ID AND ASSISTANCE PROVIDED TO HELP GAIN ACCESS 1 (2024), <https://www.gao.gov/assets/d24105435.pdf> [<https://perma.cc/B7R8-A2DL>] (“Homeless individuals often lack a reliably safe place to store IDs and other important personal documents, making these items subject to loss, destruction by the elements, and theft. Items may also be discarded when these individuals and their belongings are removed from an area.”).

issued.²⁴⁴ Recognizing this challenge, Alex Kornya, the Litigation Director and General Counsel of Iowa Legal Aid, created an online ability to pay calculator that auto-populates with expense assumptions the Internal Revenue Service uses in determining how to collect back taxes.²⁴⁵

The online tool, abilitytopay.org, asks litigants to enter basic information, including: where do you live, how many people are in your household, and how many cars do you have?²⁴⁶ It then asks about the person's total income, both from wages and benefits. It also asks about expenses that are particular to that person, including child support payments, back taxes, consumer debt, and other court debts.²⁴⁷ Instead of asking a person to provide information about and prove all of their monthly expenses, the tool uses assumptions from the IRS's Collections Financial Standards, findings that the IRS has made about how much an average household that size — in that particular county — spends.²⁴⁸ The IRS has created and made public national standards for five basic necessities that it uses when calculating people's ability to pay back taxes: food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous.²⁴⁹ It has also created standards for each individual county for: average costs of housing and utilities,²⁵⁰ the cost of owning and operating vehicles in each region of the country,²⁵¹ and national standards for out-of-pocket healthcare costs.²⁵²

The tool auto-populates with each of these numbers, greatly reducing the burden for litigants to try to estimate — or prove — how much they spend on each of these necessities each month.²⁵³ If the person spends more than

244. Tim Parker, *Do You Need a Rent Receipt?*, INVESTOPEDIA (Aug. 28, 2023), <https://www.investopedia.com/articles/personal-finance/091214/do-you-need-rent-receipt.asp> [https://perma.cc/E24Q-JKJW].

245. See *Iowa Ability to Pay Calculator*, IOWA LEGAL AID <https://abilitytopay.org/interview?i=docassemble.ATPCalculator:data/questions/ATP.yml#page1> [https://perma.cc/ZE9M-BHUL] (last visited Aug. 22, 2024).

246. *Id.*

247. *Id.*

248. *Id.*

249. *National Standards: Food, Clothing and Other Items*, IRS (Apr. 22, 2024), <https://www.irs.gov/businesses/small-businesses-self-employed/national-standards-food-clothing-and-other-items> [https://perma.cc/LGA8-JEXP].

250. See *Local Standards: Housing and Utilities*, IRS (Apr. 22, 2024), <https://www.irs.gov/businesses/small-businesses-self-employed/local-standards-housing-and-utilities> [https://perma.cc/5PS9-EZC6].

251. See *Local Standards: Transportation*, IRS (Apr. 22, 2024), <https://www.irs.gov/businesses/small-businesses-self-employed/local-standards-transportation> [https://perma.cc/KC8J-ZDLZ].

252. See *National Standards: Out-of-Pocket Health Care*, IRS (Apr. 22, 2024), <https://www.irs.gov/businesses/small-businesses-self-employed/national-standards-out-of-pocket-health-care> [https://perma.cc/DVF8-ZTDY].

253. See *Iowa Ability to Pay Calculator*, *supra* note 246.

the IRS Collections Financial Standards provide for any of the monthly expenses, they have the option of entering the actual number instead and providing documentation of their higher expenses.²⁵⁴ The tool then calculates how much a person can pay monthly, based on how much disposable income they have and generates an affidavit that the person can submit to the court.²⁵⁵ Because most litigants have no disposable income, the tool most often recommends a payment plan of \$1 per month, which Kornya says creates accountability but is manageable for people with even the most modest means.²⁵⁶

B. A Different Approach to Reach a Waiver or Specific Payment Outcome: Hardship Is Not a Number

“Hardship is not a number. It’s a story,” said Ed Wunch, an attorney at Oklahoma Legal Aid who represents people when they have been unable to pay fines and fees and become delinquent.²⁵⁷ Mr. Wunch has developed a questionnaire that he provides to litigants to help understand their financial hardship.²⁵⁸ The form asks about receipt of public benefits — which would make a person eligible for waiver under Oklahoma’s indigency standards adopted in 2023 — but it goes on to ask questions that could help to paint a picture quickly for the judge of the person’s financial circumstances.²⁵⁹ These include: have you ever used a food pantry or food donation service; when was the last time you stayed with family or friends because you could not afford housing; what is the highest paying job you have ever had; what is the highest paying job you have had since incarceration; what was the last emergency you faced where you needed money; and much did it cost and were you able to get it?²⁶⁰

Mr. Wunch then uses the answers in this questionnaire and, during a cost hearing, asks the judge to swear the person in so they can hear directly about the person’s living circumstances.²⁶¹ He sometimes submits the person’s social security earnings history or benefits verification letters, but mostly

254. *Iowa Ability to Pay Calculator*, *supra* note 245.

255. *Iowa Ability to Pay Calculator*, *supra* note 245.

256. Interview with Alex Kornya, Litig. Dir. & Gen. Couns., Iowa Legal Aid (Nov. 8, 2023, 12:00 PM).

257. Interview with Ed Wunch, Att’y, Okla. Legal Aid (May 4, 2023, 10:00 AM).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

relies on the stories.²⁶² Bills, he said, are too long and judges often get bogged down in the weeds of computing how much people owe.²⁶³

Mr. Wunch said that the first hearing he ever did was with a mother of four children who earned so little that she received the Earned Income Tax Credit (EITC) — a credit the federal government gives to low-income earners to provide a tax break.²⁶⁴ She had used some of the money from her EITC to pay off some of her fines and fees already, so Mr. Wunch was not asking for a waiver, but rather for the judge to reduce the fines and fees to what the woman had already paid.²⁶⁵ In a short hearing, the judge heard about how paying off the remaining fines and fees would mean that the woman's children would have to go without food.²⁶⁶ The judge waived the remaining fines and fees.²⁶⁷

After the passage of HB 2259 in 2023, which requires all counties in Oklahoma to hold cost hearings at least once per month, Mr. Wunch has started to provide trainings to judges and other practitioners across the state to replicate the kind of ability to pay considerations he has been relying on over the past years.²⁶⁸ These hearings provide a promising way to bring fines and fees to levels that people can more easily afford to pay.²⁶⁹ Other state models provide alternative — or complimentary — ways to bring fines and fees more in alignment with people's financial abilities.

IX. POLICY ALTERNATIVES TO DEMANDING FULL, IMMEDIATE FINES AND FEES PAYMENT

When people cannot afford to pay fines and fees immediately, it is best for courts to waive or reduce the fines and fees to an amount they can afford to pay. The U.S. Supreme Court has held, however, that the State has the right to enforce judgments against those who are unable to pay.²⁷⁰ To

262. *Id.*

263. *Id.*

264. *Id.* For information on the Earned Income Tax Credit, see *Earned Income Tax Credit (EITC)*, IRS, <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credits> [https://perma.cc/6KEC-BZC8] (last visited Jul. 29, 2024).

265. Interview with Ed Wunch, *supra* note 257.

266. Interview with Ed Wunch, *supra* note 257.

267. Interview with Ed Wunch, *supra* note 257.

268. Interview with Ed Wunch, *supra* note 257.

269. In the first six months of 2024, judges waived more than \$1 million in fines and fees previously charged to Ed Wunch and his colleagues conducting such hearings. Conversation with Ed Wunch, Att'y, Okla. Legal Aid (June 20, 2024, 4:00 PM).

270. See *Williams v. Illinois*, 399 U.S. 235, 244 (1970) (finding that “[t]he State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.”).

provide greater flexibility for judges to match penalties to the particular circumstances of the case, some states have created alternatives to paying fines and fees in full up front.²⁷¹ The alternatives include allowing community service in lieu of payment and authorizing people to pay in installments over time.²⁷² The U.S. Supreme Court has supported such alternative approaches to unaffordable fines and fees:

[G]iven the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine . . . a sentencing court can often establish a reduced fine or alternative public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence²⁷³

A. Programming, Education, and Community Service as Alternatives to Fines and Fees

Giving people the option to participate in court-ordered programs, education, and community service in lieu of paying fines and fees can be beneficial to people who can't afford to pay — but only when there are strong guardrails in place to ensure the options are fair and reasonable. The DOJ has recognized that community service orders can:

[E]xact a financial consequence if individuals are required to pay costs for participation, take unpaid leave from their jobs, pay for childcare, or miss educational opportunities to fulfill it. And if the available alternatives are limited, disproportionate, or imposed without regard for an individual's circumstances, they can have the unintended consequence of imposing a greater burden on the defendant than the original fine.²⁷⁴

Ordering community service in lieu of paying fines and fees can be particularly unfair when participants are credited at low hourly rates. In Virginia, for example, people who complete community service to pay down fines and fees in some jurisdictions are credited at minimum wage, \$7.25 per hour.²⁷⁵ At such a low rate — and with no statutory cap — it could take people months or even years to work off their debts, hampering their abilities

271. *See, e.g.*, NEB. REV. STAT. § 29-2206(2) (2020); VA. CODE ANN. § 19.2-354.1(B) (2024); TENN. CODE ANN. § 40-24-105(b)(2) (2021); TEX. CODE CRIM. PROC. ANN. art. 43.091 (West 2023).

272. *See, e.g.*, NEB. REV. STAT. § 29-2206(2) (2020); VA. CODE ANN. § 19.2-354.1(B) (2024); TENN. CODE ANN. § 40-24-105(b)(2) (2021); TEX. CODE CRIM. PROC. ANN. art. 43.091 (West 2023).

273. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

274. ACCESS TO JUSTICE SPOTLIGHT, *supra* note 90, at 20 (internal quotations omitted).

275. Phil Hernandez et al., *Set Up to Fail: How Court Fines & Fees Punish Poverty and Harm Black Communities in Virginia*, THE COMMONWEALTH INST. (Jan. 14, 2021), <https://thecommonwealthinstitute.org/research/set-up-to-fail-how-court-fines-fees-punish-poverty-and-harm-black-communities-in-virginia-2/> [<https://perma.cc/NH5T-H363>].

to focus on work, spend time with family, and get and stay healthy.²⁷⁶ The punishment can thus become grossly disproportionate to the crime.

For that reason, the Missouri judiciary's bench card provides an important warning for judges considering ordering community service in lieu of fines and fees: "*Caution*: Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual."²⁷⁷ Similarly, the DOJ has cautioned that "[j]urisdictions that receive federal financial assistance must also ensure that individuals with disabilities can access community service options, including by making reasonable modifications to community service requirements, and that litigants who have limited English proficiency have meaningful language access to community service activities."²⁷⁸ The Department has further recommended that states adopt a wide and flexible definition of community service because jurisdictions with such definitions "are better able to ensure that the service a court assigns does not inadvertently impose a greater burden than the financial penalty the service replaced. What's more, jurisdictions with flexible definitions have the benefit of being able to offer options that further rehabilitative goals and improve public safety."²⁷⁹

Policies regarding community service as an alternative to paying fines and fees are strongest when they: (1) include a broad definition of community service so that judges may order programs and services that help to create stability in people's lives; (2) take into account a person's life circumstances when deciding whether to order community service and how much; (3) allow people to select community service in place of paying fines and fees; and (4) place a time limit on the community service requirement. The following are exemplary:

Texas — Broad Definition of Community Service and Authority to Waive It. The Texas Code of Criminal Procedure provides the broadest definition of "community service" of any state law reviewed. Its definition

276. Steven Robinson, for example, completed more than 1,000 hours of community service to reduce more than \$12,000 in court fines and fees. *See* Rebecca Beitsch, *An Alternative to Paying Court Debt: Working It Off*, STATELINE.ORG (Apr. 4, 2017, 12:00 AM), <https://stateline.org/2017/04/04/an-alternative-to-paying-court-debt-working-it-off/> [<https://perma.cc/YMW9-WGC9>].

277. COURTS.MO.GOV, *LAWFUL ENFORCEMENT OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES*, [https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/c6942599d39f5bea8625815a0062967e/\\$FILE/Lawful%20Enforcement%20of%20Legal%20Financial%20Obligations%20a%20Bench%20Card%20for%20Judges.pdf](https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/c6942599d39f5bea8625815a0062967e/$FILE/Lawful%20Enforcement%20of%20Legal%20Financial%20Obligations%20a%20Bench%20Card%20for%20Judges.pdf) [<https://perma.cc/6NA5-J97Z>] (emphasis in original) (last visited July 30, 2024).

278. ACCESS TO JUSTICE SPOTLIGHT, *supra* note 90, at 21.

279. ACCESS TO JUSTICE SPOTLIGHT, *supra* note 90, at 20.

includes attending “a work and job skills training program; . . . a preparatory class for the high school equivalency examination . . . an alcohol or drug abuse program; . . . a rehabilitation program; a counseling program, including a self-improvement program; . . . a mentoring program; or . . . any similar activity.”²⁸⁰ Texas also provides that a court may waive fines and community service in lieu of fines if such community service would pose an “undue hardship.”²⁸¹ In considering whether the person would face an undue hardship, the court may consider the person’s: “(1) significant physical or mental impairment or disability; (2) pregnancy and childbirth; (3) substantial family commitments or responsibilities, including child or dependent care; (4) work responsibilities and hours; (5) transportation limitations; (6) homelessness or housing insecurity; and (7) any other factor the court determines relevant.”²⁸²

Michigan — Another Broad Definition of Community Service. The Michigan Supreme Court Ability to Pay Workgroup recommends that judges consider at least the following alternatives to payment: Community service; good grades; completion of a class or program; school attendance; painting a mural in a courthouse or youth center; and teaching music.²⁸³ It recommends judges:

Find out what the obligor is passionate about or likes to do and figure out a creative way for him or her to channel that talent in a positive light within his or her community. It gives the obligor a great sense of accomplishment and makes them feel like he or she is a part of the community.²⁸⁴

Multnomah County, Oregon — High Reimbursement Rates and Caps on Community Service Requirements. Every two months, Legal Services Day, a program created by the Multnomah County District Attorney’s Office, gives people relief from outstanding fines and fees.²⁸⁵ The voluntary program gives people \$100 of credit towards their fines and fees for every hour of community service or treatment they complete, up to

280. TEX. CODE CRIM. PROC. ANN. art. 45.049(c)(2)(A)–(G) (West 2023).

281. TEX. CODE CRIM. PROC. ANN. art. 43.091(a)(2) (West 2019).

282. *Id.* at (b).

283. See MICH. STATE CT. ADMIN. OFF., TOOLS AND GUIDANCE FOR DETERMINING AND ADDRESSING AN OBLIGOR’S ABILITY TO PAY (2015), <https://www.courts.michigan.gov/49d691/siteassets/reports/collections/abilitytopay.pdf> [<https://perma.cc/J5UB-YXL2>].

284. *Id.*

285. For information on this initiative, see generally *Legal Services Day Flyer*, MULTNOMAH CNTY. DIST. ATT’Y (2019) [hereinafter *Legal Services Day Flyer*], <https://mcda.us/wp-content/uploads/2018/06/2019-Legal-Services-Day.pdf> [<https://perma.cc/KYX2-UCHH>]; *Legal Services Day Marks Successful One Year Anniversary*, MULTNOMAH CNTY. DIST. ATT’Y (2019), <https://www.mcda.us/indix.php/news/legal-services-day-marks-successful-one-year-anniversary> [<https://perma.cc/QH23-Y62T>] (last visited Jul. 30, 2024).

80 hours. After a person has completed 80 hours of services or treatment, any remaining balance of fines and fees is waived.²⁸⁶

B. Payment Plans

Many states allow judges to order people to pay fines and fees in installments or payment plans, but few states require judges to offer that option in every case.²⁸⁷ Nebraska, for example, only allows judges to order payment in installments if the court finds “that an offender is financially unable to pay [] fines or costs in one lump sum but is financially capable of paying in installments”²⁸⁸ Fewer still provide the option of a payment plan without an additional fee.²⁸⁹ Only four states mandate that anyone can choose to pay fines and fees on a payment plan if they cannot afford to pay immediately without incurring any additional fees or interest charges.²⁹⁰ At least nine states charge people for entering into payment plans.²⁹¹ Some impose late fees and other penalties if the person misses a payment.²⁹² A survey in California, for example, found that 71% of people on a payment plan had incurred a late fee.²⁹³ In addition to participation and late fees, interest can mean that people on payment plans pay more over time than people who can pay upfront. In Washington State, for example, until 2018 the state charged 12% interest on fines and fees.²⁹⁴ The Supreme Court there found the following:

[O]n average, a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed Consequently, indigent offenders owe higher LFO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount that they owe.²⁹⁵

286. See *Legal Services Day Flyer*, *supra* note 285.

287. See *generally Fines and Fees*, NAT’L CTR. FOR ACCESS TO JUST., *supra* note 9.

288. NEB. REV. STAT. § 29-2206(2) (2023).

289. See, e.g., ARIZ. REV. STAT. ANN. § 12-116(A) (West 2023); FLA. STAT. §§ 28.246(4)(b) (West 2022), 28.24(27)(c) (2021); OHIO REV. CODE ANN. § 2929.28(G)(2) (West 2023); W. VA. CODE § 50-3-2a(b)(1) (2022).

290. See *generally Fines and Fees*, NAT’L CTR. FOR ACCESS TO JUST., *supra* note 9.

291. ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 5 (2012), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-debt-toolkit-action> [https://perma.cc/S9RQ-63AK].

292. In a nationwide survey, 10% of people said they were charged late fees when they were unable to pay fines and fees on time. See DEBT SENTENCE, *supra* note 40, at 11.

293. See SAVER LIFE, HOW FINES AND FEES IMPACT LOW-INCOME CALIFORNIANS (2024); see also CAL. PENAL CODE § 1214.1 (West 2024).

294. See WASH. REV. CODE § 3.62.020(5) (2012).

295. *State v. Blazina*, 344 P.3d 680, 684 (Wash. 2015) (citations omitted).

As with overall determinations of ability to pay, it is important for states to create clear standards for judges to use in setting payment plan amounts so that they fall within a person's monthly ability to pay. A California study found that when courts set payment plans at \$25 per month, almost half of people paid.²⁹⁶ By comparison, when courts set monthly payment plans at \$50, payment rates dropped to just 27%.²⁹⁷ Ultimately, though, the utility of payment plans is limited unless courts first determine a person's ability to pay and set the overall amount accordingly. Even if monthly payment amounts are within reach, without an overall cap, people could be in debt for years. A study of the aforementioned MyCitations platform in California found that "[w]hile payment plans offer litigants short-term relief by easing the pressure that fine and fee obligations place on their monthly incomes, the total amount a litigant is ordered to pay is what is most strongly associated with successful case outcomes."²⁹⁸

Rights-protective statutes regarding payment plans: (1) allow anyone to opt to use a payment plan; (2) require judges to complete an ability to pay determination and modify the overall amount owed before creating the payment plan; (3) cap monthly payments; and (4) do not charge late fees, participation fees, or interest. The following provide strong examples:

Florida — Caps on Monthly Payment Amounts. Florida is a good example of providing guardrails for judges setting monthly payment plans, although it does not require judges to lower the total amount due so that people do not have to pay for years.²⁹⁹ The state recently enacted a law that provides that:

A monthly payment amount, calculated based upon all fees and all anticipated fees, service charges, court costs, and fines, is presumed to correspond to the person's ability to pay if the amount does not exceed the greater of: a. Two percent of the person's annual net income . . . ; or b. Twenty five dollars.³⁰⁰

Oklahoma — New Determination of Ability to Pay, Not Punishment, if a Person Misses a Monthly Payment. In Oklahoma, anyone can opt to pay fines and fees in installments.³⁰¹ A person is considered delinquent if the court has not received an installment payment within the last 90 days.³⁰² The court clerk must review cases for delinquency once every six months, notify the court about who is delinquent, and the court must set a cost hearing

296. JENKINS ET AL., *supra* note 195, at 7.

297. JENKINS ET AL., *supra* note 195, at 8.

298. JENKINS ET AL., *supra* note 195, at 8.

299. FLA. STAT. § 28.246(4)(b) (2022).

300. FLA. STAT. § 28.246(1) (2022).

301. OKLA. STAT. tit. 22, § 983 (2024).

302. *Id.* at (G)(1)(b).

to determine the person's current ability to pay, at which point the court can modify the monthly payments and waive or modify the total amount due.³⁰³ Once a hearing date has been set, "all court financial obligations shall be suspended until the cost hearing has been held."³⁰⁴

Delaware — Judges Barred from Charging Interest, Payment Plan Fees, and Late Fees. Delaware provides a good example of barring judges from charging interest or additional fees for payment plans or late payments. The law provides that:

- (3)a. A court may not impose an additional fee for any of the following:
1. The payment of a fine, fee, cost, assessment, or restitution that is made at designated periodic intervals.
 2. A late payment of a fine, fee, cost, assessment, or restitution.
 3. Supervision by probation of the payment of a fine, fee, cost, assessment, or restitution.
- b. A court may not charge interest for a payment of a fine, fee, cost, assessment, or restitution that is made late or at designated periodic intervals.
- c. A court may not charge a convenience fee for a payment made at a court designated payment kiosk or through an Internet-based court payment system.
- (4) A court may not charge a penalty, assessment, or fee to a defendant for a *capias* issued due to the defendant's nonpayment of a fine, fee, cost, assessment, or restitution.³⁰⁵

X. Conclusion

Millions of Americans are burdened by outstanding fines and fees that they cannot afford to pay.³⁰⁶ Meaningful ability to pay assessments can reduce these harms and create greater equity in the criminal legal system, yet courts do not reliably make them. When judges do make such determinations, they either must rely on their own *ad hoc* criteria, which can be rife with bias, or on policies that are incoherent, incomplete, and largely invisible to the public. Although no state has yet created a system that is worthy of replication in its entirety, states that are looking to improve their systems can look to innovations in other states for inspiration. Over the last few years, there has been tremendous progress in eliminating criminal court

303. *Id.* at (G)(2).

304. *Id.* at (A)(3).

305. DEL. H.R. 244, 151st. Gen. Assembly (2020–22).

306. An estimated 17 million families have experienced hardships paying for food, rent, and other basic necessities as a result of a parent's fines and fees. See DEBT SENTENCE, *supra* note 40, at 4.

fees altogether and rightsizing fines.³⁰⁷ Hopefully, the examples set forth here will help continue the momentum towards decriminalizing poverty.

307. See generally *Dozens of States and Localities are Driving Fee Elimination Reform*, END JUST. FEES, <https://endjusticefees.org> [<https://perma.cc/JF9W-BJJR>] (last visited Jul. 30, 2024).