

Fines and Fees in American Courts

An Overview of NCAJ's Fines and Fees Indexing Project

NCAJ National Center for
Access to Justice

About the National Center for Access to Justice

The National Center for Access to Justice (www.ncaj.org) works to advance the principle that everyone should have a meaningful opportunity to be heard, secure their rights and obtain the law's protection. We use research, data and analysis to expose how the justice system fails to live up to that ideal and, all too often, functions as a source of oppression. We work to identify and promote practices that can improve access to justice, and we measure existing laws and policies against those goals. The NCAJ makes its home at Fordham Law where it helps to guide the school's Access to Justice Initiative.

One of NCAJ's signature efforts is the Justice Index, an online resource that measures the performance of every US state against a set of more than 100 best policies to make the justice system broadly accessible and fair. The Fines and Fees Indexing Project is an extension of this work.

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Summary

State and local courts sentence millions of Americans to pay fines every year as punishment for an extraordinary range of offenses. Too often, they sentence struggling people to pay amounts they simply cannot afford and then punish them again for “failing” to come up with the money. Monetary sanctions are a necessary accountability tool, but in the United States they are so widely misused and abused that they effectively criminalize poverty.

We owe this ugly reality to a mix of bad policy choices and cruelty. The same monetary sanction that inconveniences an affluent person can prevent a poor family from paying the rent—but fines are usually set without regard to a person’s financial situation. When people *can’t* pay, courts often treat them as though they *refused* to pay—and the penalties are steep. People who don’t pay what they owe face incarceration, suspension of their driver’s licenses—even the loss of their right to vote. All of this misery falls disproportionately on people who are already struggling to make ends meet.

Compounding this cruelty still further, jurisdictions across the United States increasingly charge exorbitant fees that try to shift court costs away from taxpayers and onto the people who “use” the courts. Politically expedient for lawmakers, these user fees are devastating for many litigants. People who might already struggle to pay the fines they are sentenced to as punishment are required to pay for the costs of their own prosecution, their own court-ordered drug treatment, their own probation supervision—even their own incarceration. What’s more, many courts face tremendous pressure to raise revenue for local authorities by collecting fines and fees. That creates a very real perverse incentive to focus on extracting money rather than doing justice.

Reformers and activists are increasingly focused on addressing these abuses. Campaigners around the country are fighting—and often winning—important battles. The task is complicated, however, by just how fragmented and diverse the policy landscape is around these issues. The day-to-day grind of repressive fines and fees policies unfolds at the state, county and municipal levels. Practices vary widely across and within states. States also differ considerably in the degree to which they constrain the powers of local courts, or let them chart their own course.

Until now, we have not had a consistent snapshot of where all of the states stand on key fines and fees questions. NCAJ’s fines and fees indexing project is an effort to shed light on that complex empirical picture, and to measure the laws and policies of every US state against a set of principled policy benchmarks we think all of them should strive for.

NCAJ has identified a set of 17 policies we believe every state should have in place to rein in these abuses. These policies represent our vision of a minimally adequate, rights-respecting approach to monetary sanctions. They are grouped loosely into five issue areas:

- Abolition of harmful practices, like the imposition of predatory “user fees.”

- Steps to ensure that fines are cognizant of what a person can actually afford to pay.
- Elimination of unreasonably punitive collateral consequences for non-payment of fines, like suspending driver's licenses and voting rights.
- Data collection and transparency, so policymakers and the public know what the human impact of fines and fees policies looks like and who shoulders most of that burden.
- Mitigation of the impact of fines and fees in light of the economic harm so many families have suffered due to the COVID-19 pandemic.

We researched the laws and policies of every US state to determine whether they have these policies in place. We use that information to give each state a score on a scale of 0-100 that reflects its overall performance. The policy benchmarks are weighted according to their relative importance. A state that met all of our policy benchmarks would earn a score of 100; a state that met none of them would earn a score of 0.

In assessing state performance, we went to great lengths to acknowledge and credit good practice, even where it falls short our 17 benchmarks. In most cases, we gave states partial credit for a number of different policy approaches that represent progress relative to the dismal norms that prevail in many jurisdictions. Even so, the results are strikingly bad. No state performs well. What's more, even when a state has the right policies on the books, it may not be implemented properly. The road ahead is a long one.

There is one very important point of optimism in our findings, however. Fourteen of our 17 benchmarks have been adopted, in the real world, by at least one state. Several have been adopted by many different states. And several states have at least taken tentative steps in the direction of the other three." This means that the good policy practices we are looking for do not need to be invented out of whole cloth. Every state could arrive at a much better and more rights-respecting approach to fines and fees simply by emulating policies other states already have in place.

You can explore our findings in detail on our website, www.ncaj.org.

I. The Fines and Fees Problem

States and localities across the United States impose monetary fines as punishment for a broad range of offenses. Many jurisdictions also impose various fees that are in theory not a form of punishment, but an effort to shift the financial costs of the justice system away from taxpayers and onto the backs of those who are hauled before the courts. These fees force people to pay for some or all of the costs of their own prosecution and punishment, and in some cases to contribute to government programs that are wholly unrelated to the justice system.¹

The cumulative financial burden of these court-imposed financial obligations can be staggering, particularly for low-income people. Courts often make no effective efforts to assess a person's ability to pay, let alone ensure that the amounts of fines and fees imposed are tailored to that reality. Many people across the country are incarcerated or otherwise sanctioned for "failing" to pay fines and fees they simply cannot afford. Some of the punishments that states impose for failure to pay—like driver's license suspensions—exacerbate the poverty that prevents people from paying in the first place.

The expanding scale of these problems is daunting and their human toll is devastating. Fortunately, awareness of these once-neglected problems has grown tremendously in recent years.

The Department of Justice's 2015 investigation of policing in Ferguson, MO spurred nationwide outrage with its portrait of that municipality's racist, predatory justice system—and its intense focus on extracting money from poor, black residents.² But Ferguson was no anomaly.

The larger reality is that localities across the US are increasingly reliant on fines and fees revenue, and courts face a corresponding pressure to keep that money flowing.³ This has given rise to a perverse financial incentive to over-police and over-punish. One recent study found that over 280 US municipalities draw more than 20 percent of their general revenues from fines

¹ A related but distinct issue, is the issue of restitution—where people convicted of offenses are required to pay monetary compensation to individuals harmed by their unlawful conduct. This fines and fees indexing project does not include a focus on restitution, and does not offer a perspective on good practice in that arena.

² US Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department*, March 14, 2015, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

³ See Mike Maciag, "Addicted to Fines," *Governing* Special Report, August 21, 2019, <https://www.governing.com/topics/finance/fine-fee-revenues-special-report.html>; Kasey Hendricks and Diana Cheyenne Harvey, "Not One but Many: Monetary Punishment and the Fergusons of America," *Sociological Forum*, July 31, 2017, <https://onlinelibrary.wiley.com/doi/abs/10.1111/socf.12360>.

and fees, and that 720 municipalities levy fines, fees and forfeitures revenue at a rate of more than \$100 per capita for every resident.⁴

Nor was the racism of Ferguson’s approach to fines and fees something new. Instead, it echoed a larger, ugly history. As the US Supreme Court acknowledged in *Timbs v. Indiana*, excessive fines became a key part of many states’ efforts to control and oppress black communities not long after the end of slavery.⁵

The US Department of Justice’s Ferguson report spurred increasing awareness of the widespread injustices around criminal justice fines and fees. In the last five years there have been a number of efforts to offer strong, principled guidance to states on fines and fees issues. For example:

- In March 2016, the US Department of Justice issued a “Dear Colleague” letter that sought to lend clarity to courts’ constitutional obligations around the imposition of fines and fees—notably the obligation to refrain from incarcerating people for failure to pay, when they are genuinely unable to do so.⁶ The Trump Administration rescinded the letter in 2017, but it remains a source of clear-eyed guidance on the fundamental rights concerns at stake in these cases.⁷
- In August 2018, the American Bar Association issued ten guidelines on fines and fees, setting out principles that should guide courts and legislatures in pursuing a rights-respecting approach to fines and fees.⁸
- In 2016, the National Conference of State Court Administrators issued a paper offering guidance on how courts should address the rights issues posed by the handling of fines and fees cases.⁹

⁴ See Mike Maciag, “Addicted to Fines,” *Governing* Special Report, August 21, 2019, <https://www.governing.com/topics/finance/fine-fee-revenues-special-report.html>

⁵ *Timbs v. Indiana*, 586 U.S. ____.

⁶ US Department of Justice, Office of Civil Rights, Dear Colleague Letter (March 16, 2016), available at <https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf>.

⁷ US Department of Justice, “Attorney General Jeff Sessions Rescinds 24 Guidance Documents,” July 3, 2018, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>.

⁸ American Bar Association, “Ten Guidelines on Court Fines and Fees” (August 2018), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-ten-guidelines_.pdf?logActivity=true.

⁹ Conference of State Court Administrators, “The End of Debtors’ Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations” (2015-2016), <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>.

There are many other examples.¹⁰ There have also been efforts to articulate sweeping redesigns of the entire model of punishment through fines and fees.¹¹

II. A Rights-Respecting Approach to Fines and Fees

The goal of our fines and fees project is to examine whether states respect the rights of litigants whenever courts consider imposing monetary sanctions, whenever they actually impose monetary sanction, and whenever they consider the situation of a person who has not paid the fines they were sentenced to.

We did not seek to interrogate whether states make the right decisions about what conduct to punish in the first place, or what kind of conduct is appropriately punished with monetary sanctions. Nor did we interrogate the degree to which states actually respect their own laws and policies—our inquiry looked to the existence of good legal norms, as distinct from their implementation.

With this larger goal in mind, we set out to identify the core elements of a rights-respecting approach to monetary sanctions. In close consultation with leading experts, we sought to identify benchmarks that were a strong answer to our current reality of pervasive abuses— but also pragmatic in the sense that any state could be reasonably expected to achieve them.

Our work was guided by the following core principles:

- States may use fines as an appropriate punishment for violations of law, so long as they are proportionate to the severity of the offense, and defined with reference to what an individual can afford to pay without undue hardship.

¹⁰ See for example, Harvard Law School Criminal Justice Policy Program, “Confronting Criminal Justice Debt: A Guide for Policy Reform” (September 2016), <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf>; The Financial Justice Project, “San Francisco Fines and Fees Task Force: Initial Findings and Recommendations (2017), <https://sftreasurer.org/sites/default/files/2019-09/SF%20Fines%20%26%20Fees%20Task%20Force%20Initial%20Findings%20and%20Recommendations%20May%202017.pdf>; National Center for State Courts, National Task Force on Fines, Fees and Bail Practices, “Principles on Fines, Fees, and Bail Practices” (December 2017), <https://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx>; New Jersey Courts, Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees (2018), <https://www.njcourts.gov/courts/assets/supreme/reports/2018/sccmcoreport.pdf>; Abby Shafroth, National Consumer Law Center, “Criminal Justice Debt in the South: A Primer for the Southern Partnership to Reduce Debt” (December 2018), <https://www.nclc.org/images/pdf/criminal-justice/white-paper-criminal-justice-debt-in-the-south-dec2018.pdf>.

¹¹ See for example Sharon Brett and Mitali Nagrecha, *Proportionate Financial Sanctions: Policy Prescriptions for Judicial Reform*, Harvard Law School Criminal Justice Policy Program, September 2019, http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf. Some advocates have also begun calling for the outright abolition of most or even all monetary sanctions as a form of punishment.

- States should ensure that fines imposed as punishment for any violation of law are tailored to reflect what a person can afford to pay.
- States should ensure that fines are not used to shift the costs of the justice system away from government and onto the shoulders of individuals in conflict with the law, and should abolish fees as a predatory alternative to taxation across the board.
- States should ensure that courts take a rigorous and proactive approach to ensuring that no person is incarcerated or otherwise punished for “failing” to pay fines and fees that they are unable to afford to pay without undue hardship.
- States should not impose unreasonably harsh collateral consequences, such as the suspension of voting rights or of driver’s licenses, on people with unpaid fines and fees.
- States should make rigorous efforts to collect key data on the imposition and human impact of fines and fees, and make that data publicly available.

In the end, we settled on 17 distinct policy benchmarks informed by those principles. These benchmarks can be grouped loosely into five different areas of focus:

- Abolition of harmful practices;
- Meaningful consideration of ability to pay;
- Abolition of abusive collateral consequences for nonpayment;
- Data transparency; and
- COVID-related mitigation efforts.

The elements of this policy framework are summarized below. You can find a detailed explanation of the process we used to identify these benchmarks—and a much more detailed discussion of the rationale for each of them—in the appendices to this paper.

Abolition of Harmful Practices

Some state policies around monetary sanctions are inherently abusive. The following practices need to be abolished and not reformed:

- **Fees, Costs, surcharges and assessments.** Fees are distinct from the fines imposed as punishment. They are imposed to force people to pay for the supposed costs of their encounters with the justice system. We believe that the costs of the justice system should be borne by taxpayers. What’s worse, fees are often used— quite brazenly— as a way to raise money to bolster county and municipal budgets. Fees often balloon to exorbitant amounts, and put courts in the unsavory business of extracting wealth from the poor in order to fund the government.
- **Fines in juvenile cases.** In juvenile court cases, monetary sanctions are not a viable accountability mechanism. Instead, they punish families for the conduct of their children. Not only is this unjust, but juvenile fines and fees can disrupt families’ economic stability or push them deeper into poverty. This can make it even harder for parents to address the factors that put their children into conflict with the law to begin with.
- **Conflicts of interest.** Too many jurisdictions explicitly tie court and law enforcement budgets to fines and fees revenue. It creates a pernicious conflict of interest when judges,

prosecutors and police officials know that their own budgets depend on extracting revenue from offenders. These functions should be funded from general public revenues, so that court and law enforcement officials can focus on doing justice and not extracting money they need for themselves.

- **Private debt collection.** Many states and localities contract with private debt collectors to pursue unpaid fines and fees debt. Officials typically pay debt collectors the same way private creditors do-- on a contingency basis that incentivizes abusive, strong-arm collections tactics. Making matters worse, officials tack on additional fees that force struggling people to pay for the services of the collectors who are sent out to pursue them. While some jurisdictions take steps to mitigate abuse, NCAJ believes that the business practices of private collectors are fundamentally incompatible with the mission of the courts.

Ability to Pay

Fines should be set in a way that is cognizant of a person's ability to pay. Instead, state and local governments typically assess fines without regard to what the individual before them can actually afford. The result is a system that punishes the poor far more harshly than the rich, for the same offenses. We argue that states should take the following steps to ensure that fines are tailored to reflect each individual's financial situation:

- **States should require ability to pay determinations at sentencing.** Often, courts will inquire about a person's ability to pay only when they are at the point of possible incarceration because they have fallen behind on payments. Instead, courts should assess ability to pay when fines are first imposed, so that it is possible for these to be adjusted in line with a person's financial situation.
- **To make ability to pay determinations fair, states should codify concrete standards** to govern them, as well as circumstances that should give rise to a rebuttable presumption that a person is indigent and cannot afford to pay any amount of fines and fees.
- **To make ability to pay determinations meaningful, states should ensure that judges have discretion to waive, convert or modify** any and all fines and fees obligations according to ability to pay. People should also have the right to pay fines on an extended payment plan instead of all at once up front.
- **States should require proof that failure to pay is willful.** It is unconstitutional for a court to imprison someone for failing to pay a fine because they could not afford it. However, many courts put the burden on the person who couldn't pay to assert and prove that their failure to do so was not "willful." Instead, the burden should be on prosecutors to prove that it *was*. People who face possible sanctions for failure to pay should be entitled to counsel.
- **States should experiment with means-adjusted fines.** In means-adjusted or "day fines" model, fines are assessed as a proportion of a person's income instead of as a flat amount. This helps ensure that people experience the same level of punishment regardless of income. This model, widely used in Europe and in some Latin American countries, should be tested more widely in the United States.

Collateral Consequences

Too often, states mete out unreasonably harsh follow-on punishments to people who fail to pay fines and fees. We believe all states should eliminate the three most egregious of these:

- **Suspension of voting rights.** Most states bar incarcerated people from voting. Many states go one step further and refuse to restore those rights to people who have finished a term of incarceration if they still owe fines and fees to the state. The state's interest in collecting money from formerly incarcerated people is nowhere near serious enough to justify this use of disenfranchisement as a cudgel. What's more, these restrictions have a tremendous disparate impact along racial lines.
- **Suspension of driver's licenses.** Many states suspend the driver's licenses of people who fail to pay fines and fees debt. This causes tremendous hardship to many people, who cannot realistically work or take care of their families without driving. The point of this sanction is precisely to use that pain to coerce people to pay what they owe. The punishment is not only wildly disproportionate but also counterproductive— by making it impossible for people to work, license suspensions make it impossible for them to pay, and also – if they risk driving without a license -- put them at risk of re-arrest, new fines, and new fees.
- **Denial of record expungement.** Expungement or record sealing can help people put their life in order, find work and live without fear of discrimination. Many states deny access to expungement until outstanding fines and fees are paid. This effectively denies it to many low-income people—while also making it harder for them to establish the kind of financial stability that would make payment more feasible.

Data Transparency

States can't know whether their use of monetary sanctions is fair unless they collect data on who is impacted by them and how. **States should collect—and publish—data on:**

- **The amounts of fines and fees** assessed and actually collected;
- **The number of people incarcerated** for failure to pay; and
- **The racial and demographic makeup** of people sentenced to pay fines and fees.

COVID-19 Relief

The COVID-19 pandemic has plunged many families into economic hardship. Every state should enact **temporary measures that help mitigate the impact of fines and fees debt** on already-struggling families. These can include suspension of collection efforts, moratoriums on certain fines and fees, or other forms of relief.

III. Scoring State Performance

Using the policy framework described above, we created 17 benchmarks. Each represents a key policy that we think every US state can and should have in place.

Not all of the policy benchmarks are of equal importance—restoring the voting rights of people who struggle to pay fines and fees debt is more important than launching limited experiments with day fines, for example. To capture that reality, we use a weighting system that assigns different point values to each benchmark. These range from 3 to 10, and add up to a total possible score of 100.

We recognize that, quite often, there is considerable and important variation among states that do not meet a particular benchmark. Many have adopted related policy approaches that warrant positive recognition even though they fall short of our ideal, benchmarked policies. To capture this reality, we identified secondary benchmarks—43 in all—that we treat as “second best” alternatives to our 17 primary benchmarks. A state that fails to meet a primary benchmark might nonetheless score a few points for having a “second best” alternative policy in place. In this way we are able to inject an important level of nuance into our assessment of state laws and policies.

With this framework in place, we researched the laws and policies of every US state to determine whether they had each of our 17 benchmark policies in place. Where a state did not meet a primary benchmark, we then also determined whether it met any associated secondary benchmarks. Using that information, we assigned every US state a score on a scale of 0-100. A state that had all 17 of our primary benchmark policies in place would receive a score of 100.

You can find a detailed description of our primary and secondary benchmarks and of our weighting system in this paper’s appendices. There is also a more in-depth description of our methodology available on our data visualizations page.

IV. Our Findings—How the States Measure Up

Our complete findings are accessible on the NCAJ website, where we present maps that show how every state performs overall and on each individual policy benchmark. We also present graphics that illustrate how the states rank relative to one another, from highest to lowest, and which benchmarks are most- and least-widely adopted. Those visualizations also include citations that reference and describe the relevant state laws, court rules and other policies.

The best way to explore and understand our findings is to use the visualizations on our website. Here, we offer some brief, overall reflections on those findings and what we think they signify.

To start with, it has to be said that the overall findings are grim. No state performs well. As of March 2021, the highest-scoring state is Washington with a score of just 54 out of 100. The lowest performing states have virtually no meaningful policies in place to safeguard the rights of litigants in fines and fees cases. This is in some sense unsurprising given what we know about the pervasive abuses associated with fines across America. Still, it is jarring to see states fall so far short against deliberately pragmatic and achievable policy goals. The road ahead is a long one.

<u>Highest Scoring States</u>			<u>Lowest Scoring States</u>	
State	Score		State	Score
Washington	54		Delaware	8
Oklahoma	49		Kansas	7
Rhode Island	48		Arkansas	6
New Jersey	46		Alabama	5
Massachusetts	42		Wyoming	3

Greatly compounding this bleak picture, is the fact that good laws and policies are not always respected on the ground. Too often, courts and other authorities ignore key safeguards or fail to implement good policies properly. That is to say, the decidedly poor state performance captured in our index actually overstates their degree of real-world accomplishment.

With that said, our findings also offer reason for optimism. Fourteen of our 17 benchmarks have been adopted, in the real world, by at least one state. Several have been adopted by many different states. And several states have at least taken tentative steps in the direction of the other three. What this means is that the good laws and policies we are looking for do not need to be invented out of whole cloth.

Every state could arrive at a much better and more rights-respecting approach to fines and fees simply by emulating policies other states already have in place. In fact, one could arrive at an overall fines and fees score of 86 out of 100—considerably better than the real-world top score of just 54— by cobbling together good policies that already exist in one or more states. One way to get that result would be to emulate policies that are already on the books in a politically diverse collection of just seven states: Utah, New York, Oklahoma, Washington, California, New Jersey and Rhode Island.

Another reason for optimism is that many of the good policies now in place have been adopted by states fairly recently. In many parts of the country, the narrative is one of progress. Slow and inadequate progress, but progress nonetheless.

Our research points to other interesting and important findings that bear further analysis. For example, there does not appear to be any clear correlation between political party dominance and overall score. Nor does there seem to be any clear correlation between party affiliation and state performance on particular benchmarks. For example, during the 2020 Presidential election the practice of disenfranchising people because of outstanding fines and fees debt was

widely associated with the Republican party. This was mostly because of the party's tenacious efforts to uphold that practice in Florida. But nearly half of all states restrict voting rights because of unpaid fines and fees and many of them are strongly Democratic—including President Biden's home state of Delaware.

NCAJ will dive deeper into these findings to analyze correlations and trends, and produce new insights in the months ahead. We hope others will do the same. Above all, we hope that our findings will prove useful to people fighting for change—and a measure of recognition to states that are at least taking steps in the right direction.

V. Acknowledgments

This project was a vast undertaking, and NCAJ is a small organization. The work was possible only thanks to the generous support of many people. The project was funded by Arnold Ventures. Their generous support made all of this work possible, and their staff also stood by us as thought partners as we worked through the many thorny questions this project needed to confront.

We also benefitted tremendously from the expertise of 19 notable experts and activists who volunteered their time as members of an Expert Advisory Group. In the early stages of this project, we relied on this group to help us define our policy benchmarks through a process of dialogue, feedback and unsparing critique. The members of that group were extraordinarily generous with their time and expertise, and the project benefitted tremendously from the rigor they brought to bear.

Finally, we had to confront the enormous task of measuring the laws and policies of every US state against our 17 primary and 43 secondary benchmarks. Across 51 jurisdictions, this added up to a total universe of more than 3000 possible data points—each one of them a question of law that required research.

We dedicated significant time to developing an efficient process for pursuing this work. That meant editing our benchmarks to be as clear and straightforward as possible, road-testing them to make sure they were feasible to research. We then had to develop a coherent process, and easily usable forms, to make the research task as straightforward as possible. In all of this, we benefitted tremendously from the pro bono assistance of Daniel Lewkowicz, an associate at the New York law firm Stroock & Stroock & Lavan. Daniel, leveraging expertise from other complex legal research projects, helped us lay a foundation that made the rest of the work possible.

In carrying out the state-by-state research, we relied on an exceptional team of pro bono attorneys from the law firm of Hughes Hubbard & Reed. Over the course of many months, the Hughes Hubbard team carried out painstaking legal research across the entire country with rigor and creativity. The team had to examine the laws and court rules of every US state and consider whether they line up with our benchmarks. The task proved even larger and more

difficult than we initially anticipated, and the final product would not have been possible without the Hughes Hubbard team's generosity, patience and dedication.

We also received indispensable help from three NCAJ Fordham Law School students who worked for NCAJ as part time research assistants at various stages of the project— Nathaniel Sundel, Ashley Meadows and Isabel Brown. Each of them did meticulous work troubleshooting thorny research and legal issues surfaced by the Hughes Hubbard team, and analyzing particularly thorny legal issues at the state level.

Finally, when we had a set of provisional results in hand, we offered the states an opportunity to comment on our findings and suggest any changes they thought warranted. Authorities in several states provided us with in-depth feedback that helped improve the accuracy and depth of our findings.

Appendix A: NCAJ's Approach to Framing the Fines and Fees Policy Benchmarks

Drafting and Finalizing the Fines and Fees Policy Benchmarks

In the first half of 2019, NCAJ drafted a provisional set of fines and fees policy benchmarks. We then spent the second half of the year improving, reimagining and refining them. We arrived at a refined set of policy benchmarks in December 2019. After “road-testing” them through research in several states, we made additional adjustments to several of them. Finally, after the onset of the COVID-19 pandemic we added a policy benchmark to consider whether states were taking steps to mitigate the impact of fines and fees on vulnerable communities.

As a key part of this process, we convened an expert advisory group made up of people with deep knowledge of fines and fees issues. The group was composed of activists and thinkers who are all committed to reform, with a diverse range of perspectives and of specific expertise.¹²

The group's role was twofold: to offer concrete suggestions about what the policy benchmarks should and should not include, and to ensure that the work in its entirety was subject to robust discussion and critique. We asked group members to provide detailed feedback on two different drafts of the policy benchmarks. We hosted three calls with the group as a whole as well as a number of conversations with individual group members, to discuss substantive issues that emerged throughout this process.

After finalizing the policy benchmarks, we also asked for the experts' feedback on our approach to assigning different numerical weights to each of them. As described below, this is how we capture the relative importance of each policy benchmark.

While the expert group's feedback heavily influenced the development of the policy benchmarks and there was broad agreement on many issues, the end result is not entirely the product of consensus. In some places, it represents NCAJ's own institutional perspective on the best way to bridge gaps between the differing ideas and perspectives that emerged within our group across key issues. The most salient of these decision points are described in section II of this paper, which explains the rationale for each policy benchmark's inclusion in the set.

Measuring State Performance

NCAJ's Justice Index is a tool that measures whether states have adopted key policies that we regard as important components of a fair and accessible justice system. We use the Index to publicize these policies, to facilitate access to them, and to promote debate around them. It

¹² For a list of expert advisory group members, see the Appendix to this paper.

serves multiple purposes: as a source of concrete policy guidance to states, as a set of concrete standards advocates can rally around and promote, as a set of findings that researchers can turn to for knowledge of geographical disparities, and, perhaps most importantly, as a set of benchmarks against which state officials can be held accountable. In all these ways we support good policies’ replication and movements for reform across the country.

This project applies the Justice Index’s methodology to the fines and fees context. We approach the inquiry as to whether a state has each one of our selected policies as a binary, yes or no question—states either have the recommended policy in place and get credit for it, or they do not. Where we find that states have in place policies that are of interest to the public, but do not match the policy, we do not give credit for the policy, but we do publicize the policy, making it available to the public for review and consideration.

Each primary policy benchmark is framed as an affirmative description of a policy we believe every state should have adopted. In assessing the states, we ask whether each of these descriptions represents an accurate description of the policies they actually have in place. We do not purport to measure the degree to which states succeed in the practical implementation of good policies, nor do we evaluate whether the policies, as implemented, achieve their intended outcomes. We encourage others to use the Justice Index to examine those important, but different, issues and questions. As an extension of the Justice Index, this fines and fees project adheres to this same basic methodology.¹³

This approach requires a delicate balance between two key imperatives. On the one hand, we need our policy benchmarks to be concrete and substantive enough to serve as a clear and useful description of good policy. On the other hand, we need to avoid the kind of prescriptive detail that could lead us to deny recognition to states whose policy approaches on a mere technicality.

Primary and Secondary Policy Benchmarks

In applying the Justice Index’s methodology to the fines and fees context, we face a particular challenge. Since the goal is to articulate a vision of best—and not merely “acceptable”—policies, our benchmarks set a deliberately high bar. However, the prevailing policy landscape is quite bleak across many key fines and fees issues. In fact, we anticipate that the majority of states will fail to meet many of our policy benchmarks—and there are some benchmarks that no state will meet even though every state can and should.

At the same time, there is considerable and important diversity among states on their policy approaches to these issues. Some have taken positive but limited steps to improve their laws and policies. Or to put it another way, not all states that fail to meet our policy benchmarks are in fact equal. We believe that this fines and fees indexing exercise will be most useful and

¹³ For more on the Justice Index’s methodology, see <https://justiceindex.org/methodology/general-methodology/#site-navigation>

accurate if it is able to recognize some of this policy diversity, without diluting the principled stands we've taken in framing the main policy benchmarks.

We have addressed this dilemma by creating “secondary” policy benchmarks that ask whether states that do not meet some of the primary policy benchmarks have at least adopted one or more of several enumerated alternative policies. These generally represent either incomplete progress in the direction of the main policy benchmark, or an alternative approach which while inadequate does represent a step up compared to the prevailing status quo in many other states. These secondary benchmarks are afforded considerably less weight than the primary policies they relate to. In this way we are able to capture some of the complex range of existing policies, and push for incremental progress in sensible directions, without giving undue credit to states that have taken only minor steps forward.

The adoption of secondary policy benchmarks also allows us to address another key dilemma. Our policy benchmarks look for statewide implementation of best policies—and ultimately, that is the only way to ensure that the rights of all people are respected equally. It is not in fact possible to assess fines and fees policies across all local jurisdictions in the country. In the fines and fees arena, however, many of the most pervasive problems—and their policy solutions—lie at the local level.

Different states have varying degrees of legal control over county- and municipal-level judicial practices, and varying degrees of political will to exercise the control they do have.¹⁴ What this means in practice is both that some states may have good policies in place that do not extend to the local level, and that some important local jurisdictions may have policies in place that are much better than those that prevail at the state level. In an effort to capture aspects of both of these realities, we have introduced secondary policy benchmarks underneath many of the primary benchmarks that do two things:

- 1) Ask whether a state meets the primary benchmark except for the policies of some local jurisdictions. This allows us to afford partial recognition to a state that has one of our best policies on the books, but either cannot or does not extend its reach to the local level; and
- 2) Ask whether a significant local jurisdiction (we define this as a county or municipality with a population of at least 50,000) meets the primary policy benchmark with regard to its own policies, even though the state itself fails to do so. Some of our expert advisory group members raised the concern that this approach seems to give credit to the state for local-level progress that it had nothing to do with. However, we ultimately placed a

¹⁴ One key distinction is between states that have a “unified” court system—one where state authorities have the power to oversee and govern the conduct of courts at all levels—and those that do not. See <https://www.ncsc.org/Topics/Court-Management/Court-Unification/State-Links.aspx?cat=States%20Legally%20Described%20as%20Unified>

higher priority on encouraging states to facilitate local-level progress even where the state itself lags behind. We have, however, taken the concern into account by affording this secondary benchmark a low weight so that it does not unduly inflate the score of any state.

Scoring

Every state will receive a composite score that reflects the degree to which it has met the fines and fees policy benchmarks. The complexity here is that the policies set down in those benchmarks are not all of equal importance because a range of factors – like the number of people affected and the nature of those impacts -- may determine the importance of a given policy. The total abolition of fees, surcharges and other court costs, for example, is a far more important policy goal than affording all people the option of paying fines down over time on a reasonable payment plan.

We account for this reality by assigning different numerical weights to each of the 17 main policy benchmarks. These range from 3 to 10, and the benchmarks' weighted values add up to a total possible score of 100. This allows us to offer greater recognition to states that adopt policy benchmarks that are particularly transformative, or whose impact is likely to be particularly deep or far-reaching. This is not a finely-tuned, objective metric but a reflection of broad perspective arrived at in consultation with the advisory group. The secondary, "second best" policy benchmarks are also weighted and are worth some fraction of the point value assigned to the primary benchmark they sit beneath.

Apart from all of this, our approach to scoring is straightforward and simple:

- 1) If a state meets one of our main policy benchmarks, we add that policy's point value to the state's overall score. In this scenario, we do not look to the secondary benchmarks at all.
- 2) If a state does not meet one of our main policy benchmarks, we ask whether the state at least meets one or more of any related secondary benchmarks. If it does, we add those secondary benchmarks' point value to the state's overall score. If it does not, the state earns no points.

When a state does not meet either the main policy benchmark or the secondary benchmark, but has a policy that we determine is of significant interest to the public, the state earns no points (as noted, above) but we will make the policy visible.

Appendix B: Fines and Fees Policy Benchmarks Explained

The following pages set forth and explain each of NCAJ's fines and fees policy benchmarks, including the rationale for their inclusion. It also describes any difficult choices we had to make in deciding precisely how to frame them.

1. Abolition of all Fees

The state has abolished all fees, costs, surcharges and assessments in all matters involving a violation of law. This includes but is not limited to charges for: i) appointed counsel; ii) probation or parole supervision; iii) electronic monitoring; iv) diversion programs; v) services such as treatment and drug testing; and vi) costs of incarceration including room, board and health care.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 has abolished all the fees, costs, surcharges and assessments that it has the power to abolish.
- c) No charges for counsel: Statewide, there are no fees linked to the services of a public defender or other appointed counsel.
- d) No charges for incarceration: Statewide, there are no charges to incarcerated people for the costs of their incarceration including room, board and health care.
- e) Significant steps: The state has taken one or more significant steps, other than those described above, to curtail court-ordered fees, costs, surcharges or assessments within the last four years. This could for example include: i) abolition of particular fees, costs, surcharges or assessments; or ii) a reduction of, or cap on, amounts charged.

Rationale

Fees and surcharges, as distinct from fines, represent an indefensible effort to force the people who pass through the justice system to bear its operational costs, and/or to generate other revenues through the courts as an alternative to taxation. These charges are regressive, discriminatory and create a *de facto* reality of disproportionate punishment. While these user fees are in theory not punitive, they greatly compound the often-crushing financial burden of fines imposed as punishment for violations of law.¹⁵ We argue that vital public services

¹⁵ See, for example, Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor*, New York: Russel Sage Foundation, 2016; Human Rights Watch, *Profiting from Probation: America's "Offender-Funded" Probation Industry*, February 5, 2014, <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>.

concerning law enforcement and justice, which are important to all members of society, should instead be fully funded through tax revenues.

At present, no US state meets the high but essential bar set by our primary benchmark. There is, however, considerable diversity among states with regard to just how pernicious and widespread the use of fees is. Our secondary policy benchmarks should allow us to capture and acknowledge key elements of that diversity.

Secondary benchmark 1(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 1(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies. Secondary benchmarks 1(c) and 1(d) ask whether the state at least refrains from charging people fees for appointed counsel and the costs of incarceration, respectively—two especially pernicious fees that we believe we should credit states for avoiding.

Secondary benchmark 1(e) asks whether the state has taken other “significant” steps within the last four years to curtail the use of court fees. This open-ended benchmark represents an approach we have embraced in only one other instance across the entire set of benchmarks, because it greatly complicates the task of measurement. Here, however, we think this approach necessary to afford us an extra level of flexibility in capturing unique markers of progress some states may have realized on this vital issue.

2. No Juvenile Court Fines and Fees

The state has abolished all juvenile court fines, fees, costs, surcharges and assessments, including both those imposed on youth and those imposed on their parents, guardians or other responsible adults.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 has abolished all the juvenile court fines, fees, costs, surcharges and assessments that it has the power to abolish.
- c) Abolished juvenile fees: The state has abolished all juvenile court fees, costs, surcharges and assessments imposed on youth, parents, guardians or other responsible adults—but has not abolished all fines in these cases.
- d) Abolished juvenile fines: The state has abolished all juvenile court fines—but has not abolished all fees, costs, surcharges and assessments imposed on youth, parents, guardians or other responsible adults in these cases.
- e) Significant steps: The state has taken steps within the last four years to eliminate some, but not all, fines for juveniles.

Rationale

In contrast to benchmark 1 above, that calls for the abolition of all fees, this benchmark looks to the abolition of all fines as well as fees—but only in juvenile court cases. This reflects NCAJ’s belief that imposing fines and fees on juveniles typically means punishing the youths’ families, and in many cases adding to the burdens of poverty for the juvenile, their parents and their siblings.¹⁶

Secondary benchmark 2(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 2(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies.

Secondary benchmark 2(c) asks whether the state has at least abolished all juvenile court fees—but not all juvenile court fines.

Secondary benchmark 2(d) asks whether the state has taken other “significant” steps within the last four years to curtail the use of court fees. This open-ended framing represents an approach we have embraced in only one other instance across the entire set of policy benchmarks, because it greatly complicates the task of measurement. Here, however, we think it necessary to afford us an extra level of flexibility in capturing unique markers of progress some states may have realized on this vital issue.

3. Conflicts of Interest Around Fines and Fees Revenues

The state has no fines, fees, costs, surcharges or assessments whose revenues are explicitly directed to support law enforcement or the courts.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 meets the primary benchmark, with respect to all of the fines, fees, costs, surcharges and assessments it levies on its own authority.
- c) Cap on fines and fees revenue: The state caps the proportion of municipal and county budgets that may be drawn from fines and fees revenue.

Rationale

Courts and law enforcement agencies should not have to consider their own financial bottom line when deciding whether and what kind of punishment to impose on people who violate the

¹⁶ See Jessica Feierman, *Debtor’s Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System*, Juvenile Justice Center, 2016, <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf>.

law. When fines and fees revenue is tied directly to the budgets of law enforcement and justice system functions, it creates a conflict of interest by incentivizing ramped-up enforcement and the imposition of steeper financial penalties.¹⁷

Secondary benchmark 3(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 3(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies.

Secondary benchmarks 3(c) and 3(d) describe policy approaches that one or more states have taken and which we want to be sure to credit as better than the absence of any controls at all. Secondary benchmark (c) asks whether the state at least imposes a cap on the proportion of local budget revenues that can lawfully be derived from fines and fees revenue.

4. Private Collection of Fines and Fees Debt

The state does not allow courts to use private collections firms to collect unpaid fines and fees.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 meets the primary benchmark, with respect to the practice of its own courts.
- c) Payment not tied to collection: The state permits private collections of unpaid fines and fees, but requires that collectors' compensation be unrelated to the amount of money they collect.
- d) No charge for debt collection: The state prohibits courts from imposing surcharges on unpaid fines and fees sent to private collection.
- e) Contract terms: The state includes provisions in all contracts with private collectors hired to pursue court debt, that incorporate protections in the Fair Debt Collections Practices Act, or substantively equivalent terms.
- f) Fair debt collection laws: The state has fair debt collection practices laws that apply to the collection of fines and fees by private debt collectors.

Rationale

¹⁷ See Macier, *supra* note 2; Dick Carpenter, Kyle Sweetland and Jennifer McDonald, *The Price of Taxation by Citation: Case Studies of Three Georgia Cities that Rely Heavily on Fines and Fees*, Institute for Justice, October 2019, <https://ij.org/wp-content/uploads/2019/10/Taxation-by-Citation-FINAL-USE.pdf>.

When courts use private collections firms to pursue unpaid fines and fees, some or all of the cost of retaining these firms is often passed directly on to criminal justice debtors.¹⁸ Even where this is not the case, collections firms are typically paid based on the amount of unpaid debt they are able to recover. As is true in the private sphere, this can incentivize abusive and misleading collections tactics by firms looking to maximize their bottom line.

In the fines and fees arena, these larger realities are combined with the underlying problem that people are often assessed fines and fees they cannot afford to pay. Companies' incentives to squeeze payment out of debtors are entirely at odds with the responsibility of courts to ensure that people are clearly and consistently informed of their rights and given opportunities to argue that amounts owed should be reduced or waived based on ability to pay.

There was some discussion within the expert advisory group as to whether a ban on private collections was appropriate, or whether the focus should instead be on the regulation of privatized collections. NCAJ felt that the best policy is for courts to eschew the use of private collections altogether, in part because the kinds of business models envisioned as an alternative to the problematic ones described above do not generally exist. We did, however, look to capture credible efforts to regulate the conduct of private collections firms in the secondary benchmarks.

Secondary benchmark 16 (a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 16 (b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies. Secondary benchmark 16 (c) describes a situation where collections agencies are paid at a rate that is not tied to amounts collected. Secondary benchmark 16 (d) captures a situation where courts use private collections but do not impose additional charges meant to force people who owe fines and fees to help pay for the services of the collectors sent against them. Secondary benchmarks 16 (e) and 16(f) ask whether the state at least protects debtors against abusive collections tactics, either by contract or by statute, respectively.

5. Ability to Pay Determinations at Sentencing

The state requires courts to conduct an ability to pay determination whenever they impose fines, fees, costs, surcharges or assessments.

¹⁸ See Teresa Matthew, "The Only Winners in California's Fines and Fees System are Private Debt Collectors," *The Appeal*, July 2, 2018, <https://theappeal.org/california-fines-and-fees-system-private-debt-collectors/>; Human Rights Watch, *Get on the Ground! Policing, Poverty and Racial Inequality in Tulsa, Oklahoma*, September 12, 2019, Chapter IV, <https://www.hrw.org/report/2019/09/12/get-ground-policing-poverty-and-racial-inequality-tulsa-oklahoma/case-study-us-law#73f4cc>.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 meets the primary benchmark, with respect to the practice of its own courts.
- c) Meets with Regard to Fines Only: The state meets the primary benchmark with regard to fines, but not fees.
- d) Right to ability to pay determination: The state has a statute codifying a person's right to request an ability to pay determination at sentencing or at any other time, but the inquiry is not conducted automatically.

Rationale

While the US Supreme Court has held that no person can be incarcerated merely for paying a fine or fee that they are genuinely unable to pay, many states have failed to ensure meaningful respect for this protection.¹⁹

As a significant part of addressing this problem, we believe courts should always consider a person's ability to pay when imposing fines and fees—and not only when a person raises the issue affirmatively. In tandem with several other policy benchmarks, this also speaks to the larger principle that fines should be tailored to reflect the financial capacity of the person they are being levied against.

This policy benchmark does not apply to fines and fees imposed without the court's direct involvement—as for example with the issuance of a speeding ticket that the driver does not contest or seek to modify in court.

Secondary benchmark 5(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 5(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies.

¹⁹ See Harris, *supra* note 16; Human Rights Watch, *supra* note 16; ACLU, "ACLU and Biloxi Settle Lawsuit over Jailing of Indigent People," March 5, 2016, <https://www.aclu.org/press-releases/biloxi-and-aclu-settle-lawsuit-over-jailing-indigent-people>; Myesha Braden, Leah Watson, Talia Gilbert and Jason Enos, *Too Poor to Pay: How Arkansas's Offender-Funded Justice System Drives Poverty and Mass Incarceration*, Lawyers' Committee for Civil Rights Under Law, March 26, 2019, https://adobeindd.com/view/publications/f3b39ab5-1da5-409e-97a6-a0b060d2f578/1/publication-web-resources/pdf/FINAL_ARReport_Draft1_031419.pdf.

Secondary benchmark 5(c) looks to situations where states require ability to pay hearings, but not for fees—likely because the fees are mandatory. Secondary benchmark 5(d) asks whether the state that does not meet the primary benchmark, at least codifies a person’s right to request an ability to pay determination at sentencing.

6. Proof of Willful Failure to Pay

The state requires 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.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 meets the primary benchmark, with respect to the practice of its own courts.

Rationale

This speaks to the reality that states too often overlook the constitutional prohibition on incarcerating a person for failing to pay a fine or fee when the person is genuinely unable to do so.²⁰ With this in mind, we take the position that states should require the government to affirmatively prove that any failure to pay was willful before incarcerating or otherwise punishing someone on that basis—as opposed for example to requiring the accused to raise this affirmatively.

Secondary benchmark 6(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 6(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies.

7. Ability to Pay Standards

The state has codified substantive standards that all state and local courts are required to use, giving clear guidance to judges on how ability to pay should appropriately be determined.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.

²⁰ Ibid. See also Ferguson report, *supra* note 3.

- b) One major locality meets: At least one county or municipality with a population of at least 50,000 meets the primary benchmark, with respect to the practice of its own courts.

Rationale

This benchmark recognizes that even when courts conduct ability to pay determinations, they often are not guided by clear, uniform standards—substantive and not merely procedural—about the way those proceedings should be conducted, the evidence that should be considered and the criteria that should be used to gauge what a person is able to pay. This is a key driver of a serious problem: ability to pay determinations exercises are often *pro forma*, wildly inconsistent across different courtrooms, and without meaningful protective value.²¹

Within our expert advisory group, there was robust discussion as to whether this benchmark should articulate a clear expectation of how the “substantive standards” referred to here should be framed. Some expressed concern that as framed, the benchmark would afford credit to states who have codified standards that are indefensibly weak or ill-conceived.

Ultimately, the absence of good policy models in the current practice of states made us reluctant to recommend a specific set of standards. There could be a diverse range of policy approaches that do an acceptable job of meeting the principled goal that informs this benchmark, and we feel it is important to be able to credit these where they do emerge. Benchmark #8 on presumption of indigence, however, grew out of this conversation and a desire to address the concerns it pointed to.

Another advantage to framing the benchmark in these more general terms, is that it will better highlight the startling reality that many states have not taken any steps in this direction, adequate or not.

Secondary benchmark 7(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 7(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies.

8. Standards that Trigger Presumption of Indigence

The state has codified standards that trigger a presumption that a person is indigent and unable to pay fines, fees, costs, surcharges or assessments, in cases involving a violation of law. This presumption must be triggered by at least one of the following: receipt of means-tested public assistance, income below an enumerated threshold, and/or eligibility for court-appointed counsel.

Secondary Benchmarks

²¹ See *supra* note 17.

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 meets the primary benchmark, with respect to the practice of its own courts.

Rationale

This benchmark works in tandem with #7, on ability to pay standards. Ability to pay is a far more expansive concept than indigence. The former is relevant to all cases where an individual is sentenced to fines and fees, while the latter describes situations where people lack the financial means to pay any amount of fines and fees.

As a subset of their broader approach to ability to pay determinations, it is particularly important for states to codify concrete standards that trigger at least a presumption of indigence so that courts are able to capture cases where people cannot reasonably expected to pay any amount of monetary sanctions or fees. We also believe that this policy approach would lend greater efficiency to proceedings, and reduce unnecessary burdens placed on individuals to prove the fact of their own poverty.

Within our expert advisory group, we also found that it was easier to arrive at consensus views of what some of these triggers ought to hinge on. For that reason we were able to frame this benchmark in more prescriptive terms than the broader benchmark on ability to pay standards.

Secondary benchmark 8(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 8(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies.

9. Discretion to Waive or Modify Fines and Fees

The state ensures that all 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.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 meets the primary benchmark, with respect to the practice of its own courts.
- c) Meets only partially: The state meets the primary benchmark with respect only to all fines, or with respect to some or all fees, costs, surcharges and assessments.

Rationale

One key principle flowing throughout this set of policy benchmarks is the idea that the amount of fines and fees imposed on any person should reflect an understanding of what that person can afford to pay. Wide judicial discretion to adjust or waive fines and fees is an essential component of any effort to live up to that policy ideal. In reality, judges often face significant limits on their ability to waive or modify certain financial obligations based on ability to pay.²²

Secondary benchmark 9(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 9(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies. Secondary benchmark 9(c) looks to ensure that we can afford some recognition to states that have taken positive steps that align with the primary benchmark except that they are limited in their scope of application.

10. Payment Plans

The state mandates 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.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 meets the primary benchmark, with respect to the practice of its own courts.

Rationale

Restrictions on entry into long-term payment plans for fines, fees and surcharges constitute a needless barrier to payment for many individuals. Fees linked specifically to the “privilege” of entering into such payment plans are essentially a tax on poverty, since low income individuals are mostly likely to need time to pay down legal financial obligations. Any person sentenced to pay fines or fees should be able to automatically enter into a longer-term payment arrangement if they cannot afford to pay immediately— at any time, without incurring additional charges.

Secondary benchmark 10 (a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark

²² See Maura Ewing, “A Judicial Pact to Curt Costs for the Poor,” *The Atlantic*, December 25, 2017, <https://www.theatlantic.com/politics/archive/2017/12/court-fines-north-carolina/548960/>; New York City Bar Association, *New York Should Re-Examine Mandatory Court Fees Imposed on Individuals Convicted of Criminal Offenses and Violations*, May 2019, <https://s3.amazonaws.com/documents.nycbar.org/files/2018410-MandatorySurchargesCriminalCharges.pdf>.

10 (b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies.

11. Individualized Fines

The state has 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.

Secondary Benchmarks

- a) At least one court piloting: At least one court, at any level within the state, is currently implementing or piloting a system of proportional fines as described in the primary benchmark.

Rationale

This benchmark seeks to position the Index in support of campaigns to promote the use of individualized, scalable fines (referred to as "day fines" in foreign jurisdictions that have adopted this approach). This represents a progressive approach to calibrating fines and fees to an individual's ability to pay. Implemented correctly, it has the potential to address many of the underlying problems with the use of financial sanctions in US courts. It also has the advantage of being a concrete model that is already in use in other parts of the world. The benchmark is framed explicitly around incremental progress and experimentation, on the understanding that no US jurisdiction at any level currently relies on the day fines model.²³

There was some debate within the expert advisory group as to whether the goal of pushing states to experiment with this approach was of sufficient importance to warrant being a primary benchmark, as opposed to being framed as a secondary benchmark somewhere else. The balance of opinion within the group was in favor of inclusion, and NCAJ was also persuaded to keep it as it is.

²³ Germany and several other European countries use a day fines system. In the US, there were several local-level experiments with day fines regimes in the 1980s and 1990s, but none took root and no such initiatives have been undertaken in recent years. See Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, Georgetown Law School, American Criminal Law Review, 55:2 (2018), <https://www.law.georgetown.edu/american-criminal-law-review/in-print/volume-55-number-2-spring-2018/day-fines-reviving-the-idea-and-reversing-the-costly-punitive-trend/>; Susan Turner and Joan Petersilia, *Day Fines in Four US Jurisdictions*, RAND Corporation, March 1996, <https://csgjusticecenter.org/wp-content/uploads/2013/07/1996-RAND-day-fines-4-BJA-pilot-sites.pdf>. In December 2019, the New York City council took up a bill that would pilot a day fines system for some low-level offenses in the City. The bill text can be found at: <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4265946&GUID=CB87BD3F-CC74-4FD0-ACC4-5B0217281D1A&Options=&Search=>.

The lone secondary benchmark seeks to recognize and promote environments that foster the use of day fines models in individual courts at any level, even where this is not the result of state government action.

12. Right to Counsel When Incarceration is Possible

The state has codified a right to counsel in all proceedings where a person faces possible incarceration for failure to pay fines, fees, surcharges and assessments.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.
- b) One major locality meets: At least one county or municipality with a population of at least 50,000 meets the primary benchmark, with respect to the practice of its own courts.

Rationale

Under the US Constitution, the right to counsel should apply in any situation where a court imposes a sentence of immediate incarceration or a sentence that may result in incarceration later for failure to pay.²⁴ To ensure that this right is respected and understood to attach in all such situations, states should codify the expectation.

Secondary benchmark 12(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 12(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the benchmark with regard to its own policies.

13. Driver's License Suspensions for Unpaid Fines and Fees

State law does not allow for the suspension of driver's licenses for failure to pay fines, fees, costs, surcharges and assessments; nor for failure to appear in court.

²⁴ The US Supreme Court and federal appellate courts have consistently held that the right to counsel should apply in *at least* the following cases: criminal contempt proceedings employed to punish a person for non-payment of fines and fees; sentencing proceedings where fines and fees are imposed if incarceration could result from nonpayment; probation revocation proceedings where incarceration may result because of nonpayment of fines and fees; and juvenile proceedings where detention may be imposed along with or instead of fines and fees. See *Turner v. Rogers*, 564 U.S. 431, 441 (2011); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Alabama v. Shelton*, 535 U.S. 654, 674 (2002); *Shayesteh v. City of South Salt Lake*, 217 F.3d 1281, 1283–84 (10th Cir. 2000); *United States v. Foster*, 904 F.2d 20, 21 (9th Cir. 1990); *United States v. Perez-Macias*, 335 F.3d 421, 428 (5th Cir. 2003); *United States v. Pollard*, 389 F.3d 101, 105–06 (4th Cir. 2004); *Mempa v. Rhay*, 389 U.S. 128, 135 (1967); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); *Bearden v. Georgia*, 461 U.S. 660, 668–69 (1983); *In re Gault*, 387 U.S. 1, 35–42 (1967).

Secondary Benchmarks

- a) Meets but for some driving-related offenses: The state meets this benchmark, except that state law provides that licenses may be suspended for nonpayment of fines and fees imposed for some driving-related offenses.
- b) Meets only re: failure to pay: The state meets this benchmark with regard to failure to pay, but not with regard to failure to appear.
- c) Meets only re: failure to appear: The state meets this benchmark with regard to failure to appear, but not with regard to failure to pay.

Rationale

Driver's license suspensions are an overly harsh punishment for the non-payment of fines and fees.²⁵ This is precisely why many states make use of the mechanism, viewing it as a useful tool to coerce people into payment. In reality, suspensions have the perverse effect of making it harder for many people to earn the money they need to satisfy those obligations. Without a reliable means of transportation that allows people to work, care for their children and provide for basic needs, people with suspended licenses often face the desperate and paradoxical choice of breaking the law or losing their jobs and failing their families. Suspensions also tend to put people in a position where they have little choice but to violate the law as they struggle to work, take care of their children, and provide for other basic needs.

This benchmark reflects NCAJ's position that no such use should be made of license suspensions. Instead, suspensions should only be applied when driver's engage in behavior that endangers others on the roads.

Secondary benchmark 13 (a) looks to acknowledge states that meet the benchmark *except* with regard to license suspensions for payment of some driving-related offenses. Secondary benchmarks 13 (b) and 13 (c) recognize the limited but important value of state laws that at least refrain from suspending licenses for either failure to pay *or* failure to appear, but not both.

14. Voting Rights

The state does not condition restoration of voting rights on payment of fines, fees, costs, assessments, or surcharges, including any payments that are a condition of probation or parole.

²⁵ See Mario Salas and Angela Ciolfi, *Driven by Dollars: A State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, Carson Whitelemons, Ashley Thomas, Sarah Couture, *Driving on Empty: Florida's Counterproductive and Costly Driver's License Suspension Practices*, October 2019, Legal Aid Justice Center, Fall 2017, <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf>; <https://finesandfeesjusticecenter.org/content/uploads/2019/11/florida-fines-fees-drivers-license-suspension-driving-on-empty.pdf>; For an extensive overview of the problem and links to other relevant content, see Free to Drive Campaign, <https://www.freetodrive.org/resources/#page-content>.

Rationale

The suspension of or refusal to reinstate voting rights for failure to pay fines and fees is a grossly disproportionate punishment.²⁶ In some states, people convicted of certain crimes lose their right to vote until they have completed their sentences—and this is treated as including the full payment of any outstanding fines and fees.

This is the only primary benchmark that has no secondary benchmarks. The consensus view between NCAJ and the expert advisory group was that the fundamental rights at stake cannot be the subject of compromise or respected only partially.

15. Does not Condition Expungement on Payment of Fines and Fees

The state does not condition the expungement or sealing of records, on payment of fines or fees.

Secondary Benchmarks

- a) Meets except for localities: The state meets the primary benchmark, except with regard to some counties and/or municipalities.

Rationale

As with driver's license suspensions, there is no rational or defensible connection between unpaid fines and fees, and expungement or sealing of records.

The lone secondary benchmark looks to acknowledge states that meet the benchmark *except* with regard to license suspensions for payment of some driving-related offenses.

16. Collection and Publication of Data

The state collects and publishes the following data at the state, county and municipal levels:

- (a) Total amounts: The total amount of fines, fees, surcharges and assessments imposed, and amounts of revenue in each category collected.
- (b) Incarceration: The total number of people incarcerated for failure to pay fines, fees, surcharges or assessments, including probation revocations for failure to pay.
- (c) Race: Data, broken down by sentenced individuals' race and ethnicity, on the total amount of fines and fees imposed.

²⁶ See Alicia Bannon, Mitali Nagrecha, Rebekah Diller, *Criminal Justice Debt: a Barrier to Reentry*, Brennan Center for Justice, 2010, pp. 29-30, <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; Lawrence Mower, "State Supreme Court Agrees with Legislature: Felons Must Pay All Costs to Regain Vote," *Miami Herald-Times*, January 16, 2020, <https://www.miamiherald.com/news/politics-government/state-politics/article239355253.html>.

- (d) Age: Data, broken down by sentenced individuals' age, on the total amount of fines and fees imposed.
- (e) Gender: Data, broken down by sentenced individuals' gender, on the amount of fines and fees imposed.
- (f) Income: Data, broken down by sentenced individuals' income level at the time of sentencing, on the amount of fines and fees imposed.

Secondary benchmark:

- a) Meets except for localities: For any of the above, the state meets the primary benchmark, except with regard to some counties and/or municipalities.

Rationale

This benchmark looks to whether states collect and publish data that makes it possible to know how much revenue is derived from fines and fees, to determine the impact of fines and fees on the people they are assessed against, and to reveal key disparities in their use and imposition.

Like the benchmark on notice and unlike all of the other benchmarks, each sub-part of this benchmark will be scored separately, with one point awarded if the state meets that part of the benchmark and zero if it does not, for a maximum total score of 6.

The secondary benchmark looks to whether the state at least collects and publishes this key data at the state level, even if it fails to do so with regard to the practice of counties and municipalities.

17. COVID Response

The state has enacted at least one significant, temporary measure to mitigate the impact of fines and fees in light of the COVID-19 pandemic This could include the waiver of outstanding court debt; the reduction or elimination of certain fines and fees; or the suspension of efforts to secure payment or punish non-payment of fines and fees.

Secondary Benchmarks

- (a)** At least one major locality meets: At least one county or municipality with a population of at least 50,000 has enacted a measure that meets the primary benchmark's substantive criteria.

Rationale

The COVID-19 pandemic has upended countless lives, and the economic fallout has put many families on precarious terrain. In light of the pandemic's severe and unequal economic fallout, states should be taking steps to ensure that people's suffering is not unjustly compounded by unpaid—and perhaps newly unpayable—fines and fees debt. With that in mind, this benchmark asks whether a state has taken steps to mitigate the impact of fines and fees. We have cast a deliberately wide net with framing that could accommodate a range of approaches.

The secondary benchmark asks whether, in a state that has not met the benchmark, at least one major locality has taken steps like the ones we would hope to see at the state level.

Appendix C: Weighting and Numerical Scoring

Below, we present a simplified, at-a-glance overview of the entire benchmark set that was described in detail above, along with the numerical weight assigned to each primary and secondary benchmark. Included here are two different charts. The first lists *only* a shorthand description of the 17 primary benchmarks—this is meant to offer a clear and simple snapshot of the primary benchmark set in its totality. The second chart does the same thing at a higher level of detail, adding simplified descriptions of the secondary benchmarks to the picture presented by the first chart.

Short Form Primary Benchmarks With Weighting

<u>Benchmark</u>	<u>Weight</u>
1) Abolishes all Fees	10
2) Abolishes Juvenile Fines and Fees	6
3) Eliminates Conflicts Around Revenue	6
4) Does Not Allow Private Debt Collection	3
5) Requires Ability to Pay Determinations at Sentencing	6
6) Requires Government to Prove Willful Failure to Pay	10
7) Sets Ability to Pay Standards	5
8) Sets Presumption of Indigence Standards	5
9) Authorizes Discretion to Waive or Modify Fines and Fees	8
10) Authorizes Payment Plans	3
11) Tests Individualized Fines (“Day Fines”)	3
12) Provides Right to Counsel When Incarceration is Possible	6
13) Does not Suspend Driver’s Licenses for Debt	6
14) Does Not Deny Voting Rights for Debt	6
15) Does Not Deny Expungement for Debt	6
16) Collects and Publishes Data (x6)	6
17) Mitigates Fines and Fees in Response to COVID	5

TOTAL	100
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Short Form Primary & Secondary Benchmarks with Weighting

<u>Benchmark</u>	<u>Weight</u>
1) Abolishes all Fees	10
• Meets except for some localities	5
• At least one major locality meets the benchmark	1
• No charges for public defender or appointed counsel	2
• No charges for incarceration costs	2
• Other significant steps within last four years	3
2) Abolishes Juvenile Fines and Fees	6
• Meets except for some localities	3
• At least one major locality meets the benchmark	1
• Abolishes all juvenile fees but not fines	2
• Abolishes all juvenile fines but not fees	4
• Significant steps within last four years	2
3) Eliminates Conflicts Around Revenue	6
• Meets except for some localities	3
• At least one major locality meets the benchmark	1
• Cap on local fine and fees revenue	2
4) Does not Allow Private Debt Collection	3
• Meets except for some localities	1.5
• At least one major locality meets the benchmark	1
• Collectors' fees not linked to amount collected	1
• No additional fees when court debt sent for collection	1
• Collectors' contracts incorporate FDCPA-like terms	1

<ul style="list-style-type: none"> ● State has fair debt collections law that applies to court debt 	1
5) Requires Ability to Pay Determinations at Sentencing	6
<ul style="list-style-type: none"> ● Meets except for some localities. 	3
<ul style="list-style-type: none"> ● At least one major locality meets the benchmark 	1
<ul style="list-style-type: none"> ● Right to request ability to pay hearing codified by law 	2
6) Requires Government to Prove Willful Failure to Pay	10
<ul style="list-style-type: none"> ● Meets except for some localities 	5
<ul style="list-style-type: none"> ● At least one major locality meets the benchmark 	1
<ul style="list-style-type: none"> ● Right to ability to pay determination after sentencing 	2
7) Sets Ability to Pay Standards	5
<ul style="list-style-type: none"> ● Meets except for some localities 	2.5
<ul style="list-style-type: none"> ● At least one major locality meets the benchmark 	1
8) Presumes Indigence	5
<ul style="list-style-type: none"> ● Meets except for some localities 	2.5
<ul style="list-style-type: none"> ● At least one major locality meets the benchmark 	1
9) Authorizes Discretion to Waive or Modify Fines and Fees	8
<ul style="list-style-type: none"> ● Meets except for some localities 	3
<ul style="list-style-type: none"> ● At least one major locality meets the benchmark 	1
<ul style="list-style-type: none"> ● Meets the benchmark only with respect to fines or some fees 	4
10) Authorizes Payment Plans	3
<ul style="list-style-type: none"> ● Meets except for some localities 	1.5
<ul style="list-style-type: none"> ● At least one major locality meets the benchmark 	1
11) Tests Individualized Fines (“Day Fines”)	3
<ul style="list-style-type: none"> ● At least one court using or piloting day fines 	1
12) Provides Right to Counsel When Incarceration is Possible	6

● Meets except for some localities	3
● At least one major locality meets the benchmark	1
13) Does not Suspend Driver's Licenses for Debt	6
● State meets benchmark except for some driving-related offenses	2
● State meets benchmark for failure to pay, but not failure to appear	3
● State meets benchmark for failure to appear, but not failure to pay	3
14) Does Not Deny Voting Rights for Debt	6
15) Does Not Deny Expungement for Debt	6
● Meets except for some localities	3
16) Collects and Publishes Data (x6)	6 (6x1)*
● Meets except for some localities	3 (6x0.5)*
17) Mitigates Fines and Fees in Response to COVID	5
● At least one major locality meets the benchmark	2
TOTAL	100

* This benchmark contains multiple elements worth one point each. The secondary benchmark is scored the same way, but with each element worth half a point each. See section II above, for a fuller discussion.

Appendix D: Expert Advisory Group Members

In 2019 and early 2020, NCAJ consulted extensively with an expert advisory group, made up of leading thinkers, researchers and advocates with a diverse range of expertise on fines and fees issues. All told, we received substantive input on drafts of our fines and fees benchmarks from 19 of these experts.

The final policy benchmarks are attributable to NCAJ alone, and we take full responsibility for their content. However, we also want to emphasize that their content was greatly improved by the feedback, suggestions and criticism we received from the expert advisory group members. We're tremendously grateful for the time and effort the experts put in to this process.

18 of the 19 expert advisory group members who provided feedback, explicitly agreed to be identified and credited with having participated. They are as follows:

- Samuel Brooke, Deputy Legal Director, Economic Justice Project, Southern Poverty Law Center.
- Nusrat Choudhury, Legal Director, ACLU-Illinois
- Beth Colgan, Professor of Law, UCLA Law School
- Jessica Feierman, Senior Managing Director, Juvenile Law Center
- Lisa Foster, Co-Director, Fines and Fees Justice Center
- Sarah Geraghty, Managing Attorney, Impact Litigation, Southern Center for Human Rights
- Beth Huebner, Professor, Department of Criminology and Criminal Justice, University of Missouri-St. Louis
- Juliene James, Director of Criminal Justice, Arnold Ventures
- Matt Menendez, Counsel, Brennan Center for Justice
- Mitali Nagrecha, Director, National Criminal Justice Debt Initiative, Harvard Law School Criminal Justice Policy Program.
- Adeola Ogunkeyede, Legal Director, Civil Rights and Racial Justice Program, Justice and Legal Aid Center
- Ricard Pochkhanawala, formerly Research Attorney, Institute for Justice.
- Jeff Selbin, Clinical Professor of Law and Faculty Director, Policy Advocacy Clinic, UC Berkeley Law School
- Abby Shafroth, Attorney, National Consumer Law Center
- Anne Stuhldreher, Director, The Financial Justice Project, Office of the Treasurer for the City and County of San Francisco.
- Jo-Ann Wallace, President and CEO, National Legal Aid and Defender Association
- Joanna Weiss, Co-Director, Fines and Fees Justice Center
- Carson Whitelemons, Criminal Justice Manager, Arnold Ventures

