

**NCAJ** National Center for  
Access to Justice

AT FORDHAM LAW SCHOOL

# The Price People Pay: Closing the Access to Justice Gap with Policy Solutions for Unaffordable Fines and Fees

---

By Lauren Jones

April 24, 2024



## About the National Center for Access to Justice

The National Center for Access to Justice (<https://ncaj.org>) based at Fordham Law School 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 how all too often it functions as a source of oppression. We identify and promote policies that can improve access to justice, and we measure existing laws and policies against those goals. Our flagship project, the Justice Index, ranks states on their adoption of selected best laws and policies. The Fines and Fees Justice Index is an extension of the Index in which NCAJ tracks the relative performance of states in adopting 17 policies critical to curbing the excessive use of "fines and fees" as a means of collecting revenue from people in the legal system. NCAJ makes its home at Fordham University School of Law where it teaches the Access to Justice Seminar and co-directs the Access to Justice Initiative.

## Acknowledgements

NCAJ is grateful to all with whom we consulted while carrying out the research for this report, and also to all the reformers and advocates, experts and scholars, reporters and funders, all who, in their respective settings, whether national and local, whether in the courts, the bar, the legislatures, the executive branch, the nonprofit sector, or the for profit sector, are dedicated to the vision and task of increasing increase access to justice in America. NCAJ extends special thanks to Arnold Ventures for its support for this project, and to the Fines and Fees Justice Center, Ed Wunch, and Alex Kornya for the particular expertise they contributed. We are also grateful for the pro bono caselaw research of lawyers at Debevoise & Plimpton LLC, report design by Hughes Hubbard, editing acumen of Judy Mogul, and the assistance of our interns, Athena Karavasilis, Jane Kim, and Ryan Pollock, without whom this report would not be possible. While immensely grateful for all the contributions that helped us carry this work forward, NCAJ is of course solely responsible for the findings and views set forth in this final report.

Contact us:

NCAJ | [ncaj@fordham.edu](mailto:ncaj@fordham.edu), [ncaj.org](https://ncaj.org)

## Foreword

At the National Center for Access to Justice, we believe that every person deserves access to justice – the opportunity to understand and assert their rights, in a neutral process under the fair rule of law, with the power to enforce the result. But, while everyone deserves this, few obtain it.

The policy nightmare known as “fines and fees” illustrates the gap. The same government-imposed sums – for example, the fine and the fee that accompany a ticket for a broken tail-light – pose a substantial challenge for a person between jobs, but are a mere slap on the wrist (the equivalent of a restaurant bill) for people with a significant salary. For indigent persons, the carceral entanglement that follows fines and fees exemplifies the phenomenon known as “the criminalization of poverty.”

Life is unequal, of course, but it is fair to ask whether our justice system can deliver on its promise of equal justice when individuals with differing resources, and some without resources at all, are required to pay the same. In 1983, the Supreme Court underlined the core principle at stake, holding in *Bearden v. Georgia* that payment must not be compelled by threat of incarceration in the absence of a showing that the person has the actual ability to pay. We know an ability to pay determination is critical not only when the penalty is jail, but also whenever payment is demanded from those unable to pay.

To date, however, there has been only modest progress in assuring that ability to pay will be considered meaningfully when government pursues revenue from individuals. Most states still do not even require courts to make ability to pay determinations, much less specify how to make them, what the standard of financial eligibility should be, or when to waive all (or a portion) of recovery. However, it’s not all bad news, as there are have also been some breakthroughs. In our research we identified the following ten policy models that states are using – in a variety of forms – to promote fairness: i) judges must be able to waive or modify fines and fees; ii) judges must be required to make determinations on ability to pay at all times; iii) procedural protections must assure the integrity of ability to pay decisions; iv) a bright-line standard of indigency should direct a full waiver of payment; v) statutory guidelines set conditions that justify full waiver or partial recovery; vi) official tools, such as ability pay calculators and bench cards, help judges determine ability to pay; vii) practitioners’ tools simplify the task for judges, viii) “day fines” adjust the amounts owed based on income and severity of crime; ix) community service plans serve as an alternative to payment, and x) “payment plans” offer another alternative.

The “ability to pay policies” we have gathered in this Report, each of which is already operating in at least one of the 50 states, point the way toward equal justice for all in the treatment of fines and fees. We are mindful of all who are struggling in our legal system for access to justice. We are grateful for the opportunity this Report has provided to share our findings with activists, advocates, researchers – all who are committed to taking next steps to improve the quality of justice in our country.

April 24, 2024

David Udell  
Executive Director

## Table of Contents

Foreword .....	i
Executive Summary .....	iv
Report .....	1
<b>A. INTRODUCTION .....</b>	<b>1</b>
I. Background	
II. A National Policy Scourge	
III. The Costs of Being Too Poor to Pay	
IV. Societal Impacts of Unaffordable Fines and Fees	
<b>B. ABILITY TO PAY DETERMINATIONS .....</b>	<b>4</b>
I. Constitutional Underpinnings of Ability to Pay Determinations	
II. Abolition of Fees and Right-Sizing of Fines: The Most Direct Approach to Ending Harms	
III. The Justice Index’s Best Policies for Determining Ability to Pay	
<b>C. SELECTED POLICY MODELS .....</b>	<b>7</b>
<b>I. Discretion: Judicial Authority to Waive or Reduce Fines and Fees .....</b>	<b>8</b>
A. <i>Courts Should Have the Fundamental Power to Waive or Reduce All Fines and Fees</i>	
• Judicial Responsibility to Make Ability to Pay Determinations (Montana)	
• Judicial Discretion to Waive or Reduce All Fines and Fees (Rhode Island)	
<b>II. Timing: A Judicial Duty to Hold Ability to Pay Hearings at Critical Times .....</b>	<b>9</b>
A. <i>Judicial Duty to Make an Ability to Pay Determination Before Imposing Any Fines or Fees</i>	
• Judicial Duty to Determine Ability to Pay Before Imposing Fines and Fees (Washington)	
B. <i>Judicial Duty to Make a New Ability to Pay Determination Upon Request at Any Time</i>	
• Notice and Right to Request Ability to Pay Hearing at Any Time (Oklahoma)	
• Standardized Form to Request a New Ability to Pay Determination (Texas)	
C. <i>Judicial Duty to Suspend Collection During Incarceration and Determine Ability to Pay After Release</i>	
• Suspension of fines payments during incarceration and ability to pay determination post release (Indiana)	
D. <i>Judicial Duty to Determine Ability to Pay Before Imposing Sanctions for Failure to Pay</i>	
• Elimination of Incarceration Altogether (Delaware)	

- Courts Are Required to Make an Ability to Pay Determination Before Imposing Sanctions for Failure to Pay on Time (Oklahoma)
- Courts Are Required to Make an Ability to Pay Determination Before Imposing Sanctions for Failure to Pay on Time (Washington State)

**III. Procedure: Judicial Duty to Provide Procedural Protections in All Ability to Pay Proceedings ..... 13**

- A. *Judicial duty to put ability to pay findings on the record*
- Judicial Duty to Consider Evidence and Put Findings on the Record (Oklahoma)
- B. *Judicial duty to make clear and definite findings of fact*
- Judicial Duty to Make Clear and Definite Findings of Fact Based on Evidence (Ohio)
- C. *Judicial duty to appoint counsel for party facing potential incarceration or sanction*
- Judicial Duty to Appoint Counsel, as of Right (Massachusetts)

**IV. Indigency: Waiver of Fines and Fees When Person Cannot Afford to Pay ..... 15**

- A. *Waiver if income below bright line financial eligibility standard: 200 percent of the federal poverty line*
- Presumption of Waiver for Income Below 200 Percent of Federal Poverty Line (Illinois)
  - Presumption of Waiver for Income below the “Very Low Income Limit” set by the Department of Housing and Urban Development (instead of the federal poverty line) when determining ability to pay (Montana)
- B. *Relying on Receipt of Public Benefits as a Shortcut to Determine Eligibility for Waiver*
- Presumption of Waiver for a Person Who Receives Public Benefits (Illinois)
  - Presumption of Waiver for a Person Who Receives Public Benefits, Broadly Defined (Washington)
  - Presumption of Waiver for a Person Who Receives Public Benefits Based on a Disability (Oklahoma)
- C. *Judicial Duty to Waive Fines and Fees Based on a Person’s Life Circumstances*
- Requirement to Waive Fines and Fees if a Person Has Been Committed to a Mental Health Facility (Washington)
  - Requirement to Provide Relief from Fines and Fees if a Person is Living in Subsidized Housing (Oklahoma)
  - Requirement to Waive Fines and Fees if Payment Would Cause Undue Hardship (Illinois)

<b>V.</b>	<b>Statutory Guidelines: Judicial Considerations for Determining How Much a Person Should Pay</b> .....	<b>19</b>
A.	<i>States Codify Factors for Courts to Consider in Determining Ability to Pay</i>	
	<ul style="list-style-type: none"> <li>• Specific Factors for Judges to Consider in Determining Ability to Pay (Oklahoma)</li> </ul>	
B.	<i>States Codify Income Brackets to Reduce Amounts, Addressing the Cliff Effect</i>	
	<ul style="list-style-type: none"> <li>• Income Brackets to Determine Percentage Reduction in Fines and Fees (Illinois)</li> </ul>	
<b>VI.</b>	<b>Tools: Official Tools (Not Yet in Statutory Law) for Determining How Much a Person Should Pay</b> .....	<b>23</b>
A.	<i>Courts Use an Online Tool That Allows Litigants to Apply for a Reduction of Fines</i>	
B.	<i>Courts Use a State-Created Ability to Pay Calculator</i>	
C.	<i>Courts Use Bench Cards to Determine Amounts to Order or Waive</i>	
	<ul style="list-style-type: none"> <li>• Guideline: fines and fees should be no more than 10 percent of net monthly income (North Carolina)</li> <li>• Guideline: people should be able to keep at least \$217.50 per week (Michigan)</li> <li>• Presumptions of waiver for indigence (Michigan)</li> </ul>	
<b>VII.</b>	<b>Practitioners’ Tools: Advocates’ Approaches are Helping Courts Determine Ability to Pay</b> .....	<b>25</b>
A.	<i>A Practitioner-Created Ability to Pay Calculator Lowers the Burden of Proving Expenses (Iowa)</i>	
B.	<i>“Hardship Is Not a Number” Offers a Narrative that Promises Fairer Determinations (Oklahoma)</i>	
<b>VIII.</b>	<b>Day Fines: An Alternative Formula for Setting Fines Based on Income and Severity of Crime</b> .....	<b>27</b>
<b>IX.</b>	<b>Community Service: Services, Education and Other Activities Offer Alternatives to Payment</b> .....	<b>28</b>
	<ul style="list-style-type: none"> <li>• Broad Definition of Community Service and Authority to Waive It (Texas).</li> <li>• Another Broad Definition of Community Service (Michigan)</li> <li>• High Reimbursement Rates and Caps on Community Service Requirements (Multnomah County, Oregon)</li> </ul>	
<b>X.</b>	<b>Payment Plans: Alternative Approaches to Full Payment Up Front</b> .....	<b>30</b>
	<ul style="list-style-type: none"> <li>• Caps on Monthly Payment Amounts (Florida).</li> <li>• New Determination of Ability to Pay—Not Punishment—If a Person Misses a Monthly Payment (Oklahoma)</li> <li>• Courts not Permitted to Charge Interest, Payment Plan Fees, and Late Fees (Delaware)</li> </ul>	
<b>D.</b>	<b>CONCLUSION</b> .....	<b>32</b>

## Executive Summary

### A. The Policy Scourge of Unaffordable Fines and Fees

*Brooke Bergen spent almost a year in the Dent County Jail in Missouri for stealing an \$8 tube of mascara from Walmart. At the end, she owed \$15,900 in fines and fees, primarily for what's known as "pay-to-stay"—the fees many states charge per night in jail.<sup>1</sup> Ms. Bergen had never held more than a minimum wage job, and certainly did not have enough savings to pay up front. She had to go to court monthly for hearings on the fines and fees, spending half a day there for each appearance. There was no official payment plan in place, but each month Ms. Bergen would have to pay what she could scrounge together. If she did not appear for court or had no money that month, the judge could send her back to jail (and often did with other litigants), where they incurred still more debt. 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—all for stealing mascara.<sup>2</sup>*

Ms. Bergen's story is unusual because it was featured in a Pulitzer Prize-winning series in the *St. Louis Post-Dispatch*, but the imposition of high fines and fees for even minor scrapes with the law is unfortunately anything but unusual. State and local governments across the country impose *fin*es as punishment for everything from traffic and municipal code violations to felonies. On top of those fines, they frequently add *fees* whose purpose is to fund law enforcement, the court system, and other government operations. In many states, these include fees for a "free" public defender, probation and parole supervision, electronic monitoring, and more.<sup>3</sup> For even a minor infraction like stealing \$8 worth of goods, people can owe hundreds or even thousands of dollars.

People who cannot afford to pay court-imposed fines and fees suffer numerous and substantial harms. Surveys in Alabama and New Mexico, for example, have found that eight in ten people who owe fines and fees sacrifice basic necessities such as food, rent, car payments, and child support in their attempts to pay off these debts.<sup>4</sup> Fines and fees can ruin credit, making it hard to buy a car or rent a home. In more than half of states, people can have their driver's licenses suspended for failure to pay, ironically making it hard to get to work to pay off their debts.<sup>5</sup> Twenty states block people with outstanding fines and fees from exercising the right to vote.<sup>6</sup> And in some places, as many as one in two people with outstanding fines and fees have gone to jail because they could not afford to pay.<sup>7</sup>

While the harms fines and fees cause to individuals, families and communities can be grave, the economic benefits are relatively small. One study found that, on average, counties spent 41 cents for every dollar they collected in fines and fees revenue on jail and court costs alone.<sup>8</sup> One county in New Mexico spent \$1.17 collecting fines and fees for every dollar it raised, meaning that it lost money.<sup>9</sup>

The most direct way to address the harms is to abolish fees and to right-size fines. Momentum is building across the country to eliminate court fees altogether, and to eliminate juvenile court fines as well as juvenile court fees. Recognizing, however, that even if those campaigns are ultimately successful, adults will continue to face fines—and that in many places fee elimination campaigns may take years or decades to succeed—NCAJ set out to address the present harms by finding laws and practices that meaningfully consider people's ability to pay, and that could be adopted in more jurisdictions right now. The goal of this report is to provide communities considering reform with these real-world examples of

policies that have been identified by experts and other stakeholders as valuable, and that are potentially replicable. By and large, however, the examples provided here have not been made subject to empirical evaluation, so a critical next step would be to carry out such evaluation. xx

## **B. The Project to Identify Policy Models**

Building on NCAJ's Fines and Fees Justice Index—an online tool that ranks states based on their degree of adoption of policies that curb abusive fines and fees practices—NCAJ set out to find examples of states that provide especially good protection for people, focusing on states' requirements and procedures for determining ability to pay.<sup>10</sup> NCAJ did a deep dive into the laws on the books for each state that received credit in its Fines and Fees Justice Index for benchmarks that touch on ability to pay; researched caselaw in each state that requires judges to make ability to pay determinations; completed an extensive literature review of writings and studies on ability to pay practices in fines and fees cases across the country; analyzed bench cards that provide guidance to judges about setting fines and fees; and interviewed practitioners across the country.

Based on this analysis, NCAJ found that no state or locality is doing well, overall, when it comes to determining ability to pay. We did, however, find examples of laws and practices – policy models -- that stand out as worthy of consideration for evaluation and for possible replication because they appear to be more protective, as compared to those in other states. In this report, we have gathered the policy models that impressed us as worthy of additional consideration and evaluation.

## **C. The Policy Models**

The following are NCAJ's top recommendations for policy models that are worthy of further consideration because they appear to be useful in reducing the likelihood that judges would impose and compel payment of fines and fees from people unable to afford to pay:

- 1. Court has Power to Waive or Reduce All Fines and Fees.** The threshold question for every state when it comes to fines and fees is: do judges have the authority to waive or modify *all* fines and fees? Without that, even if judges waive *discretionary* fines and fees, the *mandatory* charges can continue to trap people in cycles of debt and incarceration.
- 2. Court has Duty to Make Ability to Pay Determinations at Critical Times.** There are at least four critical points at which judges must determine ability to pay, with multiple policy models available to guide how these determinations are made: (1) prior to imposing fines and fees; (2) upon request at any time; (3) after incarceration; and (4) before imposing any sanctions for failure to pay.
- 3. Procedural Protections During Ability to Pay Hearings.** Procedural protections—such as requiring judges to hear particular evidence and to put their findings on the record—are important to ensure that any time judges make an ability to pay determination, they consider the person's individual circumstances and finances. Without that, even if judges were required to conduct an ability to pay hearing, they could simply check a box to indicate that they had considered ability to pay without undertaking a meaningful determination. Another important protection is the right to counsel where ability to pay is at issue because a court must decide



whether the party is in contempt for failure to have made a court ordered payment.

- 4. Waiver of Fines and Fees When a Person is Indigent.** Several states have created a bright line test to determine when judges should presume that a person is unable to afford to pay and, therefore, order waiver of all fines and fees. Illinois has the highest income threshold, creating a presumption that a judge should waive fines and fees if a person's income falls below 200 percent of the federal poverty level.<sup>11</sup> Recognizing that receipt of public benefits means that a government agency has already determined that the person does not have the means to pay for basic necessities, most states with such a standard also provide a shortcut for judges, presuming that a person is unable to afford to pay fines and fees if they receive public benefits. Some states take into account other life circumstances, providing that judges should waive fines and fees if, for example, the person has been involuntarily committed to a state mental hospital, has been declared totally disabled, or is unhoused.
- 5. Statutory Guidelines for Determining How Much a Person Can Afford to Pay.** Having effective guidelines for determining when a judge should waive fines and fees entirely based on indigency does not protect many financially struggling people—not yet indigent—from becoming indigent as a result of fines or fees. Some states have codified standards that courts must consider when determining how much a person can afford to pay (although in some states these factors only come into play when a court is deciding whether to incarcerate a person for failure to pay). The factors broadly fall into three categories: (1) income and assets; (2) debts and expenses; and (3) life circumstances. Illinois has taken a different approach to other states, directing judges to reduce fines and fees by pre-set percentages based on the degree to which the person's income exceeds indigency as reflected in bracketed income levels.<sup>12</sup>
- 6. State-Created Tools to Help Judges Determine Ability to Pay.** Several states have created tools to help judges determine appropriate fines and fees amounts based on ability to pay assessments. Washington State, for example, has attempted to provide guidance to judges about how to determine fines and fees amounts by creating a Legal Financial Obligation (“LFO”) calculator that helps judges determine ability to pay.<sup>13</sup> California has created an online tool, Mycitations, that allows people facing traffic fines to apply for a reduction in what they owe. Other states have attempted to fill the gap with judicial bench cards.
- 7. Practitioners' Tools that Illuminate Ability to Pay.** In some states, practitioners have created tools that help present evidence and argument to judges to facilitate the determination of ability to pay. In Iowa, for example, a legal aid lawyer has created [abilitytopay.org](http://abilitytopay.org), a tool which asks litigants a series of basic questions about where they live, their family composition, and their income. The tool then auto-populates with assumptions the IRS has created about average cost of living expenses in each county. Using this data, the tool creates a recommendation about how much the person can afford to pay based on their monthly disposable income. In Oklahoma, another legal aid lawyer has created a questionnaire to elicit stories about the hardships a person faces as a result of the fines and fees. The tool asks questions like: When was the last time you had to get food from a food pantry? What is the most you have ever earned in a year? And how many times have you had to sleep on a friend or family member's couch because you could not afford rent? The theory behind this approach is that hardship is not a

number, but a story. These approaches, and others employed by advocates, are important to courts as they work to render determinations that are fair.

- 8. Day Fines.** Many laws in Europe and South America provide a different model. There, fines are not set at a particular amount that judges can modify if the person cannot afford to pay. Rather, fines are always pegged to the severity of the offense and the person's income. A particular fine, for example, might be set at five times a person's daily wages, which would be much higher for a person with means than a person living paycheck to paycheck.
- 9. Community Service, Education and Activities Offer Alternatives to Payment.** One method for reducing overall fines and fees is community service. Such requirements, however, can become onerous if judges do not take into account people's life circumstances, define community service too narrowly, or credit people for their time at very low monetary rates. Some states have attempted to address these problems by creating a broad definition of community service, creating waivers for people if performing community service would create an "undue hardship," capping the total number of hours a person can be required to complete, and crediting people at a reasonable rate.
- 10. Payment Plans as an Alternative to Payment in Full Up Front.** Some states provide that anyone can pay with a monthly payment plan rather than in one lump sum. One important guardrail with payment plans is to require that judges make an initial ability to pay determination before setting the overall fines and fees, so that people do not have to pay a total amount that, even if broken up into monthly payments, would take years or even decades to pay off. Another safeguard is to put caps on the amount of money due each month. Importantly, Delaware bars courts from charging interest, payment plan fees, or late fees if people miss a payment, avoiding the problems that can arise when people select a payment plan that ends up costing them more over time.<sup>14</sup>

Our findings underscore what people who face unaffordable fines and fees have known for years: across the country, fines and fees inflict years-long and sometimes lifelong burdens on people, harming them simply because of their poverty. But there are rays of hope because of the policy models that states are adopting to eliminate fees, right-size fines, and make meaningful determinations of ability to pay. We hope that this report will provide real-world examples for evaluation and replication by those who are working to fix this broken system.

## Report

# The Price People Pay: Closing the Access to Justice Gap with Policy Solutions for Unaffordable Fines and Fees

## A. INTRODUCTION

### I. Background

*For stealing an \$8 tube of mascara from Walmart, Brooke Bergen spent almost a year in the Dent County Jail in Missouri. 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.<sup>15</sup> Ms. Bergen had never held more than a minimum wage job. The judge required her to appear for court once a month, spending half a day there for each appearance. There was no official payment plan in place, but each month Ms. Bergen would have to pay what she could scrounge together. If she did not appear for court or had no money that month, the judge could send her back to jail (and often did with other litigants), where they incurred still more debt. 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.<sup>16</sup>*

Ms. Bergen’s story was profiled in a Pulitzer Prize-winning series in the *St. Louis Post-Dispatch*. But countless stories just like hers go unreported. State and local governments across the country impose *fin*es as punishment for everything from traffic and municipal code violations to felonies. They then tax people with extra *fee*s whose purpose is to fund law enforcement, courts, and other government operations. 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.<sup>17</sup> In Washington State alone, there are 156 different fines and fees that judges can (and sometimes must) impose.<sup>18</sup>

In Washington State alone there are more than 150 fines and fees that judges may—and sometimes must—impose.

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, sometimes without spending any time in jail or prison. People who cannot promptly pay, however, not only face late fees and high interest rates on the outstanding debt, but are sometimes also jailed for failure to pay, incurring additional penalties such as pay-to-stay fees. This means that those with the least means often end up owing the most—and remain hopelessly entangled with the criminal legal system for long periods of time. For example, a person arrested for theft in the third degree in Iowa would be required to pay \$1,133 in fines, fees, and victim restitution. If they pay immediately, they can avoid jail. If the person cannot pay, however, there is an additional \$1,260 indigent defense fee for the appointment of a public defender and roughly \$2,100 in jail fees, charged at a rate of \$70 per day, plus a 15 percent collection fee. That’s a total of \$4,497—a 441 percent increase in the bill.<sup>19</sup> Many states also contract with debt collectors, who often charge collection fees. In Washington State, for example, if the debt is turned over to a collection agency, that agency can charge up to a 50 percent “collection fee” if the

outstanding obligations are under \$100,000 and up to a 35 percent fee if the outstanding debt is more than \$100,000.<sup>20</sup> The letter of the law thus provides for the poor to pay more.

Person #1 – not indigent – Theft 3 <sup>1</sup>		Person #2 –indigent – Theft 3	
Fine	\$ 855	Fine	\$855
Victim restitution	\$ 30	Restitution	\$ 30
Filing fees	\$ 100	Filing fees	\$100
		Indigent defense fee	\$1,260
		Jail fees	\$2,100 (\$70 per day)
SUBTOTAL	\$ 985	SUBTOTAL	\$4,345
15% fee	\$ 148	15% collection fee	\$ 652
<b>TOTAL</b>	<b>\$1,133</b>	<b>TOTAL</b>	<b>\$4,997 (441% increase)</b>

Source: <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>

Meaningful ability to pay determinations, in 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, but meaningful determinations 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. 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 on fines and fees are worthy of replication in full, this paper explores laws and practices in place across the United States that aim to prevent the states from compelling unaffordable payment. Using research from statutes, caselaw, judicial bench cards, and additional sources, this paper explores best policies for: (1) authorizing judges to waive or modify all fines and fees so that the charges fit the particular circumstances of the case; (2) requiring judges to conduct determinations of ability to pay at critical times, including before setting fines and fees, any time a litigant requests a re-hearing, after incarceration, and before imposing sanctions for failure to pay; (3) putting in place procedural protections that aim to ensure that ability to pay hearings are meaningful; (4) mandating waiver of fines and fees if a person meets bright-line standards for income; (5) mandating waiver of fines and fees where life circumstances warrant presumption of inability to pay; (6) setting forth standards to waive or reduce fines and fees when a person is not indigent but nonetheless unable to afford to pay; (7) creating options for community service (broadly defined) when a person is not able to pay in full; (8) creating options for payment plans where person is unable to pay up front in full; and (9) deploying creative, replicable tools and strategies that lawyers have created to advocate for a reduction in fines and fees for their clients.

This report builds on the important work that others have done before us, including but certainly not limited to: [First Steps Towards More Equitable Fines and Fees Practices: Policy Guidance on Ability-to-Pay Assessments, Payment Plans and Community Service](#) by the Fines and Fees Justice Center; [Ten Guidelines on Court Fine and Fees](#) by the American Bar Association; [Resource Guide: Reforming the Assessment and Enforcement of Fines and Fees](#) by the Department of Justice; and [Ability to Pay](#), prepared for the 22<sup>nd</sup> Annual Liman Center Colloquium. This report seeks to take the field further by examining real-world examples of best policies and practices for making ability to pay determinations when courts set fines and fees. The goal is to make it easier for local governments and advocates seeking to increase the fairness of their legal systems to find real-world examples that (a) have proven useful in other places, (b) are potentially replicable, and (c) are available for evaluation.

## **II. A National Policy Scourge**

There are wide gaps in data that make it hard 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, in 2021 people collectively owed at least \$27.6 billion in fines and fees debt.<sup>21</sup> The Federal Reserve found in 2020 that six percent of adults—or one in 17 people—report that their family owes outstanding fines and fees.<sup>22</sup> For people with an incarcerated loved one, that number increases to one in five.<sup>23</sup> Fines and fees for even a single minor incident can add up to thousands of dollars. A survey by the Ella Baker Center of people who owed fines and fees found that the average court-related debt was \$13,607.<sup>24</sup> 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.

Most people cannot afford to pay these large—and sometimes even comparatively small—court debts. The Federal Reserve has found that nearly four in 10 Americans cannot afford to pay for a \$400 emergency.<sup>25</sup> 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.<sup>26</sup> Across the country, between 80 and 90 percent of people in criminal court are eligible for a public defender, meaning they are indigent.<sup>27</sup> Nearly half of incarcerated people have individual incomes below \$10,000.<sup>28</sup> But too often courts impose fines and fees on people who cannot afford payment, without taking a person’s ability to pay into consideration. In our national research for the Fines and Fees Justice Index we found that only 12 states require judges to conduct ability to pay assessments any time they impose fines or fees.<sup>29</sup>

## **III. The Costs of Being Too Poor to Pay**

Imposing fines and fees that people are unable to afford causes grave harms. 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.<sup>30</sup> In Alabama, two thirds of people who owe fines and fees said they had to turn to faith-based charities or churches for food, which they would not have had to do absent the court debt.<sup>31</sup>

The harmful consequences of unaffordable fines and fees can last for years or even a lifetime. Studies confirm that fines and fees contribute to the “criminalization of low income defendants,” which can keep people entangled with the courts for years through warrants and debt collection proceedings.<sup>32</sup> Many people face ruined credit that makes it hard to rent a home or buy a car. Fines and fees can prevent people from pursuing higher education or building wealth, deepening intergenerational poverty. In more than half of states, people can have their driver’s licenses suspended for failure to pay, ironically making it harder—or in some places impossible—to get to work to pay off the debts.<sup>33</sup> In some cases, people make the difficult choice to drive on a suspended license, which can lead to arrest, incarceration, and further debt.<sup>34</sup> In 20 states, outstanding fines and fees can block some people from exercising the right to vote.<sup>35</sup> In some states, as many as one in two people with outstanding fines and fees debts have gone to jail because they could not afford to pay.<sup>36</sup> In short, unaffordable fines and fees can trap people in deepening 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 on average the pay is between \$0.14 and \$0.63 per hour for regular prison jobs—owe fines and fees during their time in prison.<sup>37</sup> The money to pay these debts comes out of their

commissary accounts, meaning that money families have scraped together to send to their incarcerated loved ones to supplement meager prison diets, hygiene products, and stamps or phone calls to stay in touch instead gets diverted to pay these fines and fees.<sup>38</sup> Studies show that 63 percent of the time, family members are the ones who are paying back court debts for their loved ones who are incarcerated.<sup>39</sup> Of the family members who pay, 83 percent are women.<sup>40</sup> Even after people have returned from incarceration, family members often continue to pay court debts because they know that failure to do so could send their loved ones back to jail. As a result, families paying fines and fees report struggling to afford basic necessities like rent and food.<sup>41</sup>

#### **IV. Societal Impacts of Unaffordable Fines and Fees**

Since the 1980s—when the costs to run courts, law enforcement, and corrections systems ballooned alongside the rise of mass incarceration—states have increasingly turned to fines and fees to foot the bill.<sup>42</sup> In 1986, for example, just 12 percent of people who were incarcerated were also ordered to pay fines. By 2014, 66 percent of incarcerated people were ordered to pay fines and/or fees.<sup>43</sup> The number and types of fees have also risen substantially.<sup>44</sup>

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 on average spent \$0.41 on court costs and jail expenses alone. One county in New Mexico spent at least \$1.17 for every dollar it brought in, meaning that it actually lost money on fines and fees.<sup>45</sup> By contrast, the IRS spends well under a penny for every dollar it collects in taxes.<sup>46</sup>

A study by the Brennan Center for Justice found that one county in New Mexico spent at least \$1.17 for every dollar it brought in trying to collect fines and fees.

When police spend their time focused on fines and fees, it leaves less time for other investigations and can undermine public safety. In fact, cities that rely heavily on fines and fees for revenue tend to solve violent and property crimes at a lower rate than cities that focus less on fines and fees.<sup>47</sup> Unaffordable fines and fees can drive crime as well. Surveys in Alabama and New Mexico both show that roughly four in ten people who owe court debt say they have committed a crime (including but not limited to driving on a suspended license) to help pay it off.<sup>48</sup>

The U.S. Department of Justice has recognized the problem. In a Dear Colleague Letter that the Department of Justice sent to state and local courts across the country in April 2023, the Department cautioned: “Assessment of unaffordable fines and fees often does not achieve the fines’ and fees’ purpose. In many cases, unaffordable fines and fees undermine rehabilitation and successful reentry and increase recidivism. 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.”<sup>49</sup> XXX [stopped transferring content here]

### **B. ABILITY TO PAY DETERMINATIONS**

#### **I. Constitutional Underpinnings of Ability to Pay Determinations**

The power to collect fines is not infinite. Rather, the 8<sup>th</sup> 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.<sup>50</sup> The Supreme Court has held that a fine is unconstitutional when it “is grossly disproportional to the gravity of the defendant’s offense,” but Supreme Court litigation focused on the Excessive Fines Clause has been limited.<sup>51</sup> Exactly what constitutes an excessive fine has been left largely open to interpretation by lower courts, as has the question of whether the Excessive Fines Clause applies to fees.<sup>52</sup>

Of the courts that have addressed this question, 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.”<sup>53</sup>

The 14<sup>th</sup> Amendment establishes an additional limit on fines and fees. The U.S. Supreme Court has held that the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution bar courts from “punishing a person for his poverty.”<sup>54</sup> 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. The Department of Justice has spelled out that, at a minimum, the holding means that, “State 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.”<sup>55</sup>

Further, in its Dear Colleague letter, the Department of Justice took this view about conducting ability to pay determinations for all fines and fees: “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.”<sup>56</sup>

## **II. 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 so that they are more affordable. As a result of tireless work by advocates, many states in recent years have taken important steps towards ending fees altogether and right-sizing fines. The Debt Free Justice Campaign, for example, has had wins in a dozen states to limit or end fines and fees in juvenile courts, and the End Justice Fees Campaign is building momentum to end legal system fees, as distinct from fines, across the country.<sup>57</sup>

In many jurisdictions, however, abolition of fees is far-off at best and fines are routinely unaffordable. While many seek abolition of fees writ large, stakeholders (advocates, as well as 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. Millions of people are being burdened every day by unaffordable fines and fees, and the recommendations that follow seek to mitigate these burdens. These are important, interim steps towards the ultimate elimination of fees, as well as the right-sizing of fines so that punishments are measured, just, and equitable.

### III. 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 created the Fines and Fees Justice Index, an online tool that measures the degree to which states have established policies that create a fairer legal system that does not criminalize poverty when imposing fines and fees, and that ranks the states accordingly.<sup>58</sup> In consultation with experts from around the country, NCAJ identified 17 policies that create more equity in the system and greater access to justice. 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 how their policies measure up, and posted the findings and rankings online both to empower and encourage state officials to establish the selected policies as law.

In the Fines and Fees Justice Index, eight distinct benchmarks (numbered 5 through 12) track the following essential types of state policies governing ability to pay determinations:

5. **Mandatory Ability to Pay Determinations (12 states)** - The state requires courts to conduct an ability to pay determination whenever they impose fines, fees, costs, surcharges or assessments.
6. **Proof of Willfulness Prior to Incarceration or Sanction (16 states)** - 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.
7. **Substantive Standards (12 states)** - 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.
8. **Presumptions of Indigence (8 states)**- 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.
9. **Judicial Discretion (18 states)** - 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.
10. **Payment Plans (4 states)** - 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.

11. **Day Fines (1 state)** - 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.
12. **Right to Counsel (25 states)** - 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.<sup>59</sup>

Using the Fines and Fees Justice Index's eight ability to pay benchmarks as a starting point, we have researched state laws and practices that fulfill the vision of the original benchmarks by providing practical protection to individuals unable to afford to pay fines and fees.

To locate specific policy models of interest, we (1) looked in depth at the laws on the books for each state that received credit for one of these eight benchmarks; (2) researched caselaw in each state that requires judges to conduct ability to pay determinations to understand the factors appellate courts deem sufficient in such cases; (3) conducted an extensive literature review, combing through writings and studies on ability to pay practices in fines and fees cases across the country; (4) found and read bench cards that provide guidance to judges about fines and fees; and (5) interviewed practitioners across the country.

### **C. SELECTED POLICY MODELS**

In our research, we found that no state or locality has established comprehensive policies for assuring fairness in ability to pay determinations. We did find however, that some states have policies that stand out as more protective of people's rights than those in other states, and we also found that, in some states, advocates are pursuing certain innovative advocacy strategies are an important part of the landscape.

In the report, below, we have gathered a set of the policy models that impressed us as worthy of additional investigation and evaluation. Of course, inclusion of a policy in this report does not guarantee that the particular model is fully implemented in the state, nor that the model, itself, is capable of fully realizing the goals for which it is intended. Indeed, no matter how good a policy appears on paper, it will still be important for communities, advocates and officials to hold government accountable for the practical effectuation of the policy on the ground. Likewise, it remains potentially valuable to subject all policy models to empirical evaluation.

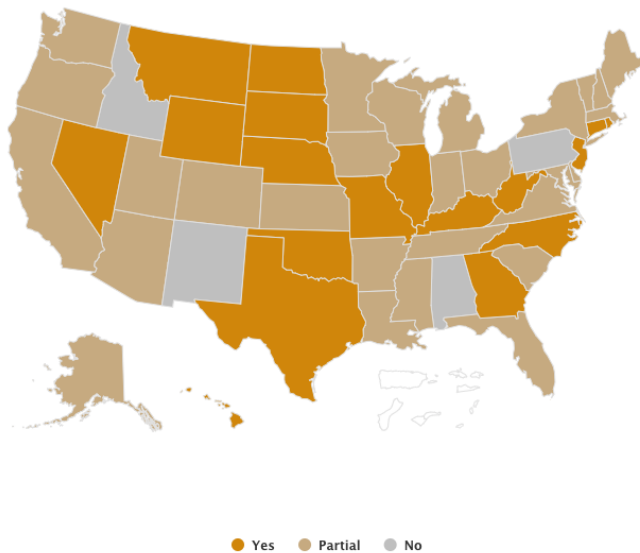
Nonetheless, all accountability and evaluation – and the rule of law itself -- begins with the policies, themselves, and what follows are examples of practically useful provisions we located in statutes, cases, bench cards, interviews and other resources for determining ability to pay that we identified through our research.

## I. Discretion: Judicial Authority to Waive or Reduce Fines and Fees

Recognizing that 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 and also create greater equity in the system. It is also beneficial to state and local government revenue. When people are unable to pay the total charge, they often pay nothing. Some research has found that when fines and fees are pegged to a person’s means, total revenue for the government, in fact, increases because people generally pay fines and fees when they are able to do so.<sup>60</sup>

To limit harms and increase equity, it is critical for judges to have the ability to waive or modify all fines and fees.

### A. Courts Should Have the Fundamental Power to Waive or Reduce All Fines and Fees



The essential first step in ensuring any measure of fairness in a system that imposes fine and/or fees is judicial discretion in determining the amounts to be imposed and whether to waive or reduce monetary sanctions in light of the individual’s circumstances. When states make fines and fees mandatory—meaning judges have no authority to waive or modify them—they remove the judge’s power to consider the individual’s circumstances. Two out of three states impose at least some fines and/or fees that judges have no power to waive or modify.<sup>61</sup> In some places, mandatory fines can be as high as \$750,000.<sup>62</sup>

Without judicial discretion to waive or modify all fines and fees, ability to pay determinations may have limited utility. Understanding what an individual can afford only helps inject fairness where the law authorizes judges to consider that limitation when imposing fines and fees. A survey of judges in Washington State, for example, found that an online “ability to pay calculator” had limited impact because, recognizing the financial circumstance I like of the people who appeared before them, judges were already waiving all fines and fees that were discretionary.<sup>63</sup> This comports with national trends. A study found that roughly 70 percent of people nationwide are unable to pay statutorily set, mandatory fines and fees.<sup>64</sup>

State laws are most protective when they remove the mandatory requirement from all fines and fees, giving judges the authority to waive or modify all fines and fees according to the circumstances of

the case. No single statute stood out as exemplary in all regards, but portions of statutes in two states stood above the rest:

- **Judicial Responsibility to Make Ability to Pay Determinations (Montana):** Montana law 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 defendant is or will be able to pay them.”<sup>65</sup>
- **Judicial Discretion to Waive or Reduce All Fines and Fees (Rhode Island):** 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.”<sup>66</sup>

## II. Timing: Judicial Duty to Hold Ability to Pay Hearings at Critical Times

Giving judges the authority to waive or reduce fines and fees without requiring them to hold ability to pay hearings means that justice might depend not only on where a person is arrested, and which judge they appear in front of, but also on how busy the docket is that day—or even whether the judge is in the mood to hold a hearing. It is, therefore, critical for states to require judges to conduct meaningful determinations of ability to pay at certain critical junctures in a case: (1) before ordering a person to pay fines and fees; (2) when a person requests a re-determination; (3) after incarceration; and (4) before imposing any sanctions for failure to pay.

### A. *Judicial Duty to Make an Ability to Pay Determination Before Imposing Any Fines or Fees*

Of the states that give judges authority to waive or modify all fines and fees, only some allow judges discretion prior to setting fines and fees. In other states, judges have authority to waive or modify fines and fees, but only after the person has failed to pay and is facing sanctions.<sup>67</sup> Having discretion from the outset is critical. Giving judges authority to waive or modify all fines and fees without requiring them to make an ability to pay determination prior to setting such costs means that people could still be ordered to pay fines and fees that are well outside of their means. The Department of Justice has outlined clearly the benefits of requiring judges to make ability to pay determinations prior to ordering anyone to pay fines or 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 adverse consequences, and increase the likelihood that litigants have legal representation when navigating these processes.”<sup>68</sup>

Fewer than one in four states, however, require courts to conduct an ability to pay determination prior to imposing fines, fees, costs, surcharges, or assessments.<sup>69</sup> An additional one in five states require courts to conduct an ability to pay determination before setting fines (as opposed to 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.<sup>70</sup> These latter schemes are better than no judicial requirement to conduct ability to pay determinations before assessing court financial obligations, but they are not as protective as requiring courts to conduct ability to pay determinations before they may order any fines, fees, assessments, surcharges, or other costs.

Laws—including statutes and caselaw 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 (as a matter of right, regardless of whether a litigant requests one); and (2) require judges to do more than just a pro forma recitation about having considered a person’s ability to pay. Although no state law was exemplary overall, the following elements of statutes and caselaw standards stand out as the protective of litigants’ rights:

- **Judicial Duty to Determine Ability to Pay Before Imposing Fines and Fees (Washington):** In Washington State, the 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].”<sup>71</sup>

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

People lose their jobs or get sick. Rent prices increase. Families have a new baby. Grocery bills go up. 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. For all of these reasons, it is important for litigants to have the right to request a new ability to pay determination after the judge initially orders payments of fines and/or fees.

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. If someone does not know about a particular right, it does them little good. In a survey of judges in Washington State—where litigants have the right to request a new ability to pay determination if they cannot afford to pay—75 percent of judges reported that litigants only “sometimes” or “rarely” ask them to reconsider fines and fees after imposition. 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 of ability to pay if their financial circumstances change.<sup>72</sup> Further, 85 percent of defense attorneys surveyed in the state said that there was no clear process for making a new ability to pay determination in the courts in which they practice.<sup>73</sup>

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 formal, easily accessible process in place for people to make such a request. The following laws are exemplary:

- **Notice and Right to Request Ability to Pay Hearing at Any Time (Oklahoma):** In 2023 Oklahoma passed HB 2259, which provides that at the time of plea or sentencing the court must inform the person 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.”<sup>74</sup> The bill later provides that “upon any change in circumstances affecting the ability of a defendant 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.”<sup>75</sup>
- **Standardized Form to Request a New Ability to Pay Determination (Texas).** Although it does not apply to everyone who owes fines and fees, Texas law provides that, when a person is on community supervision 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 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.’”<sup>76</sup>

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

Many states require people to pay fines and fees during incarceration, meaning that the money comes out of their commissary accounts or from the extremely meager wages they earn from prison jobs. The Texas Supreme Court has held that, to recover court fees and costs, the state may garnish a person's commissary account—and need not even notify them until after the garnishment has begun.<sup>77</sup> Many other states garnish commissary accounts for fines and fees. Some states, however, pause fines and fees payments until after a person exits jail or prison— a far less harsh policy. But many people exiting prison have little to no ability to pay fines and fees. Indeed, fines and fees debt owed by people returning from prison often leads to cycles of incarceration and poverty—and to further distrust of the legal system.<sup>78</sup>

Rights protective laws provide that the state: (1) pauses payment of fines and fees during incarceration; and (2) requires courts to conduct an ability to pay determination after a person exits prison and before requiring them to begin post-incarceration payments. Indiana's law is better than others, even though it is not mandatory and only applies to fines post release:

- **Suspension of fines and fees payments during incarceration and ability to pay determination post release (Indiana).** Indiana 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.”<sup>79</sup>

*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.”<sup>80</sup> The Department of Justice has interpreted the Court's ruling this way: “[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.”<sup>81</sup>

The procedural protections that states provide, however, vary. Less than one third of states require the government to prove that the person's failure to pay was willful before ordering incarceration. Other states place the burden on the person to prove that their failure to pay was not willful.<sup>82</sup> Beyond incarceration, the Department of Justice recommends that courts make a determination of whether a persons' 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.’”<sup>83</sup>

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:

- **Elimination of Incarceration Altogether (Delaware).** 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.”<sup>84</sup>
- **Courts Are Required to Make an Ability to Pay Determination Before Imposing Sanctions for Failure to Pay on Time (Oklahoma).** Oklahoma law provides that if a court clerk finds that a person is delinquent on paying fines and fees, rather than imposing penalties, the court shall set a cost hearing “to determine if the defendant is able to pay.”<sup>85</sup>
- **Courts Are Required to Make an Ability to Pay Determination Before Imposing Sanctions for Failure to Pay on Time (Washington State).** 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.”<sup>86</sup>

### III. Procedure: Judicial Duty to Provide Procedural Protections in All Ability to Pay Proceedings

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

#### A. *Judicial duty to put ability to pay findings on the record*

Until recently, for example, 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 Defendant to pay the fines, court costs, reimbursement fees, and restitution as indicated above and further detailed below.”<sup>87</sup> There was an assumption in place 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 record.”<sup>88</sup> 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.<sup>89</sup>

- **Judicial Duty to Consider Evidence and Put Findings on the Record (Oklahoma).** Oklahoma law helps to ensure that ability to pay determinations are meaningful by providing that judges must put their findings on the record: “Any order of the court, whether there be a court reporter in attendance or not, shall be reduced to writing and filed of record

in the case. The order shall set forth the findings of the court regarding the defendant's ability or inability to pay the fine and/or costs, the refusal or neglect to do so, if that be the case, the amount of the installments and due dates, if so ordered, and all other findings of facts and conclusions of law necessary to support the order of the court.”<sup>90</sup> Oklahoma also provides a good example of the ways a judge may gather evidence to make an ability to pay determination: “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.”<sup>91</sup>

*B. Judicial duty to make clear and definite findings of fact*

To ensure that judges conduct a meaningful ability to pay determination—and that their decision is appealable—it is important for the judge to include their findings of fact in the record.

- **Judicial Duty to Make Clear and Definite Findings of Fact Based on Evidence (Ohio).** Ohio specifies that “If a court or magistrate determines after considering the evidence presented by an offender, that the offender is able to pay a fine, 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.”<sup>92</sup>

*C. Judicial duty to appoint counsel for party facing potential incarceration or sanction*

An important procedural protection for litigants appearing in court is the right to have an attorney appointed free of charge. A meta study looking at research on the impact of counsel in civil cases generally found that people with an attorney were anywhere from eight to 200 times more likely to prevail as people without a lawyer.<sup>93</sup> 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. Nevertheless, 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.<sup>94</sup> And, no state provides a right to counsel in basic fines and fees proceedings (outside of the context of contempt), including when a person requests a new hearing, after incarceration, on ability to pay, and including when a person is facing other sanctions for failure to pay, such as the suspension of a driver's license.

- **Judicial Duty to Appoint Counsel, as of Right (Massachusetts).** 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.”<sup>95</sup> 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.

#### **IV. Indigency: Waiver of Fines and Fees When a Person Cannot Afford to Pay**

Even when states authorize judges to waive or modify fines and fees and require them to make ability to pay determinations, the laws often provide little guidance about what factors to consider (or omit from consideration)—and how to set appropriate fines and fees once a judge has considered those factors.

Hawaii, for example, simply provides that, “In 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.”<sup>96</sup> Like Hawaii, most states do not direct a particular outcome – such as waiver, reduction, or other result – based on the considered factors.

Several states, however, have created bright-line rules for when a judge should presume that a person is unable to afford to pay and should, therefore, waive all fines and fees. These include when a person’s income falls below a designated threshold, when a person receives public benefits, or when a person has certain other life circumstances, such as being committed to a state mental hospital or living in subsidized housing.

##### *A. Waiver if income below bright line financial eligibility standard: 200 percent of the federal poverty line*

Tens of millions of Americans are poor. In 2022, 37.9 million Americans—or 11.5 percent of the total U.S. population—were living below the federal poverty level.<sup>97</sup> Today, that level is \$30,000 per year for a family of four.<sup>98</sup> A greater percentage of people who owe fines and fees, however, may be living below the poverty level. In California, of the 66,000 people who applied for traffic ticket relief online, 88 percent reported that their income was below the federal poverty level.<sup>99</sup>

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. Of those, Illinois, Rhode Island, and Washington direct judges to waive costs if they find that the person is indigent.<sup>100</sup> Oklahoma provides that if a person meets the standard set forth for being “unable to pay,” the person “shall be relieved of the debt by the court through a hardship waiver of the court financial obligations, either in whole or in part.”<sup>101</sup> Georgia directs judges to “waive, modify, or convert” fines and fees if a person on community supervision is found to be “a significant financial hardship or inability to pay or that there are any other extenuating factors which prohibit payment or collection”.<sup>102</sup> Mississippi, by contrast, bars incarceration for failure to pay fines and fees if the court finds that the person is “indigent.”<sup>103</sup>

Income is one way to measure indigence. Of the small set of states that define indigence for purposes of waiving some or all fines and fees, most include the person’s income level in relation to the

federal poverty level as part of the definition. Illinois sets the highest income threshold, providing that an “indigent person” is 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.”<sup>104</sup>

Critics, however, argue that the federal poverty level is extremely outdated. It is still pegged to “three times the cost of a minimum diet *in 1963*,” (italics added) when it was created. 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.<sup>105</sup> 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.<sup>106</sup> As such, many people living above—and even well above—the federal poverty level still have little to no disposable income.

For that reason, the Fines and Fees Justice Center recommends that states use the “Very Low Income Limit” set by the Department of Housing and Urban Development instead of the federal poverty line when setting guidelines about ability to pay.<sup>107</sup> The HUD standard is updated yearly and sets different numbers for each state—and each county—based on average income in the location.<sup>108</sup> To date, however, no state has adopted the HUD income limits as part of their statutory waiver eligibility standard. 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.<sup>109</sup> 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.

**2023 Poverty Guidelines: 48 Contiguous States (all states except Alaska and Hawaii)**

Household/ Family Size	Per Year													
	25%	50%	75%	100%	125%	130%	133%	135%	138%	150%	175%	180%	185%	200%
1	\$3,645	\$7,290	\$10,935	\$14,580	\$18,225	\$18,954	\$19,391	\$19,683	\$20,120	\$21,870	\$25,515	\$26,244	\$26,973	\$29,160
2	\$4,930	\$9,860	\$14,790	\$19,720	\$24,650	\$25,636	\$26,228	\$26,622	\$27,214	\$29,580	\$34,510	\$35,496	\$36,482	\$39,440
3	\$6,215	\$12,430	\$18,645	\$24,860	\$31,075	\$32,318	\$33,064	\$33,561	\$34,307	\$37,290	\$43,505	\$44,748	\$45,991	\$49,720
4	\$7,500	\$15,000	\$22,500	\$30,000	\$37,500	\$39,000	\$39,900	\$40,500	\$41,400	\$45,000	\$52,500	\$54,000	\$55,500	\$60,000
5	\$8,785	\$17,570	\$26,355	\$35,140	\$43,925	\$45,682	\$46,736	\$47,439	\$48,493	\$52,710	\$61,495	\$63,252	\$65,009	\$70,280
6	\$10,070	\$20,140	\$30,210	\$40,280	\$50,350	\$52,364	\$53,572	\$54,378	\$55,586	\$60,420	\$70,490	\$72,504	\$74,518	\$80,560
7	\$11,355	\$22,710	\$34,065	\$45,420	\$56,775	\$59,046	\$60,409	\$61,317	\$62,680	\$68,130	\$79,485	\$81,756	\$84,027	\$90,840
8	\$12,640	\$25,280	\$37,920	\$50,560	\$63,200	\$65,728	\$67,245	\$68,256	\$69,773	\$75,840	\$88,480	\$91,008	\$93,536	\$101,120
9	\$13,925	\$27,850	\$41,775	\$55,700	\$69,625	\$72,410	\$74,081	\$75,195	\$76,866	\$83,550	\$97,475	\$100,260	\$103,045	\$111,400
10	\$15,210	\$30,420	\$45,630	\$60,840	\$76,050	\$79,092	\$80,917	\$82,134	\$83,959	\$91,260	\$106,470	\$109,512	\$112,554	\$121,680
11	\$16,495	\$32,990	\$49,485	\$65,980	\$82,475	\$85,774	\$87,753	\$89,073	\$91,052	\$98,970	\$115,465	\$118,764	\$122,063	\$131,960
12	\$17,780	\$35,560	\$53,340	\$71,120	\$88,900	\$92,456	\$94,590	\$96,012	\$98,146	\$106,680	\$124,460	\$128,016	\$131,572	\$142,240
13	\$19,065	\$38,130	\$57,195	\$76,260	\$95,325	\$99,138	\$101,426	\$102,951	\$105,239	\$114,390	\$133,455	\$137,268	\$141,081	\$152,520
14	\$20,350	\$40,700	\$61,050	\$81,400	\$101,750	\$105,820	\$108,262	\$109,890	\$112,332	\$122,100	\$142,450	\$146,520	\$150,590	\$162,800

Source: <https://aspe.hhs.gov/sites/default/files/documents/1c92a9207f3ed5915ca020d58fe77696/detailed-guidelines-2023.pdf>

Laws that provide the greatest protection: (1) set the highest income level below which judges must presume that a person is unable to afford to pay; and (2) require judges to waive fines and fees entirely if the person meets that income threshold.

- **Presumption of Waiver for Income Below 200 Percent of Federal Poverty Line (Illinois).** Illinois law provides that “If the court finds that an 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.”<sup>110</sup> It defines “indigent person,” in part, as someone whose “available personal income is 200% or less of the current poverty level.”<sup>111</sup>

- **Presumption of Waiver for Income below the “Very Low Income Limit” set by the Department of Housing and Urban Development (instead of the federal poverty line) when determining ability to pay (Montana).**<sup>112</sup> The HUD standard is updated yearly and sets different numbers for each state—and each county—based on average income in the location.<sup>113</sup> 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.<sup>114</sup> See also, below (discussing Bench Cards)

*B. Relying on Receipt of Public Benefits as a Shortcut to Determine Eligibility for Waiver*

States also presume a person to be indigent and, therefore, unable to afford to pay fines and fees if they receive means-tested public benefits. The federal government and states have created public benefits programs to help people with very low income levels to pay for essentials of living, such as food, housing, health insurance, and more. To qualify, people must apply and meet financial cut-offs. 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. As the Department of Justice 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.”<sup>115</sup> 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.”<sup>116</sup>

Laws that provide the greatest protections (1) include the greatest range of means-tested public benefits in their definition of indigence, and (2) provide that judges should waive all fines and fees if a person receives means-tested public benefits.

- **Presumption of Waiver for a Person Who Receives Public Benefits (Illinois).** As detailed above, Illinois provides that a court shall grant full waiver if a litigant is an “indigent person.” In addition to the income cutoff, Illinois also defines an “indigent person” as someone who receives “assistance under one or more of the following means-based governmental public benefits programs: Supplemental Security Income; Aid to the Aged, Blind and Disabled; Temporary Assistance for Needy Families; Supplemental Nutrition Assistance Program; General Assistance; Transitional Assistance; or State Children and Family Assistance.”<sup>117</sup>
- **Presumption of Waiver for a Person Who Receives Public Benefits, Broadly Defined (Washington).** Washington State defines “indigent” for purposes of waiving fines and fees as including a person who receives “Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035 [including people who are not

eligible for Medicaid or other federal medical care but they are, for example, victims of human trafficking], pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, Medicaid, or Supplemental Security Income.”<sup>118</sup>

- **Presumption of Waiver for a Person Who Receives Public Benefits Based on a Disability (Oklahoma).** In addition to other public benefits, Oklahoma provides that a court must presume a person is unable to pay if they have 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.”<sup>119</sup>

### C. *Judicial Duty to Waive Fines and Fees Based on a Person’s Life Circumstances*

In addition to an income cut-off and receipt of public benefits, some states include in their definitions of indigence (or otherwise in a presumption that a person is unable to pay) consideration of certain health and living statuses. Oklahoma, for example, provides that a court should presume a person is unable to pay 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.”<sup>120</sup> Washington 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.”<sup>121</sup>

In addition, a number of states use “substantial hardship” or “undue hardship” either in their definitions of indigence or in statutes regarding ability to pay determinations more generally. There is no consistent definition, but Texas provides one that is fairly broad. It provides that, in determining whether a person will face undue hardship if ordered to pay a fine or to complete community service in lieu of paying the fine, the court may consider a 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.”<sup>122</sup>

Laws that are most protective in this regard (1) provide the broadest definition of life circumstances that require waiver of fines and fees; (2) require waiver if a judge finds that a person meets the definition; and (3) include judicial discretion to waive or reduce fines and fees if the judge finds that they would result in “undue” or “substantial hardship.” The following are examples of such laws:

- **Requirement to Waive Fines and Fees if a Person Has Been Committed to a Mental Health Facility (Washington).** In its definition of “indigent” (and, therefore, eligible for waiver of fines and fees), Washington State includes a person who has been “involuntarily committed to a public mental health facility.”<sup>123</sup>

- **Requirement to Provide Relief from Fines and Fees if a Person is Living in Subsidized Housing (Oklahoma).** Oklahoma law provides that “defendants in the following circumstances are presumed unable to pay and eligible for relief,” 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.”<sup>124</sup>
- **Requirement to Waive Fines and Fees if Payment Would Cause Undue Hardship (Illinois).** Illinois includes in its definition of “indigent person” eligible for waiver of fines and fees a person who “in the discretion of the court [is] unable to proceed in an action with payment of assessments and whose payment of those assessments would result in substantial hardship to the person or his or her family.”<sup>125</sup>

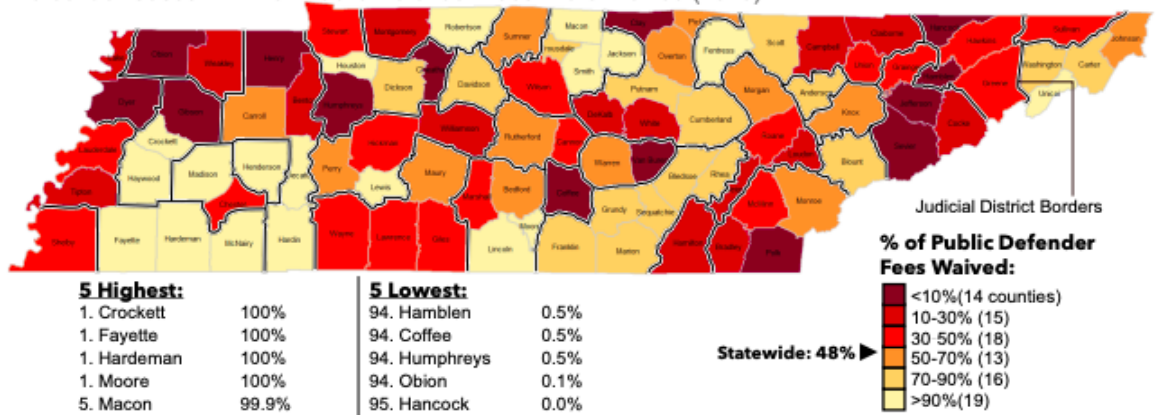
#### V. **Statutory Guidelines: Judicial Considerations for Determining How Much a Person Should Pay**

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, in whole or in part. 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. 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. 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.

Studies show that, without a clear standard, the decision-making by judges varies widely (as one might expect). 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 percent of the time, while judges in 19 counties waive it more than 90 percent of the time.<sup>126</sup> North Carolina requires judges to consider ability to pay before setting many fines, fees, assessments, and other legal financial obligations. A recent study, however, found that judges in that state waive the financial obligations less than four percent of the time. In 16 counties, judges waive these charges less than one percent of the time, making waiver practically nonexistent.<sup>127</sup>

## The Likelihood of Judges Waiving the Public Defender Fee in Tennessee Varies Widely

Percent of Cases in Which Public Defender Fees Were Waived (2020)



Source: The Sycamore Institute's analysis of data from the Tennessee Administrative Office of the Courts (30)

What follows are various examples of factors and income brackets that states have created to help judges in determining ability to pay, and the amount that people may be directed to pay. (In a subsequent section, we also discuss additional tools, not yet codified in state statutory law, but that some states are using to make these determinations). It is the rare policy that has the potential to provide clear, helpful guidance that leads judges to equitable, fair, and consistent outcomes across cases.

### A. States Codify Factors for Courts to Consider in Determining Ability to Pay

A dozen states have codified factors that courts may or must consider in determining ability to pay.<sup>128</sup> In some states, however, these factors only come into play if a court is considering whether to incarcerate people for failure to pay.<sup>129</sup> 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. Assets include real or personal property, ability to access credit, and assets generally. Notably, Oklahoma stands out as more protective than other states because it specifically provides that judges *may not* consider money that is essential for meeting a person's—or their family's—basic needs, including: (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.<sup>130</sup>

Figure 2: Factors Judges Must Consider When Determining Ability to Pay

State	Income and assets								Status					Debts and expenses															
	Public Benefits	% of poverty level	Income	Assets	Child Support	Alimony	Retirement Income	Real or personal property	Ability to access credit	Financial resources generally	from other household members and/or family	Homelessness	Public housing	Employment status	Employment history	Physical or mental health conditions	Employability	Earning ability	Expenses generally	Debts generally	Financial obligations to dependents (child support)	Shelter (rent or mortgage)	Utilities	Food	Medical costs	Case-related expenses (i.e. restitution, counseling, etc.)	Vehicle expenses	Clothing	
California	x	125%																											
Colorado	x	200%																											
Georgia	x																												
Illinois	x																												
Michigan																													
Mississippi																													
New Hampshire																													
Oklahoma																													
Rhode Island	x																												
Washington																													

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.<sup>131</sup> 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, costs of court-ordered programs, and more.

In certain circumstances, it can be important for judges to consider expenses. When a person with an income well above the poverty line, for example, has large medical debts that mean they have no disposable income, 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. Second, requiring people to prove expenses with bills and receipts can mire the process in paperwork, bogging judges down in paperwork and creating a risk that they will lose the forest for the trees.

With regard to life circumstances, states enumerate a broad range of factors. Some states require judges to take into account the person's employment status, employment history, earning ability, and/or "employability." A few states require judges to take into consideration a person's physical or mental health conditions. And two states—Colorado and Washington—require judges to consider a person's housing status, including whether the person is unhoused or living in public housing.

With very limited exceptions, as explored below, states do not provide guidance to judges about what to do when they have considered the enumerated factors, which means that itemization of factors commonly have limited practical utility. However, 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:

- **Specific Factors for Judges to Consider in Determining Ability to Pay (Oklahoma).** 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:
  - a. individual and household income,
  - b. household living expenses,
  - c. number of dependents,
  - d. assets,
  - e. child support obligations,
  - f. physical or mental health conditions that diminish the ability to generate income or manage resources,
  - g. additional case-related expenses to be paid by the defendant, and
  - h. 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:

- 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.”<sup>132</sup>

*B. States Codify Income Brackets to Reduce Amounts, Addressing the Cliff Effect*

Indigence standards are essential in providing a bright line for judges to use in waiving all fines and fees if a person falls below a particular income level establishing indigency. But they also can create injustice in the form of a cliff effect for those with income levels that miss the line by a fraction. In such a legislative scheme, a person whose income falls \$10 below the indigency cut-off might owe no fines and fees, while a person whose income is just \$15 higher but above the cut-off might have to pay the full amount, with no relief. In states that authorize judges to adjust amounts owed, judicial discretion can address this problem, but states may also elect to codify bracketed income levels that make eligibility cutoffs more humane.

- **Income Brackets to Determine Percentage Reduction in Fines and Fees (Illinois).** Illinois provides clear income brackets for judges to use in modifying assessments when a person does not meet its definition of indigence. Specifically, the law provides:

“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. The court shall grant the applicant a partial assessment as follows:

(A) 75% of all assessments shall be waived if the applicant's available income is greater than 200% but no more than 250% of the poverty level, unless the applicant's assets [that are not exempt, as explained below] are such that the applicant is able, without undue hardship, to pay the total assessments.

(B) 50% of all assessments shall be waived if the applicant's available income is greater than 250% but no more than 300% of the poverty level, unless the applicant's assets [that are not exempt] are such that the court determines that the applicant is able, without undue hardship, to pay a greater portion of the assessments.

(C) 25% of all assessments shall be waived if the applicant's available income is greater than 300% but no more than 400% of the poverty level, unless the applicant's assets [that are not exempt] are such that the court determines that the applicant is able, without undue hardship, to pay a greater portion of the assessments.<sup>133</sup>



The exemptions 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.<sup>134</sup> 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.<sup>135</sup>

## **VI. Tools: Official Tools (Not Yet in Statutory Law) for Determining How Much a Person Should Pay**

Some states have created additional tools that are being used in practical ways to make determinations that individuals unable to afford payment should be entitled to waiver or to reductions of fines and fees. These include online software tools, a state-created ability to pay calculator, and official court bench cards.

### *A. Courts Use an Online Tool That Allows Litigants to Apply for a Reduction of Fines*

Beginning as a pilot in some courts in California in 2019 (and statutorily required statewide by mid-2024), MyCitations allows people with traffic citations to request online (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.<sup>136</sup> The tool, which was developed and is maintained by the Judicial Council, asks litigants questions about income, benefits, household size, and expenses. The tool is novel not only because of the dynamic aspects of its software, but also because it incorporates a standard that determines whether and how much to reduce the 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.

By state law, the tool must recommend at least a 50 percent reduction in price if the person receives public benefits, but local courts can choose to set the tool to recommend a greater reduction in price. Furthermore, the law provides that, at minimum, courts must take into consideration whether a person’s income is lower than 125 percent of the federal poverty level.<sup>137</sup> Based on local policy choices a court could, for example, set the tool to reduce the ticket price by 60 percent if the person is on public benefits or their income falls below 125 percent of the federal poverty level, and by 50 percent if their income falls between 125 and 200 percent of the federal poverty level. The results are then submitted to a judge, who makes a final decision. Research shows that 97 percent of the time judges’ orders fell within \$10 of the tool’s recommendation.<sup>138</sup> As with Illinois’s stepped brackets, however, MyCitations does not assess how much an individual can afford to pay. Instead, it provides a percentage reduction in the overall cost, which could still be high if the original ticket was high. Furthermore, with an income cutoff of 125 percent of the federal poverty level, MyCitations provides partial relief when people in other states would receive full waiver.

Nevertheless, MyCitations not only provides relief for individuals, but it has also been shown to improve collections. When people were ordered to pay \$300 or less, collections nearly

doubled.<sup>139</sup> Additionally, locales were most successful at collecting fines and fees when monthly installments were set at \$25.<sup>140</sup>

### *B. Courts Use a State-Created Ability to Pay Calculator*

Ability to pay calculators can improve court efficiency by streamlining judicial decision-making, help 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 decisions on fines and fees more uniform. Very few states, however, provide calculators for judges to use when determining how much to order a person to pay in fines and fees.<sup>141</sup>

Ability to pay calculators can take into consideration a person's income, assets, expenses, and life circumstances and then provide judges with a clear recommendation about the amount of fines and fees a person can afford to pay. In 2018 Washington State created an "LFO [Legal Financial Obligations] calculator" that judges can use when determining ability to pay.<sup>142</sup> The tool identifies for judges which fines and fees apply to a given charge, distinguishing between which costs are mandatory and which may be waived or suspended under the law. The tool then walks the judge through an ability to pay evaluation to determine if the person meets the statutory bright line standard of indigence, and reminds judges that they must waive non-mandatory fines and fees if the person meets the standard. For people who are not indigent, the tool then helps judges to "find an 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."<sup>143</sup>

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 amount; and (3) helping to articulate to the person exactly what they owe.<sup>144</sup> Judges also said that the tool helped to make

"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." -Washington State judge after using the online ability to pay calculator

their questioning about a person's ability to pay more formal and more consistent across cases. Importantly, however, 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 the mandatory minimum regardless.<sup>145</sup> (In 2023 Washington partially addressed this issue by amending its 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."<sup>146</sup>) One judge, however, had this to say about 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."<sup>147</sup>

### *C. Courts Use Bench Cards to Determine 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. Bench cards sometimes attempt to fill

that void. There are at least 20 bench cards—whether 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. Very few bench cards provide clear guidance about what judges must or even may do once they have considered a person’s financial circumstance, but some do provide useful guidance:

- **Guideline: fines and fees should be no more than 10 percent of net monthly income (North Carolina).** The bench card in Mecklenburg County District Court in North Carolina provides guidance for judges on how to calculate ability to pay. It states that, “The 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.”<sup>148</sup>
- **Guideline: people should be able to keep at least \$217.50 per week (Michigan).** 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 (the equivalent of 30 hours earned at the federal minimum wage).<sup>149</sup>
- **Presumptions of waiver for indigence (Montana).** 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 (a) is eligible for representation by a public defender; (b) receives needs-based public assistance; (c) earns less than 100% of HUD’s “very low income” limit; (d) spent time in a residential mental health facility in the last six months; (e) has a developmental, total, or permanent disability; (f) is a minor; (g) has experienced homelessness in the last 12 months; (h) 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 (i) is a full-time student.<sup>150</sup>

## VII. Practitioners’ Tools: Advocates’ Approaches are Helping Courts Determine Ability to Pay

In the absence of meaningful ability to pay determinations 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. *A Practitioner-Created Ability to Pay Calculator Lowers the Burden of Proving Expenses (Iowa)*

Providing documentation of monthly expenses—which many courts ask about in determining ability to pay—is often difficult, particularly if people are unhoused or moving often and have trouble keeping documents with them. 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 issued. 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.<sup>151</sup>

The online tool, [abilitytopay.org](http://abilitytopay.org), asks litigants to enter basic information, including: Where do you live? How many people are in your household? How many cars do you have? It then asks about the person’s total income, both from wages and from benefits. It also asks about expenses that are particular to that person, including child support payments, back taxes, consumer debt, and other court debts. 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. 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.<sup>152</sup> It has also created standards for each individual county about average costs of housing and utilities;<sup>153</sup> the cost of owning and operating vehicles in each region of the country;<sup>154</sup> and national standards for out-of-pocket healthcare costs.<sup>155</sup>

Expense	One Person	Two Persons	Three Persons	Four Persons
Food	\$466	\$777	\$936	\$1,123
Housekeeping supplies	\$47	\$80	\$85	\$90
Apparel & services	\$96	\$145	\$207	\$252
Personal care products & services	\$43	\$78	\$91	\$97
Miscellaneous	\$189	\$309	\$381	\$431
Total	\$841	\$1,389	\$1,700	\$1,993

The [abilitytopay.org](http://abilitytopay.org) 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. If the person spends more than the IRS Collections Financial Standards provide for any of the monthly expenses, the person has the option of entering the actual number instead, and providing documentation of their higher expenses.<sup>156</sup> The tool then calculates how much a person can pay monthly, based on how much disposable income that person has, and

generates an affidavit that the person can submit to the court. 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.<sup>157</sup>

*B. “Hardship Is Not a Number” Offers a Narrative that Promises Fairer Determinations (Oklahoma)*

“Hardship is not a number. It’s a story,” said Ed Wunch, an attorney at Legal Aid in Oklahoma who represents people in cost hearings when they have been unable to pay fines and fees and become delinquent. Mr. Wunch has developed a questionnaire that he provides to litigants to help understand the personal dimensions of their hardship. 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 succinctly to paint a compelling picture of the person’s financial circumstances for the judge. These include:

- Have you ever used a food pantry or food donation service? When?
- 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? How much did it cost and were you able to get it?

Mr. Wunch then uses the answers in this questionnaire and, during a cost hearing, asks the judge to swear the person in so the judge can hear about their living circumstances directly. He sometimes submits the person’s social security earnings history or benefits verification letters, but mostly relies on their stories. Bills, he said, are too long and judges often get bogged down in the weeds of computing how much people owe.

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. 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—he was asking for the judge to reduce the fines and fees to what the woman had already paid. 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. The judge waived the remaining fines and fees.

After the passage in 2023 of HB 2259, 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.

#### **VIII. Day Fines: An Alternative Formula for Setting Fines Based on Income and Severity of Crime**

In place of the fixed-fine system used in the United States, where people owe the same amount no matter 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.<sup>158</sup> Although the specifics of each system differ, day fines are calibrated to a person’s level of income. In Germany, for example, each offense is assigned a number of “fine units”—from 5 to 360—indicating the seriousness of the offense. To set a fine, a court determines a person’s daily income and multiplies the “fine units” by the amount of income the person brings home in a day. 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.<sup>159</sup>

The theory of day fines is that they help to ensure that punishments are felt more equitably. On one end of the spectrum, people with low incomes will not be as harmed by penalties that in a set fine regime like those used in the United States would impose fines they could not afford. On the other end of the spectrum, day fines create a greater—and more rational—deterrent effect for people with high incomes, who might be able to pay a routine fixed fine with little effective penalty.<sup>160</sup>

Beginning 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.<sup>161</sup> Research on these pilot programs showed that in addition to their other virtues, they had the potential to increase local revenues, both by increasing collection rates and reducing the costs of collecting unpaid debt and enforcing sanctions.<sup>162</sup> Judges were able to ascertain people's income and set fines accordingly.<sup>163</sup> 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, a time when tough-on-crime policies had reached their peak and when there was little appetite for less punitive criminal legal policies.<sup>164</sup>

Today, Oklahoma is the only state with a statewide day fines law on the books. It provides that when a judge orders a suspended sentence, the court 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."<sup>165</sup> Practitioners in Oklahoma, however, report that day fines there are seldom, if ever, ordered. The New York City Council has recently begun to consider making a fresh start of these experiments in the form of a possible day-fine program for civil violations in the city.<sup>166</sup>

#### **IX. Community Service: Services, Education and Other Activities Offer Alternatives to Payment**

When people cannot afford to pay fines and fees immediately, waiver or modification of the amount is justified. Some courts have balked at the notion of waiving fines and fees entirely, arguing that doing so might mean that people who are unable to afford to pay will not be held to account.<sup>167</sup> To address this concern—and to provide greater flexibility for judges to match penalties to the particular circumstances of the case—some states have pursued alternatives to paying fines and fees up front in full. The U.S. Supreme Court has recognized that community service is one such option, stating: "Given 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 deterrence."<sup>168</sup>

The Department of Justice has recommended that states adopt a wide and flexible definition of community service because "jurisdictions that adopt expansive definitions of 'community service' 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."<sup>169</sup>

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 are unable to afford to pay—but only when there are strong guardrails in place to ensure that the options are fair and reasonable. Without safeguards in place, as the Department of Justice has recognized, community service orders can "exact 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."<sup>170</sup>

Ordering community service in lieu of paying fines and fees can become particularly unfair to litigants when participants are credited towards paying down fines and fees at a low hourly rate. 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.<sup>171</sup> At such a low rate—and with no statutory cap—it could take people years to work off their debts, hampering their abilities to focus on remunerative work, spend time with family, and get and stay healthy. The punishment can also 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.” Similarly, the Department of Justice has cautioned that “jurisdictions 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.”<sup>172</sup>

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 litigants to elect to complete community service in lieu of paying fines and fees; and (4) place a time limit on the community service requirement. The following are exemplary:

- **Broad Definition of Community Service and Authority to Waive It (Texas).** The Texas Code of Criminal Procedure provides the broadest definition of “community service” of any state law reviewed. Its definition 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.”<sup>173</sup> Texas also provides that a court may waive not only fines but also community service in lieu of fines if such community service would pose an “undue hardship.” 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.”<sup>174</sup>
- **Another Broad Definition of Community Service (Michigan).** 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; Teaching music; ‘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.”<sup>175</sup>

- **High Reimbursement Rates and Caps on Community Service Requirements (Multnomah County, Oregon).** 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. The program, which is voluntary, gives people \$100 of credit towards their fines and fees for every hour of community service or treatment they complete, up to 80 hours. After a person has completed 80 hours of services or treatment, any remaining balance of fines and fees is waived.<sup>176</sup>

## **X. Payment Plans: Alternative Approaches to Full Payment Up Front**

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. 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.”<sup>177</sup> Fewer still provide the option of a payment plan without an additional fee. At least nine states charge people for entering into payment plans.<sup>178</sup> Some states impose late fees and other penalties if the person misses a payment. A survey in California, for example, found that 71 percent of people on a payment plan had incurred a late fee, which is \$100.<sup>179</sup>

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 percent interest on fines and fees.<sup>180</sup> The Supreme Court there found that “on average, a person who pays \$25 per month toward their LFOs [Legal Financial Obligations] 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.”<sup>181</sup>

As with overall determinations of ability to pay, it is important for states to set clear standards for judges to use in setting payment plan amounts so that they fall within a person’s monthly ability to pay. A study in California found that when courts set payment plans at \$25 per month, almost half of people paid. By comparison, when courts set monthly payment plans at \$50, payment rates dropped to just 27 percent.<sup>182</sup>

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, and no additional charges are imposed, without a cap on the total amount due, people could be in debt for years. A study of MyCitations in California found that “while 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.”<sup>183</sup>

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.<sup>184</sup> 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:

- **Caps on Monthly Payment Amounts (Florida).** Florida provides a good example of providing guardrails for judges in 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). 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.”<sup>185</sup>
- **New Determination of Ability to Pay—Not Punishment—If a Person Misses a Monthly Payment (Oklahoma):** In Oklahoma, anyone can opt to pay fines and fees in installments. A person is considered delinquent if their installment payment is more than 90 days past due. The court clerk must review cases for delinquency once every six months, notify the court about who is delinquent, and then the court must set a cost hearing 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. Once a hearing date has been set, “all court financial obligations shall be suspended until the cost hearing has been held.”<sup>186</sup>
- **Courts not Permitted to Charge Interest, Payment Plan Fees, and Late Fees (Delaware).** Delaware provides a good example of a law 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.”<sup>187</sup>

#### **D. CONCLUSION**

Millions of Americans are burdened by outstanding fines and fees that they are unable to pay. Meaningful ability to pay determinations can reduce the resulting harm and create greater equity in the criminal legal system. Yet courts don't reliably make ability to pay determinations. Also, 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 fees altogether and rightsizing fines. Hopefully, the examples set forth here will help to continue the momentum towards decriminalizing poverty.

- 
- <sup>1</sup> 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>.
- <sup>2</sup> TONY MESSENGER, PROFIT AND PUNISHMENT: HOW AMERICA CRIMINALIZES THE POOR IN THE NAME OF JUSTICE xii–xiv (2021).
- <sup>3</sup> 50 State Fees Surveys, End Justice Fees <https://endjusticefees.org/fee-surveys/> (last visited Mar. 25, 2024).
- <sup>4</sup> FINES & FEES JUST. CTR., INTERIM SURVEY RESULTS: THE IMPACT OF NEW MEXICO’S FINES AND FEES 5 (2023), [https://finesandfeesjusticecenter.org/content/uploads/2023/01/New-Mexico-Survey-DIGITAL\\_2023.pdf](https://finesandfeesjusticecenter.org/content/uploads/2023/01/New-Mexico-Survey-DIGITAL_2023.pdf); ALA. APPELSEED CTR. FOR L. & JUST. ET AL., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA’S RACIAL WEALTH DIVIDE 4 (2018), <https://alabamaappleseed.org/underpressure/>.
- <sup>5</sup> Free to Drive, <https://www.freetodrive.org/maps/#page-content> (last visited Mar. 25, 2024).
- <sup>6</sup> FINES AND FEES, N’TL CTR. FOR ACCESS TO JUSTICE, <https://ncaj.org/state-rankings/justice-index/fines-and-fees> (last visited Mar. 25, 2024).
- <sup>7</sup> FINES & FEES JUST. CTR., INTERIM SURVEY RESULTS: THE IMPACT OF NEW MEXICO’S FINES AND FEES 2 (2023), [https://finesandfeesjusticecenter.org/content/uploads/2023/01/New-Mexico-Survey-DIGITAL\\_2023.pdf](https://finesandfeesjusticecenter.org/content/uploads/2023/01/New-Mexico-Survey-DIGITAL_2023.pdf); ALA. APPELSEED CTR. FOR L. & JUST. ET AL., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA’S RACIAL WEALTH DIVIDE 4 (2018), <https://alabamaappleseed.org/underpressure/>.
- <sup>8</sup> Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. 5 (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.
- <sup>9</sup> *Id.*
- <sup>10</sup> See Fines and Fees Justice Index, <https://ncaj.org/state-rankings/justice-index/fines-and-fees> (last visited Mar. 28, 2024).
- <sup>11</sup> 725 ILL. COMP. STAT. 5/124A-20 (2021).
- <sup>12</sup> *Id.*
- <sup>13</sup> *LFO Calculator (State of Washington)*, WASH. STATE SUP. CT’S MINORITY & JUST. COMM’N, <https://beta.lfocalculator.org/> (last visited Mar. 22, 2024).
- <sup>14</sup> H.R. 244, 151st Gen. Assemb., Reg. Sess. (Del. 2022), available at <https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocumentEngrossment?engrossmentId=24803&docTypeId=6>.
- <sup>15</sup> 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>.
- <sup>16</sup> TONY MESSENGER, PROFIT AND PUNISHMENT: HOW AMERICA CRIMINALIZES THE POOR IN THE NAME OF JUSTICE xii–xiv (2021).
- <sup>17</sup> *National Fee Surveys*, END JUST. FEES, <https://endjusticefees.org/fee-surveys/> (last visited Mar. 22, 2024).
- <sup>18</sup> CYNTHIA DELOSTRINOS ET AL., THE PRICE OF JUSTICE: LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 13 (2022) [https://www.courts.wa.gov/subsite/mjc/docs/MJC\\_LFO\\_Price\\_of\\_Justice\\_Report\\_Final.pdf](https://www.courts.wa.gov/subsite/mjc/docs/MJC_LFO_Price_of_Justice_Report_Final.pdf).
- <sup>19</sup> Alex Kornya, *Ability-to-Pay: Why It Matters, When To Do It, and Some Ideas for How To Get It Done*, PUB. DEFENDERS 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>.
- <sup>20</sup> WASH. REV. CODE § 19.16.500 (2023).
- <sup>21</sup> BRIANA HAMMONS, TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 4 (2021), [https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg\\_Criminal\\_Justice\\_Debt\\_BH1.pdf](https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf).
- <sup>22</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, FEATURING SUPPLEMENTAL DATA FROM APRIL 2020 9 (2020), <https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf>.
- <sup>23</sup> *Id.*

- 
- <sup>24</sup> ELLA BAKER CTR. FOR HUM. RTS. ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 9 (2015), <https://ellabakercenter.org/who-pays-the-true-cost-of-incarceration-on-families/>.
- <sup>25</sup> 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/>.
- <sup>26</sup> 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/#:~:text=Fewer%20than%20half%20of%20Black,economic%20insecurity%20than%20Americans%20overall>.
- <sup>27</sup> ROCHELLE SPARKO ET AL., WAIVING CRIMINAL COURT FEES PREVENTS HARMS OF CIVIL DEBT 5 (2023), <https://www.ncijustice.org/wp-content/uploads/2023/10/crl-waive-crim-ct-fees-oct2023.pdf>.
- <sup>28</sup> Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 1, 13 (2020).
- <sup>29</sup> Fines and Fees Justice Index, <https://ncaj.org/state-rankings/justice-index/fines-and-fees> (last visited Mar. 28, 2024).
- <sup>30</sup> FINES & FEES JUST. CTR., INTERIM SURVEY RESULTS: THE IMPACT OF NEW MEXICO’S FINES AND FEES 5 (2023), [https://finesandfeesjusticecenter.org/content/uploads/2023/01/New-Mexico-Survey-DIGITAL\\_2023.pdf](https://finesandfeesjusticecenter.org/content/uploads/2023/01/New-Mexico-Survey-DIGITAL_2023.pdf); ALA. APPLESEED CTR. FOR L. & JUST. ET AL., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA’S RACIAL WEALTH DIVIDE 4 (2018), <https://alabamaappleseed.org/underpressure/>.
- <sup>31</sup> ALA. APPLESEED CTR. FOR L. & JUST. ET AL.
- <sup>32</sup> Bruce Western, et. al., *Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment*, AM. SOC. REV. (Feb. 20, 2022), available at <https://journals.sagepub.com/doi/full/10.1177/00031224221075783>.
- <sup>33</sup> Priya Sarathy Jones & Jonathan Ben-Menachem, *Free to Drive*, FREE TO DRIVE ORG., <https://www.freetodrive.org/maps/#page-content> (last visited Mar. 22, 2024).
- <sup>34</sup> See, e.g., Meghan Keneally, ‘It’s not America’: 11 million go without a license because of unpaid debts, ABC News (Oct. 25, 2019), <https://abcnews.go.com/US/vicious-cycle-11-million-live-drivers-license-unpaid/story?id=66504966>.
- <sup>35</sup> *Fines and Fees*, Nat’l Ctr. for Access to Just., <https://ncaj.org/state-rankings/justice-index/fines-and-fees> (last visited Mar. 22, 2024).
- <sup>36</sup> FINES & FEES JUST. CTR.; ALA. APPLESEED CTR. FOR L. & JUST. ET AL.
- <sup>37</sup> Lauren-Brooke Eisen.
- <sup>38</sup> See *id.*
- <sup>39</sup> ELLA BAKER CTR. FOR HUM. RTS. ET AL.
- <sup>40</sup> *Id.*
- <sup>41</sup> *Id.* at 14.
- <sup>42</sup> See Lisa Foster, at 9–10.
- <sup>43</sup> COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 3 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf).
- <sup>44</sup> *Id.*
- <sup>45</sup> 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>.
- <sup>46</sup> *IRS releases fiscal year 2022 Data Book describing agency’s activities*, INTERNAL REVENUE SERV. (Mar. 4, 2024), <https://www.irs.gov/newsroom/irs-releases-fiscal-year-2022-data-book-describing-agency-activities#:~:text=For%20FY%202022%2C%20the%20gross,the%20history%20of%20the%20agency> (showing that in FY 2022 the IRS spent \$0.29 for every \$100 it collected).

- 
- <sup>47</sup> Cortney Sanders & Michael Leachman, *Step One to an Antiracist State Revenue Policy: Eliminate Criminal Justice Fees and Reform Fines*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 17, 2021), <https://www.cbpp.org/research/state-budget-and-tax/step-one-to-an-antiracist-state-revenue-policy-eliminate-criminal>.
- <sup>48</sup> FINES & FEES JUST. CTR.; ALA. APPLESEED CTR. FOR L. & JUST. ET AL..
- <sup>49</sup> Dear Colleague Letter from Kristen Clarke, Assistant Att'y Gen., C.R. Div., Dep't of Jus., et al., at 3 (Apr. 20, 2023), <https://perma.cc/8QP2-DBCW>.
- <sup>50</sup> The U.S. Supreme Court has held that this prohibition extends to the states. *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).
- <sup>51</sup> *U.S. v. Bajakajian*, 524 U.S. 321, 336–37 (1998).
- <sup>52</sup> See Lisa Foster, at 27.
- <sup>53</sup> *Seattle v. Long*, 493 P.3d 94, 112 (Wash. 2021).
- <sup>54</sup> *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).
- <sup>55</sup> Dear Colleague Letter, at 6.
- <sup>56</sup> *Id.* at 5.
- <sup>57</sup> *Our Impact*, DEBT FREE JUST., <https://debtfreejustice.org/our-impact> (last visited Mar. 22, 2024); *Home Page*, END JUST. FEES ORG., <https://endjusticefees.org/> (last visited Mar. 22, 2024).
- <sup>58</sup> *Fines and Fees*, <https://ncaj.org/state-rankings/justice-index/fines-and-fees>.
- <sup>59</sup> *Fines and Fees*, <https://ncaj.org/state-rankings/justice-index/fines-and-fees> (scroll down to *Benchmarks: Weights and Trends*).
- <sup>60</sup> COUNCIL OF ECON. ADVISORS, at 5.
- <sup>61</sup> *Fines and Fees*.
- <sup>62</sup> See FLA. STAT. § 893.135(c)(2)(d) (2023).
- <sup>63</sup> CYNTHIA DELOSTRINOS ET AL., at 63.
- <sup>64</sup> MARIA RAFAEL, *THE HIGH PRICE OF USING JUSTICE FINES AND FEES TO FUND GOVERNMENT IN WASHINGTON STATE 5* (2021) (citing Alexes Harris), <https://www.vera.org/downloads/publications/the-high-price-of-using-justice-fines-and-fees-washington.pdf>.
- <sup>65</sup> MONT. CODE ANN. §§ 46-18-231(3), 46-18-232(2) (2023).
- <sup>66</sup> 12 R.I. GEN. LAWS § 12-20-10 (2024).
- <sup>67</sup> See MD. CODE ANN., CTS. & JUD. PROC. § 7-504(a) (LexisNexis 2023).
- <sup>68</sup> ACCESS TO JUST. OFFICE OF U.S. JUST. DEP'T, SPOTLIGHT: FINES & FEES 25 (2023), <https://www.justice.gov/d9/2023-11/doj-access-to-justice-spotlight-fines-and-fees.pdf>.
- <sup>69</sup> *Fines and Fees*.
- <sup>70</sup> *Id.*
- <sup>71</sup> See generally *State v. Blazina*, 344 P.3d 680 (Wash. 2015).
- <sup>72</sup> *Id.*
- <sup>73</sup> CYNTHIA DELOSTRINOS ET AL., at 14.
- <sup>74</sup> H.R. 2259, 59th Leg., 1st Sess. (Okla. 2023), available at <https://www.sos.ok.gov/documents/legislation/59th/2023/1R/HB/2259.pdf>.
- <sup>75</sup> *Id.* at 9.
- <sup>76</sup> TEX. CODE CRIM. PROC. ANN. art. 42A.655(h) (West 2024).
- <sup>77</sup> See generally *Harrell v. State*, 286 S.W.3d 315 (Tex. 2009).
- <sup>78</sup> See Annie Harper et al., *Debt, Incarceration, and Re-entry: a Scoping Review*, 46 AM. J. CRIM. JUST. 250, 262 (2021), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7417202/pdf/12103\\_2020\\_Article\\_9559.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7417202/pdf/12103_2020_Article_9559.pdf).
- <sup>79</sup> IND. CODE ANN. § 35-38-1-18(b) (LexisNexis 2023).
- <sup>80</sup> *Bearden*, 461 U.S. at 667–68.
- <sup>81</sup> Dear Colleague Letter, at 6.
- <sup>82</sup> *Fines and Fees*.

---

<sup>83</sup> Dear Colleague Letter, at 8.

<sup>84</sup> DEL. CODE ANN. tit. 11, § 4105(a) (West 2024).

<sup>85</sup> H.R. 2259.

<sup>86</sup> WASH. REV. CODE § 10.01.180(3)(a).

<sup>87</sup> See generally *Cruz v. State*, No. 14-21-00454-CR, 2023 WL 3236888 (Tex. App. May 4, 2023).

<sup>88</sup> *Id.*

<sup>89</sup> TEX. CODE CRIM. PROC. ANN. art. 42.15(a-1).

<sup>90</sup> Okla. R. Crim. App. 8.7.

<sup>91</sup> OKLA. STAT. tit. 22, § 983(D) (West 2023).

<sup>92</sup> OHIO REV. CODE ANN. § 2947.14(B) (LexisNexis 2024).

<sup>93</sup> Rebecca Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, *American Sociological Review*, vol. 80, 5: pp. 909-933 (Oct. 2015).

<sup>94</sup> *Id.* Note that NCAJ did not include a policy recommendation on the requirement that the state carry the burden of proving that failure to pay is willful, before ordering incarceration. We did not include such a recommendation for two reasons. First, the better policy solution is the one that Delaware has adopted: the complete elimination of incarceration for any failure to pay fines and fees. Second, our research and analysis of state laws did not produce state policy model sufficient to warrant inclusion in this Report in which we have sought to identify policy models worthy of evaluation or replication.

<sup>95</sup> MASS. GEN. LAWS ch. 127, § 145(b) (2022).

<sup>96</sup> HAW. REV. STAT. ANN. § 706-641(4) (LexisNexis 2023).

<sup>97</sup> Emily A. Shrider & John Creamer, *Poverty in the United States: 2022*, U.S. CENSUS BUREAU (Sept. 12, 2023), <https://www.census.gov/library/publications/2023/demo/p60-280.html#:~:text=Highlights-Official%20Poverty%20Measure,37.9%20million%20people%20in%20poverty>.

<sup>98</sup> *2023 Poverty Guidelines: 48 Contiguous States (all states except Alaska and Hawaii)*, ASSISTANT SEC'Y FOR PLAN. & EVALUATION (Jan. 2022), <https://aspe.hhs.gov/sites/default/files/documents/1c92a9207f3ed5915ca020d58fe77696/detailed-guidelines-2023.pdf>.

<sup>99</sup> JUD. COUNCIL OF CAL.; *2023 Poverty Guidelines: 48 Contiguous States (all states except Alaska and Hawaii)*.

<sup>100</sup> 725 ILL. COMP. STAT. 5/124A-20 (2021) (“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 (“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 (“The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent.”).

<sup>101</sup> OKLA. STAT. tit. 22, § 983.

<sup>102</sup> GA. CODE ANN. § 42-8-102 (2024).

<sup>103</sup> MISS. CODE ANN. § 99-19-20.1 (2024).

<sup>104</sup> 725 ILL. COMP. STAT. 5/124A-20.

<sup>105</sup> 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, 1:59 PM), <https://www.usatoday.com/story/news/nation/2022/12/09/why-federal-poverty-line-not-effective/10827076002/>.

<sup>106</sup> ELLA BAKER CTR. FOR HUM. RTS. ET AL., at 25.

<sup>107</sup> *First Steps Towards More Equitable Fines and Fees Practices: Policy Guidance on Ability to Pay Assessments, Payment Plans, and Community Service*, Fines and Fees Justice Center, [https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC\\_Policy\\_Guidance\\_Ability\\_to\\_Pay\\_Payment\\_Plan\\_Community\\_Service\\_Final\\_2.pdf](https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC_Policy_Guidance_Ability_to_Pay_Payment_Plan_Community_Service_Final_2.pdf) (last visited Mar. 28, 2024).

- 
- <sup>108</sup> FY 2024 Income Limit Documentation System, U.S. Dep’t of Housing and Urban Development, [https://www.huduser.gov/portal/datasets/il/il2024/select\\_Geography.odn?STATES=17.0&statelist=17.0&stname=&wherefrom=%24wherefrom%24&statefp=00&year=&ne\\_flag=0&selection\\_type=&incpath=%24incpath%24&data=2024](https://www.huduser.gov/portal/datasets/il/il2024/select_Geography.odn?STATES=17.0&statelist=17.0&stname=&wherefrom=%24wherefrom%24&statefp=00&year=&ne_flag=0&selection_type=&incpath=%24incpath%24&data=2024) (last visited Mar. 28, 2024).
- <sup>109</sup> Bench Card on file with National Center for Access to Justice, contact NCAJ@fordham.edu
- <sup>110</sup> *Id.* at (b)(1).
- <sup>111</sup> *Id.* at (a)(2).
- <sup>112</sup> *First Steps Towards More Equitable Fines and Fees Practices: Policy Guidance on Ability to Pay Assessments, Payment Plans, and Community Service*, Fines and Fees Justice Center, [https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC\\_Policy\\_Guidance\\_Ability\\_to\\_Pay\\_Payment\\_Plan\\_Community\\_Service\\_Final\\_2.pdf](https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC_Policy_Guidance_Ability_to_Pay_Payment_Plan_Community_Service_Final_2.pdf) (last visited Mar. 28, 2024).
- <sup>113</sup> FY 2024 Income Limit Documentation System, U.S. Dep’t of Housing and Urban Development, [https://www.huduser.gov/portal/datasets/il/il2024/select\\_Geography.odn?STATES=17.0&statelist=17.0&stname=&wherefrom=%24wherefrom%24&statefp=00&year=&ne\\_flag=0&selection\\_type=&incpath=%24incpath%24&data=2024](https://www.huduser.gov/portal/datasets/il/il2024/select_Geography.odn?STATES=17.0&statelist=17.0&stname=&wherefrom=%24wherefrom%24&statefp=00&year=&ne_flag=0&selection_type=&incpath=%24incpath%24&data=2024) (last visited Mar. 28, 2024).
- <sup>114</sup> Bench Card on file with National Center for Access to Justice, contact NCAJ@fordham.edu
- <sup>115</sup> Dear Colleague Letter.
- <sup>116</sup> *Id.*
- <sup>117</sup> *Id.*
- <sup>118</sup> WASH. REV. CODE § 10.101.010(3).
- <sup>119</sup> H.R. 2259.
- <sup>120</sup> OKLA. STAT. tit. 19, § 514.5.
- <sup>121</sup> WASH. REV. CODE §§ 10.01.160; 10.101.010.
- <sup>122</sup> TEX. CODE CRIM. PROC. ANN. art. 43.091.
- <sup>123</sup> WASH. REV. CODE § 10.101.010(3).
- <sup>124</sup> H.R. 2259.
- <sup>125</sup> 725 ILL. COMP. STAT. 5/124A-20.
- <sup>126</sup> MANDY PELLEGRIN & BRYCE TUGGLE, HOW TENNESSEE JUDGES LOOK AT DEFENDANTS’ ABILITY TO PAY FEES AND FINES 5 (2021), <https://www.sycamoreinstitutenetn.org/wp-content/uploads/2021/12/2021.12.20-FINAL-How-Judges-Consider-Ability-to-Pay-Fees-and-Fines.pdf>.
- <sup>127</sup> ROCHELLE SPARKO ET AL. at 11.
- <sup>128</sup> *Fines and Fees*.
- <sup>129</sup> *See, e.g.*, Mich. Ct. R. 6.425(3)(c); COLO. REV. STAT. § 18-1.3-702 (2024); WASH. REV. CODE § 10.01.180.
- <sup>130</sup> OKLA. STAT. tit. 22, § 983(D).
- <sup>131</sup> CAL. GOV’T CODE § 68645.2 (Deering 2024).
- <sup>132</sup> OKLA. STAT. tit. 22, § 983(B)(3).
- <sup>133</sup> 725 ILL. COMP. STAT. 5/124A-20. 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. 135/15-5); 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).
- <sup>134</sup> 735 ILL. COMP. STAT. 5/ Art. XII Pt. 9, 10.
- <sup>135</sup> *Id.* at Pt. 10.
- <sup>136</sup> *Request a Fine Reduction Tool*, CAL. CTS., <https://mycitations.courts.ca.gov/home> (last visited Mar. 22, 2024).
- <sup>137</sup> CAL. GOV’T CODE § 68645.2.
- <sup>138</sup> *Request a Fine Reduction Tool*.
- <sup>139</sup> JUD. COUNCIL OF CAL., at 9.
- <sup>140</sup> *Id.*

- 
- <sup>141</sup> See, e.g., MICH. SUP. CT. ABILITY TO PAY WORKGROUP, TOOLS AND GUIDANCE FOR DETERMINING AND ADDRESSING AN OBLIGOR'S ABILITY TO PAY 2 (2015), <https://www.courts.michigan.gov/49d691/siteassets/reports/collections/abilitytopay.pdf>.
- <sup>142</sup> LFO Calculator (State of Washington), WASH. STATE SUP. CT'S MINORITY & JUST. COMM'N, <https://beta.lfocalculator.org/> (last visited Mar. 22, 2024). Washington made the tool public, so that prosecutors, defense attorneys, and individuals can use the tool in addition to judges. *Id.*
- <sup>143</sup> CYNTHIA DELOSTRINOS ET AL., at 61.
- <sup>144</sup> *Id.* at 63.
- <sup>145</sup> *Id.*
- <sup>146</sup> H.R. 1169, 68th Leg., Reg. Sess. (Wash. 2023).
- <sup>147</sup> CYNTHIA DELOSTRINOS ET AL., at 65.
- <sup>148</sup> Mecklenburg Cnty. Dist. Ct., *Bench Card: Imposition of Fines, Costs, Fees, and Restitution* (Oct. 2017), <https://perma.cc/683G-XZSD>.
- <sup>149</sup> Mich. Sup. Ct. Ability to Pay Workgroup, *Appendix F Payment Plan Calculators*, MICH. CTS., <https://perma.cc/6WUR-FFPY> (last visited Mar. 22, 2024).
- <sup>150</sup> Bench Card on file with National Center for Access to Justice, contact NCAJ@fordham.edu
- <sup>151</sup> Iowa Ability to Pay Calculator, IOWA LEGAL AID, <https://abilitytopay.org/interview?i=docassemble.ATPCalculator:data/questions/ATP.yml#page1> (last visited Mar. 22, 2024).
- <sup>152</sup> *National Standards: Food, Clothing and Other Items*, INTERNAL REVENUE SERV. (Apr. 24, 2023), <https://www.irs.gov/businesses/small-businesses-self-employed/national-standards-food-clothing-and-other-items>.
- <sup>153</sup> *Local Standards: Housing and Utilities*, INTERNAL REVENUE SERV. (Apr. 24, 2023), <https://www.irs.gov/businesses/small-businesses-self-employed/local-standards-housing-and-utilities>.
- <sup>154</sup> *Local Standards: Transportation*, INTERNAL REVENUE SERV. (Apr. 24, 2023), <https://www.irs.gov/businesses/small-businesses-self-employed/local-standards-transportation>.
- <sup>155</sup> *National Standards: Out-of-Pocket Health Care*, INTERNAL REVENUE SERV. (Apr. 24, 2023), <https://www.irs.gov/businesses/small-businesses-self-employed/national-standards-out-of-pocket-health-care>.
- <sup>156</sup> Iowa Ability to Pay Calculator.
- <sup>157</sup> Telephone Call with Alex Kornya, Litigation Director & General Counsel, Iowa Legal Aid (Nov. 8, 2023).
- <sup>158</sup> EDWIN W. ZEDLEWSKI, *ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE 3–5* (2010).
- <sup>159</sup> Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, U. CHICAGO L. REV., <https://lawreview.uchicago.edu/print-archive/constitutionality-income-based-fines#heading-1> (last visited Mar. 22, 2024).
- <sup>160</sup> 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).
- <sup>161</sup> See Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 104–11 (2017).
- <sup>162</sup> Alec Schierenbeck.
- <sup>163</sup> *Id.*
- <sup>164</sup> Beth A. Colgan, at 100.
- <sup>165</sup> OKLA. STAT. ANN. tit. 22, § 991a(A)(1)(y).
- <sup>166</sup> 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].
- <sup>167</sup> See, e.g., *State v. O'Toole*, 392 A.2d 1225 (N.J. Super. 1978) (finding that “the 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”).



---

<sup>168</sup> *Bearden*, 461 U.S. at 672.

<sup>169</sup> *Id.* at 20.

<sup>170</sup> Dear Colleague Letter.

<sup>171</sup> Phil Hernandez et al., *Set Up to Fail: How Court Fines & Fees Punish Poverty and Harm Black Communities in Virginia*, COMMONWEALTH INSTITUTE FOR FISCAL ANALYSIS (Jan 14, 2021), <https://thecommonwealthinstitute.org/research/set-up-to-fail-how-court-fines-fees-punish-poverty-and-harm-black-communities-in-virginia-2/>.

<sup>172</sup> ACCESS TO JUST. OFFICE OF U.S. JUST. DEP'T, at 21.

<sup>173</sup> TEX. CODE CRIM. PROC. ANN. art. 45.049.

<sup>174</sup> *Id.* at 43.091.

<sup>175</sup> Mich. Sup. Ct. Ability to Pay Workgroup, *Appendix I Payment Alternatives*, MICH. CTS., <https://www.courts.michigan.gov/49d41b/siteassets/reports/collections/atp-appendixi.pdf> (last visited Mar. 22, 2024).

<sup>176</sup> *Legal Services Day Flyer*, OR. STATE MULTNOMAH CNTY. DIST. ATT'Y (2019), <https://mcda.us/wp-content/uploads/2018/06/2019-Legal-Services-Day.pdf>; Brent Weisberg, *Legal Services Day marks successful one year anniversary*, OR. STATE MULTNOMAH CNTY. DIST. ATT'Y, <https://www.mcda.us/index.php/news/legal-services-day-marks-successful-one-year-anniversary> (last visited Mar. 22, 2024).

<sup>177</sup> NEB. REV. STAT. § 29-2206(2) (2023).

<sup>178</sup> ROOPAL PATEL & MEGHNA PHILIP, *CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 5* (2012), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-debt-toolkit-action>.

<sup>179</sup> CAL. PENAL CODE § 1214.1 (Deering 2024); *How Fines and Fees Impact Low-Income Californians*, SAVERLIFE [https://static1.squarespace.com/static/5fb2ed3e535af708d0c84149/t/6019aff74eae96f1d41c481/1612296184389/Fines+and+Fees+Infographic-Final\\_2.pdf](https://static1.squarespace.com/static/5fb2ed3e535af708d0c84149/t/6019aff74eae96f1d41c481/1612296184389/Fines+and+Fees+Infographic-Final_2.pdf) (last visited Mar. 22, 2024).

<sup>180</sup> WASH. REV. CODE § 3.62.020.

<sup>181</sup> *Blazina*, 344 P.3d at 684.

<sup>182</sup> JUD. COUNCIL OF CAL.

<sup>183</sup> *Id.* at 8.

<sup>184</sup> *Fines and Fees*.

<sup>185</sup> Just. Admin. Comm'n, CS for H.R. 397 (2022), <https://laws.flrules.org/2022/201>.

<sup>186</sup> OKLA. STAT. ANN. tit. 22, § 983.

<sup>187</sup> H.R. 244, 151st Gen. Assemb., Reg. Sess. (Del. 2022), *available at* <https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocumentEngrossment?engrossmentId=24803&docTypeId=6>.