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ABOUT THE CRIMINAL JUSTICE POLICY PROGRAM

The Criminal Justice Policy Program (CJPP) at Harvard Law School conducts research and advocacy to support criminal justice reform. It generates legal and policy analysis designed to serve advocates and policymakers throughout the country, convenes diverse stakeholders to diagnose problems and chart concrete reforms, and collaborates with government agencies to pilot and implement policy initiatives.

For more information, please visit: Criminal Justice Policy Program at Harvard Law School at http://cjpp.law.harvard.edu.
EXECUTIVE SUMMARY

Eliminating the harms of exorbitant monetary sanctions on poor people in our civil and criminal legal systems requires wholesale change. In this paper, the Criminal Justice Policy Program (CJPP) at Harvard Law School proposes a framework for one component of such reform: a complete reworking of how courts handle financial sanctions. The judicial branch has an independent responsibility to sentence and enforce fines fairly. In most jurisdictions, courts could implement these changes today without legislative reform. Although legislation is needed in many states — including to eliminate fees and surcharges and decriminalize low-level offenses — courts need not wait for such reforms to ease or even prevent the worst harms that excessive financial sanctions create for poor people, especially people of color.

Under our framework, courts would not require people to pay revenue-raising fees and costs, and would impose only a proportionate fine as a sentence for an offense and as an alternative to more punitive sentencing options. Judges would calculate fines based on concrete numerical criteria that would result in amounts tailored according to the severity of the offense and people’s financial circumstances. And if people failed to pay, courts would send reminders and reassess the case to see whether adjustments could be made. Courts would promote open communication and facilitate trust. They would encourage people to notify the court whenever their financial circumstances change so that the court could provide relief from outstanding debt when appropriate. Courts would not use warrants, driver’s license revocation, or incarceration to compel payment or punish nonpayment. Under this framework, sentences would be less punitive and more proportionate.

At the sentencing stage, CJPP recommends that jurisdictions do the following:

- **Eliminate all revenue-raising fees and surcharges** (including for municipal ordinance violations, traffic violations, misdemeanors, and felonies). Courts and other government operations should be funded through tax revenues.
- **If fines are imposed as a sentence for an offense, set them at a level that people can afford.**
  - Fines should be *proportionate to each person’s financial circumstances*.
    - Evaluate whether certain *presumptions* are met that signal that a person is of limited financial means. Presumptions are thresholds that, once surpassed, signal to the court that ability to pay will likely be an issue.
    - Calculate a person’s *net income* based on concrete numerical factors that account for a reasonable cost of living, support of dependents, and other relevant circumstances.
    - Multiply monthly net income by a *set percentage* that people can afford to pay toward fines.
- Fines should be *proportionate to the nature of the offense*.
  - The severity of the offense should determine how long the person makes their monthly payment. Courts should impose more months of payment for more serious offenses.

- **Consider alternatives to payment that are proportionate.** Alternatives such as community service should be proportionate to the seriousness of the offense and should take into account other demands on the person’s time, such as work and child care. Courts should provide an expansive definition of what qualifies as community service and ensure that options are accessible to everyone.

- **Decouple probation and monitoring of fine payment.** Courts should not sentence a person to probation supervision to monitor payment. Making payment a condition of probation subjects people to excessive correctional control and the disproportionate consequences of probation violations.

## SETTING PROPORTIONATE FINANCIAL SENTENCES

<table>
<thead>
<tr>
<th><strong>CALCULATE MONTHLY FINE AMOUNT</strong></th>
<th><strong>STEP 1</strong></th>
<th>Identify monthly income after taxes.</th>
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<td><strong>CALCULATE THE NUMBER OF MONTHS...</strong></td>
<td>...of payment based on nature of the offense</td>
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<td><strong>MULTIPLY</strong></td>
<td>MONTHLY FINE AMOUNT</td>
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**TO DETERMINE THE TOTAL PROPORTIONATE FINE.**
In most cases, setting fines according to a person’s financial circumstances — and avoiding pitfalls such as probation or onerous alternatives — will result in timely payment. But when circumstances in a person’s life change and result in nonpayment, the court’s enforcement response must also be proportionate.

Thus, CJPP also recommends that courts better calibrate their responses to nonpayment so that they are proportionate. Our recommendations eschew punishment as the standard response to missed payments and instead encourage judges to adapt to changes in people’s ability to pay and be responsive to those who are trying to make their payments. Jurisdictions should do the following:

- **Facilitate open communication.** Oversee payment plans without heavy intrusions into daily life (such as probation supervision or regular court check-ins) and create opportunities for adjustment of fines (including waivers) by phone or other accessible means of communication.

- **Eliminate warrants for nonpayment or nonappearance.** Rely instead on reminders to facilitate payment. Courts should rarely use summonses and orders to show cause.

- **Review cases frequently with an eye toward reducing or waiving unpaid fines.** At every point of contact, judges should update their assessment of a person’s financial circumstances. Courts should review cases and waive or reduce fines whenever appropriate.

- **Ensure that enforcement mechanisms are proportionate to the act of nonpayment.** Jurisdictions should eliminate the use of harsh enforcement mechanisms and rely instead on proportionate responses to nonpayment. Specifically, jurisdictions should do the following:
  - **Eliminate driver’s license suspension and incarceration** as responses to nonpayment.
  - **Limit the use of civil debt collection mechanisms** for nonpayment.

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**PROPORTIONATE ENFORCEMENT OF FINANCIAL SANCTIONS**

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<th>USE</th>
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<td>Open channels of communication to the courts so people can notify judges of difficulty with payments before default occurs</td>
<td>Ongoing review of people’s ability to pay on the judge’s initiation — and waiver or closure of the case when appropriate</td>
<td>Incarceration for nonpayment</td>
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<td>Simple and understandable educational materials and other creative means of conveying information about the enforcement</td>
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B. Avoid overly punitive measures in response to nonpayment
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IV. CONCLUSION
I. INTRODUCTION

Across the United States, jurisdictions impose what amount to regressive taxes on their poorest residents to fund courts and other services. When people are sentenced in criminal court or face civil penalties for traffic and other infractions, they are often charged a fine. They are also frequently required to pay various fees, such as clerk fees and transcript fees, and surcharges that fund other statewide programs or services (referred to collectively in this report as “fees”), and depending on the offense, they may be required to pay restitution to compensate victims for any losses. When combined, these financial sanctions (including fines, fees, and in some cases restitution) are often disproportionate: they are not scaled to the severity of the offense or the person’s financial circumstances. This disproportionality is exacerbated by the fact that judges setting monetary sanctions do not consider people’s ability to pay, are not given or do not exercise discretion to waive or reduce those sanctions, and may even be influenced by the need to raise revenue.

When people are unable to pay these financial sanctions, they may experience additional consequences (including more fees, civil liens, and wage garnishment), become further entrapped in the legal system (through repeated court appearances, warrants, or probation supervision), and face punitive sanctions (including driver’s license suspension or revocation and incarceration). Courts seldom consider a person’s ability to pay before imposing these punishments. It’s even more rare that they assess whether a sanction for nonpayment is proportionate or necessary to serve the interests of justice in a particular case. Thus, people living in poverty experience much harsher and more prolonged involvement with the legal system than those who can pay their monetary sanctions in full at sentencing. Some people endure years of additional punishment because they are poor. And the effect is even worse for Black and Latinx people who are overrepresented in the legal system because their communities are targets for intensive policing, including revenue-driven law enforcement.

Addressing these socioeconomic and racial inequities requires fixing a few foundational problems in our court system. Most fundamentally, our courts are bloated with cases that should not be there in the first place. Dockets should be shrunk through decriminalization, diversion, declination, and other approaches.

Additionally, fees should be eliminated. Municipal and state governments should pay for courts and other government functions through tax revenue. They should not use fees as a backdoor tax in the face of budgetary shortfalls. To be sure, eliminating fees will require overcoming substantial hurdles. Jurisdictions may face legal limitations on raising taxes or generating revenue by other means. Even where funding court operations through the general budget is legally possible, decision makers may lack the political will to make such changes. But doing so is essential: the use of fees places the burden on low-income communities, often communities of color, to pay for government services that are meant for and used by everyone.
Repealing fees will require legislative action. But courts already have the discretion to set financial penalties and respond to nonpayment in more proportionate ways. Reorienting judicial policy and changing judicial culture are important steps in creating a just and proportionate system.

Finally, setting aside the question of fees, fines are common sentences and courts should reform how they calculate fines to achieve a just and proportionate system. This report provides recommendations for changes to judicial policy and practice that will make our legal systems more proportionate. For the past several years, CJPP has worked with judges and court administrators to design and implement policies to reform the imposition and enforcement of financial sanctions. In each state, CJPP thoroughly analyzed how the financial sanction system operated — as required by statutes, regulations, and other policy documents and as seen in practice. We used our analysis and our expertise in nationwide policy reform to provide guidance aimed at ensuring more proportionate imposition and collection of monetary sanctions. The recommendations in this report grow out of that work and sometimes go beyond what any single jurisdiction has been able to implement so far. We have sought to compile the best policies and practices we have seen across the country to envision a coherent system of proportionate financial sanctions. We offer these recommendations as a road map for statewide judicial policymakers and individual judges, many of whom are eager for new ideas. This report is also intended as a guide for advocates and community members to push their officials to adopt our recommended reforms and hold these decision makers accountable. Each recommendation is achievable — and if jurisdictions implement all of the changes we suggest, they will make great progress toward realizing a proportionate and just approach to financial penalties.

"When combined, these financial sanctions are often disproportionate: they are not scaled to the severity of the offense or the person’s financial circumstances."
KEY TERMS

FINES are monetary sanctions imposed as a sentence for a civil or criminal offense. A fine either constitutes the entire sentence or is imposed in addition to other components of a sentence such as incarceration, supervision, or community service.

FEES are additional charges assessed in the civil or criminal legal system. Fees can be assessed for particular court functions such as creating a court transcript, the cost of public defense, or room and board for a period of incarceration. They may also be associated with paying off other financial sanctions — such as monthly fees for participating in a payment plan or monthly supervision fees for people sentenced to probation until their financial obligations are paid off. Some jurisdictions consider fees to be “restitution” to the government, but restitution is a distinct concept defined below. Fees also include surcharges (also defined below).

SURCHARGES are fees charged either as a flat amount or as a percentage of the fine. Surcharges are typically mandated by statute or regulation to fund a particular government function or contribute to a jurisdiction’s general revenue.

RESTITUTION is a financial sanction intended to compensate victims of an offense for actual losses. This is not technically a fee or a fine but is typically considered to be part of a financial sanction.

FINANCIAL SANCTIONS are the combination of fines, fees, and restitution that may be imposed for an offense adjudicated in the civil or criminal legal system.

In this report, we focus on fair sentencing and enforcement with respect to fines (and not to fees) because 1) fees should be eliminated outright; and 2) the recommendations in this report would not cure all of the problems created when states and municipalities fund their justice systems by charging fees to their poorest community members. Many of the reforms in this report, such as consideration of ability to pay, are insufficient to fully remedy the harms or counteract the financial incentives that fees create. This report does, however, provide recommendations that would improve the ways in which all monetary sanctions are imposed and collected.

We ground our recommendations in the concept of proportionality, which requires that financial penalties be tailored to the nature of the original offense and an individual’s ability to pay so that fines are more equally experienced by people of different financial circumstances.

In a proportionate system, people receive a fine tailored to the nature of the offense and their current ability to pay and have a reasonable time period to make payments. Every person’s payments are affordable and when the payments are com-
complete, people have no further involvement with the legal system. Courts consider alternatives to financial sanctions such as community service (if the person prefers) and ensure that such alternatives are imposed in a proportionate way. If someone elects to pay their monetary sanctions in installments, courts do not use probation or other intrusive supervision measures to monitor repayment. If people’s financial circumstances change at any point during the repayment process, the court provides opportunities for them to communicate the change and adjust the sanction. When an individual misses a payment, the court reaches out using reminders rather than invasive or punitive measures such as warrants. The court provides people with ample notice as well as due process, especially if they are asked to appear before a judge. Upon nonpayment, courts review every case to assess people’s ability to pay (without requiring an appearance) and waive or reduce fines if required by their current financial circumstances. In assessing whether additional sanctions for willful nonpayment are appropriate, courts consider whether they would be proportionate or necessary for the interests of justice. Courts do not use harsh mechanisms such as driver’s license revocation and incarceration in response to nonpayment.

Proportionate financial sanctions are better for the legal system as a whole and the people involved in it. The use of financial sanctions contributes to deeply entrenched conflicts of interest, prolonged cases, and other problems. Many current reform efforts do not go far enough to correct these problems. They fail to account for the patchwork of policies that generate harm. Reforms that target only one area may result in a game of whack-a-mole, solving one small problem only to create a new problem in a different aspect of a person’s life. For this reason, CJPP has developed a comprehensive set of reforms for courts to address problems at every stage: sentencing, alternatives to payment, monitoring of payment, responses to nonpayment, and punitive responses and collection methods. We also provide some recommendations for legislative and executive reforms (although they are not exhaustive and should not be seen as a precondition for judicial reform).

In section II we discuss reforms that would result in more proportionate financial sentences. These include conducting meaningful ability-to-pay determinations to tailor fines at sentencing to each person’s financial circumstances. They also include providing alternatives to payment such as community service and ending the use of probation and community supervision solely to monitor payment, a practice that can entrap low-income people in the legal system for long periods with significant consequences. In section III we discuss reforms to create more proportionate enforcement of financial sanctions. These reforms include proportionate responses to nonpayment, such as oversight of payment plans and reliance on reminders, and open communication with people to troubleshoot barriers to payment. We also discuss the need to eliminate overly harsh punishments for nonpayment, such as incarceration and driver’s license suspension or revocation.

It must be said at the outset that the reforms we discuss in this report do not constitute a perfect policy solution. CJPP recognizes the structural problem with charging fines in justice systems that disproportionately target low-income communities and communities of color, regardless of how proportionate those fines may be. Fines will always be more difficult to pay for poor people, who make up the vast majority of those brought into our courts. Ability-to-pay policies are imperfect because they are only as good as their implementation. Although this report provides concrete, easy-to-use formulas, there is no guarantee that judges will apply them. Thus, judi-
Social reform requires more than just strong law and policy. It must also include judicial training and accountability mechanisms to achieve the culture change needed for these reforms to work in practice. And though we acknowledge that the reforms we propose are imperfect, we offer them as a temporary way to reduce the harms of financial penalties as long as they exist in their current form.

It should also be understood that tailoring fines to people’s financial means does not insulate people from punishment. Even low fines can be felt as punitive for someone who is living in poverty. In the United States, people with lower incomes are less likely to have assets or savings. One recent study showed that many people in this country do not have access to $400 at any given time, putting them just one emergency away from financial ruin.12 This is even more pronounced among people of color in the United States. In 2015, one in four Black people and one in five Latinx people nationwide were poor.13 These inequalities exist at every life stage and are structural and often intergenerational.14 Given this reality, courts do not need to fear that low fines will “let people off too easy,” because low fines for a poor person will be experienced the same as high fines for a person with economic means. For example, even a fine of $5 per month can represent a significant part of a poor person’s net income after meeting basic living expenses.

Advocates, policymakers, and courts across the country are recognizing that reform of their financial sanctions practices requires more than piecemeal solutions and quick fixes. Courts must commit to examining their practices in detail and implementing holistic solutions that promote proportionality — like the ones described in this report.

BEARDEN v. GEORGIA

The Supreme Court has made clear that people cannot be incarcerated for the sole purpose of enforcing monetary sanctions. In *Bearden v. Georgia*, the Court ruled that the Fourteenth Amendment prohibits courts from revoking probation and detaining people for failure to pay a fine, unless the court first inquires about their ability to pay.15 Under *Bearden*, a person can be incarcerated only after willfully failing to pay the fine, and only if there are no adequate alternatives to imprisonment.16

Despite this unequivocal holding, jurisdictions across the country continue to operate “debtors’ prisons” and otherwise harshly punish people for failure to pay fines and fees, without meaningful regard for the financial constraints that make payment impossible.17

In March 2016, the DOJ issued a “Dear Colleague” letter to state court administrators and chief justices, clarifying the legal framework of *Bearden* and the obligations judges have when imposing and enforcing fines and fees.18 The letter recognizes that many of the harms and injustices of monetary sanctions begin at sentencing and much more work is needed to bring court practices in line with the Constitution.
II. PROPORTIONATE FINANCIAL SENTENCES

This section discusses front-end proportionality, including setting proportionate financial sentences, ordering proportionate alternatives such as community service, and avoiding the use of probation to monitor payment.

A proportionate system begins at sentencing (including when the court accepts a plea agreement): fines should be tailored to the offense and a person’s ability to pay. Most jurisdictions engage in formally equal punishment, imposing the same amount on everyone regardless of their ability to pay. But formally equal sentences are substantially unequal because they are experienced differently by people with different financial circumstances. Those who are able to afford their full financial sanction immediately can pay and move on with their lives. People who are unable to pay the full amount upfront are often assessed additional fees, including a fee for entering a payment plan and interest on the total amount owed. Judges often extend the length of payment plans and probation supervision when people are unable to pay within their initial payment plan period, and those who miss an installment payment are at risk for additional punishment. The impact of unaffordable financial sanctions extends to family and community members who may contribute money toward payment of court debt or lose financial support from someone who is making payments to the court. This chain of consequences begins with the initial failure at sentencing to account for each person’s financial circumstances.

A model for setting proportional fines, often called “day fines,” has a track record of success, both in pilot programs in the United States in the 1980s and in dozens of countries throughout Europe and Latin America. Under this model, fines...
are set proportionate to the offense and a person’s financial circumstances, and ability-to-pay determinations are highly structured. Legislatures and courts set a number or range of “units” of punishment that correspond to the severity of each offense — much as sentencing grids do in our legal systems. They also set an amount per unit based on the person’s ability to pay — typically one day’s worth of income with adjustments based on individual circumstances. Ability to pay is assessed in every case and the total penalty is set by multiplying someone’s daily ability to pay by the number of penalty units that correspond to their offense. This section describes day fines and recommends that jurisdictions adopt this approach to setting fines.

For jurisdictions that do not implement a day-fines system, we also recommend a number of reforms to ensure robust ability-to-pay determinations at sentencing. These reforms are inspired by day fines and are being implemented in various forms throughout the country. First, to achieve a tailored sentence, judges must always consider a person’s current ability to pay at sentencing. To do this, they must calculate available net income after basic living expenses based on clear, concrete, and uniform guidance. Judges should also exercise discretion to adjust these numbers based on individual circumstances such as health issues and transportation restrictions. Fines should not swallow up all of a person’s disposable monthly income, and payment should not be required for years on end. Jurisdictions should set a reasonable percentage of net income that can be used to pay a portion of the fine every month. Both the total amount of the fine and the duration of the payment term should be proportionate. For jurisdictions that do not implement day fines, the length of a payment plan tailored to a person’s monthly net income can be used to gauge whether the total fine is proportionate; fines in lower-level cases should be payable over a short period. Tailored proportionate fines, when calculated correctly, allow people to pay the amount owed, either immediately or in reasonable installments, and then move on with their lives, avoiding the potentially life-ruining consequences of prolonged involvement in the criminal justice system.

Many jurisdictions also have alternatives such as community service for people who are unable to pay their fines. These alternatives should be widely available and appropriately designed. Courts should ensure that alternative sentences imposed to
address one problem — inability to pay — do not create additional problems, such as disproportionate and burdensome work requirements.

Jurisdictions should also avoid using probation sentences to monitor payment of financial sanctions. Even when probation is imposed for other reasons, it should not be used as a collections tool because it places people at risk for consequences associated with supervision, including increased monitoring, travel restrictions, and the risk of incarceration. In short, using probation to monitor payment plans exposes people of limited financial means to a harsher punishment than those who are able to pay their fines in full at sentencing receive.

These policy reforms, all of which target sentencing proportionality, have the ability to greatly limit or even prevent the harms of excessive financial penalties and extended system involvement. Waiting to address ability to pay until after someone has already missed a payment is too late to prevent unjustly penalizing people for being poor.

A. Conduct meaningful ability-to-pay determinations and tailor fines at sentencing

Tailoring fines to a person’s financial means at sentencing is a necessary first step to achieving a system that is fair and proportionate. The recommendation to consider ability to pay upfront is consistent with the Department of Justice’s 2016 “Dear Colleague” letter about financial sanctions and with recent statewide reforms. Over the past few years, a wave of legislation and court policy changes have required ability-to-pay determinations at sentencing in states including Louisiana, Texas, Mississippi, and Arizona. Tailored sentences are more fair and result in fines that people will actually pay. Research suggests that lower fines are more likely to be paid in full. Scholars have also cited the procedural justice benefits of affordable fines. “The graduation of economic sanctions to a manageable amount . . . should promote a belief that the debt is surmountable, leading to higher levels of self-efficacy and greater efforts at completing payment.” Monetary sanctions imposed without regard to a person’s ability to pay may remain unpaid for a long time and become essentially uncollectible. Tailoring fines at sentencing also lessens the need for future hearings for review or upon default.

Jurisdictions that have enacted reforms requiring upfront ability-to-pay determinations report improvements. Policy analysts in Texas concluded that recent reforms to state law, including requiring ability-to-pay determinations at sentencing, have resulted in a decrease in the use of warrants for nonpayment. Analysts explain: “the hypothesis is that [requiring ability-to-pay determinations upfront] will enable more individuals to fulfill their obligations without reaching the point of a warrant being issued.” Similarly, in Charlotte–Mecklenburg County, North Carolina, CJPP developed a bench card (a reference tool for judges during court proceedings) that helps judges conduct upfront ability-to-pay determinations. In the 20 month period after launching the bench card, judges issued only 129 warrants. By contrast, in the 12 month period prior to implementing the bench card, judges issued 206 warrants. Yet in both Texas and Charlotte, people are still subjected to warrants (and incar-
cerated) too often for inability to pay. So while the initial reports are promising, courts are likely still imposing unaffordable fines and fees.

Merely conducting an ability-to-pay determination is not enough. Even with information regarding people’s financial circumstances, judges often set payment amounts they mistakenly believe are affordable because they misunderstand poverty. We often hear from judges and people involved in the criminal legal system that judges will conduct an ability-to-pay determination, but if they find that someone lacks the ability to pay the statutory amount, they will set a fine that is still too high and set an arbitrary monthly payment amount such as $50 per month. Although this may seem like a reasonable amount to a judge, for many people who subsist on public benefits or rely on their entire paycheck to get by, a $50 payment is just as out of reach as $500. The fine should instead be tailored to people’s financial means and should not compromise their financial stability. Policy guidance must provide judges with a meaningful picture of what each person can afford to pay and instruct judges on exactly how they can and should use their discretion to waive or tailor fines.

1. Adopt a day fines model

In our civil and criminal legal systems, fines are usually “flat fines” — they are set at a specific amount or range for each offense. The reforms described in this report would add an ability-to-pay determination to the flat-fine system to set more proportionate fines, so that fines would be experienced more equally by people across income levels. But these are patchwork reforms. Day-fines jurisdictions, by contrast, have a more cohesive system in which all fine amounts are determined by both the level of offense and a person’s ability to pay, using a concrete structured formula. For the past year, CJPP has studied Germany’s day fines system to learn how their model can help shape reforms in the United States.

Under a day fines system, courts set fine amounts using a two-part inquiry. First, courts analyze the severity and circumstances of the offense to determine the number of “units” or “days.” Units are similar to sentencing guideline ranges based on the level of the offense. Judges are required to state the number of units or days on the record.

Second, courts calculate the person's net income for one day. In Germany, daily net income is typically a person’s monthly post-tax income divided by 30, and it does not include wealth or assets. Courts also subtract expenses including support of dependents, extraordinary expenses, and deductions of about 30% for those with limited means. Net income calculations in Germany are based on concrete formulas rather than the broad (or sometimes nonexistent) standards or lists of factors that judges in many U.S. jurisdictions use to make ability-to-pay determinations. Judges in day fines systems retain discretion to adjust the daily net income when appropriate.

The fine amount is the product of the person’s daily net income multiplied by the number of days/units of the sentence. For example, a court may set a low-level misdemeanor at 20 units. For a person with a daily net income (with expenses subtracted) of five euros, the total fine would be 100 euros. For the same offense, if someone had a net income of 10 euros per day, that person would be fined 200 euros. In this way, each person experiences the penalty similarly because the total is tailored to their financial circumstances.
Several U.S. jurisdictions successfully implemented day-fines pilot projects in the 1990s. Those examples teach us that the key to a successful day fines system is careful design. This requires making a series of decisions such as which offenses are eligible for day fines, what unit numbers or ranges are assigned to various offenses, and how net income is defined.

Once in place, day fines systems are relatively simple — judges in Germany report that they have no trouble assessing ability to pay in every case. In the vast majority of cases, German judges rely on self-reporting either through a brief colloquy or an intake form to ask people about basic biographical data including income, number of dependents, and other expenses. Courts in the United States already conduct nearly identical inquiries to ascertain eligibility for child support, court-appointed counsel, and benefits.

"Day-fines jurisdictions, by contrast, have a more cohesive system in which all fine amounts are determined by both the level of offense and a person’s ability to pay, using a concrete structured formula."

The success of a day fines system is entirely dependent on how it is implemented, both through the legislature (in setting offense units) and the courts (in using the system to set fair punishments). Although a system of graduated sanctions is more fair, more proportionate, and more likely to reduce the worst effects of current U.S. practices, successful implementation will require political will and culture change. Changing the culture requires public education about the principles of the system to counteract sensationalist news coverage. Indeed, such coverage has derailed day fines systems in the past.

Day fines should be implemented in a way that does not make sentences harsher or result in more people sentenced. Analysis, in consultation with community members and people who are affected, is necessary to assess the appropriate application of day fines in each jurisdiction and to evaluate day fines as a reform along with more fundamental changes such as decriminalization and the use of alternatives to financial sanctions such as community service and diversion. Additionally, fines are often imposed alongside other punishments, such as supervision and incarceration, without considering whether the overall sentence is proportionate to the offense. Implementation of day fines should account for all components of a sentence. Unit values should be assigned to supervision and incarceration so that the total sentence does not extend beyond a maximum, proportionate unit amount.
For jurisdictions unable to implement day fines immediately, the next two sections provide guidelines that any system can use to conduct robust ability-to-pay determinations.

2. Assess ability to pay at sentencing in every case and tailor financial sanctions as much as possible

As discussed in the Introduction, jurisdictions should eliminate fees altogether because they are unfair and operate as regressive taxes. But doing so requires legislation, and until states pass such laws, judges must operate under the statutes in place. Instead of focusing on fines alone, this section offers guidance for judges seeking to set proportional financial penalties in systems that involve myriad fees or restrictions on judicial discretion to waive or reduce fines and/or fees. Even in such systems, judges retain considerable discretion, and courts should adopt rules, bench cards, and other formal policies to reform practices around the imposition of fines and fees. To be sure, judges may feel pressure from legislatures or recipients of the funds that court fees generate. But they have a professional and legal obligation to resist this pressure.

LEGISLATIVE REFORM: REPEAL FEES AND CODIFY RULES FOR SETTING PROPORTIONATE FINES

The reforms highlighted in this report focus primarily on steps that judges can take to make fines more proportionate. To fully address the many problems caused by excessive financial sanctions, however, legislative reforms may be necessary. First and foremost, states should eliminate all fees. Additionally, states should remove limitations on judicial discretion to waive or reduce financial obligations on ability-to-pay grounds. CJPJ recommends that jurisdictions adopt the following legislative reforms alongside the judicial reforms highlighted in detail in this report:

- Eliminate all fees and surcharges.
- Provide ranges rather than mandatory fine amounts for each offense, so that fines can be scaled according to people’s ability to pay.
- Require that courts consider a person’s ability to pay at sentencing in every case, without requiring that anyone raise the issue or request a separate hearing. Place the burden of proof on the government to prove that people have the ability to pay a financial sanction rather than requiring people to prove their inability to pay.
- Remove all statutory restrictions on adjustment, reduction, and waiver of financial sanctions so that sanctions may be tailored to each person’s financial circumstances.
a. Evaluate ability to pay in every case

CJPP recommends conducting ability-to-pay determinations in every case, regardless of whether it is required by law, a person explicitly requests it, or the sentence is imposed after a guilty plea. Making these determinations standard practice ensures that judges have the information they need to correctly set proportionate financial penalties. Critically, no one should be required to affirmatively request an ability-to-pay determination, as is the case in some states. People may not be aware that their inability to pay could affect the level of fine imposed or the repayment terms. And defense attorneys may worry that arguing that their clients cannot pay a fine could lead the judge to impose a sentence of incarceration instead. Policy reforms should therefore ensure that ability-to-pay determinations occur automatically in every case at sentencing.

Although many jurisdictions have begun to recognize the importance of upfront ability-to-pay determinations, judges with full dockets understandably worry that they lack the time to conduct such inquiries. Judges also may be concerned that it is difficult to accurately evaluate a person’s ability to pay. But when done correctly, as described in more detail below, the ability-to-pay assessment is straightforward, streamlined, and accurate. Indeed, it is how judges calculate fines in jurisdictions all over the world that use day fines.

b. Tailor, waive, or suspend financial sanctions when possible

Although it may seem obvious, upfront ability-to-pay determinations are useful only when judges have the authority and inclination to waive or reduce financial sanctions based on someone’s financial circumstances. Judges should be given this authority and should use their discretion to tailor fines and fees to a person’s ability to pay.

The first barrier to exercising full discretion is that judges may not be aware that the law allows them to waive or suspend enforcement of monetary penalties. This unfortunate circumstance exists because states rarely have one clear statute authorizing judges to modify or waive all financial obligations. Instead, many states permit or prohibit waiver on almost a fee-by-fee basis or with a statute that applies to one type of financial obligation and not to others. And some states permit waiver of several types of financial obligations, but the relevant statutes use different terms or standards to denote the circumstances when waiver is permitted. This patchwork of statutes can make it difficult for judges to determine which financial sanctions can and should be waived. To address this problem, statewide judicial entities should clearly map out the statutory authority to waive fines and fees through a bench card or other guidance document for their judges. For example, the Washington Supreme Court Minority and Justice Commission created a calculator tool to help judges understand which specific assessments, surcharges, fees, costs, and fines they can waive under that state’s law.

Judges should also have a clear understanding of the different purposes served by the fines, fees, and costs provided for by statute. Fines are meant to be punishments for certain offenses. Fees are amounts imposed in addition to a statutorily defined sentence and often serve to raise revenue for the courts and other government ser-
vices. Although they are not legally considered punishment, fees are still *experienced* as punitive because the requirements for payment and consequences of nonpayment are the same as for fines. What’s more, many conflicts of interest arise when government officials rely on the court system for revenue. Finally, high fees may run afoul of the Excessive Fines Clause of the Eighth Amendment. The fact that fees are not meant to be part of the punishment puts an even stronger onus on judges to waive fees as much as possible, especially when a person cannot afford them.

Some states do not permit judges to waive or reduce certain financial obligations even on hardship grounds. In those states, legislative reform is vital. But with a firmer understanding of their legal authority to modify financial sanctions, judges will be able to conduct an ability-to-pay determination for the total amount owed and then waive or otherwise tailor what *can* be waived to ensure that each total financial obligation imposed is as proportionate as possible under state law. Even in jurisdictions where some or all types of financial obligations by statute cannot be waived, judges may still be able to use their inherent equitable powers to suspend enforcement of those sanctions. Although the debts may still be officially “on the books,” absent state law requiring otherwise, judges can decline to pursue enforcement efforts.

In sum, CJPP recommends that after judges conduct an ability-to-pay determination for the total possible amount owed, they should waive, reduce, or adjust all financial sanctions within their discretion and impose a total financial sanction that is as proportionate as possible under state law. If the judge lacks discretion to make the total amount proportionate, the judge should consider using equitable powers to suspend enforcement of the excess.

3. Determine ability to pay based on objective, concrete criteria

Ability-to-pay determinations will result in more proportionate sentencing only when financial circumstances are considered in a meaningful way. To be meaningful, ability-to-pay determinations should be based on objective criteria that are concrete, free from bias, and easy for courts to apply. Fines should be based on a person’s current income with a deduction for reasonable cost of living expenses. No one should be expected to allocate all of their disposable income toward fines, and judges should be given discretion to adjust downward where appropriate. This may mean that some people are able to pay only a very small amount each month toward financial sanctions — perhaps only a few dollars — because they are living in deep poverty.

Most current state laws regarding ability to pay are broad, lack uniformity, and invite bias and speculation. State laws guiding ability-to-pay determinations may provide factors for courts to consider but often lack guidance on how to set proportionate fines. Without concrete guidance, inappropriate or unsupported assumptions — often driven by explicit or implicit biases — can influence judicial decision making. For example, judges may speculate about how much people “should” be able to pay, their likelihood of obtaining a job in the future, and other factors that are not directly relevant to their current circumstances. When ability-to-pay deter-
minations are not based on concrete facts and numbers, punishments will be inconsistent and potentially unjust.

Ability-to-pay determinations should always be based on what people can afford to pay at the time of the hearing, not on what they might be able to pay in the future or would be able to pay under different circumstances. This prevents judges from calculating financial penalties based on assumptions and speculation rather than facts. Two cases from Arkansas demonstrate the pitfalls of unguided, counterfactual judicial inquiry. In one case, at an ability-to-pay hearing held after a man defaulted on his payments, the Arkansas Court of Appeals found that the man’s health problems did not create an inability to pay, in part because he had a prior history of successful employment and had submitted only a few job applications. Similarly, in another case, the judge held that unsuccessfully applying to a few jobs in one’s hometown was insufficient to show inability to pay, because the person should have applied outside of his field and geographic area. Each case illustrates the problem with determining ability to pay without concrete guidance: how many jobs would a person need to apply for in order to make “sufficient” effort? What is an appropriate geographic area in which to apply, and does that radius account for transportation issues? Different judges might answer these questions differently, leading to subjective conclusions regarding the sufficiency of one’s effort rather than ability to pay. What’s more, these inquiries ask the wrong questions. The right one is this: what can this person proportionately pay given their current financial circumstances?

Inspired by day fines and based on its work with judges across the country, CJPP recommends creating policies that specify which information is considered at an

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ability-to-pay hearing and how it may be used to adjust a fine. Under CJPP’s proposed system for proportionate fines, courts first look at whether a person meets a presumption (threshold) that indicates an inability to pay. Then, in cases where a fine sentence is appropriate, the court then determines each person’s proportionate total fine. The court should use concrete factors to calculate the person’s net income — their monthly income (after taxes) minus deductions for standard cost of living and other known recurring expenses. The court should also consider any additional information that may merit a further reduction of the fine. Using a benchmark for that jurisdiction, the judge then determines what percentage of the person’s net income should be paid every month toward the financial sanctions. After calculating a reasonable monthly payment, the court considers the nature of the offense to determine how long the person should make monthly payments. This will generate a total fine amount that is proportionate to the person’s ability to pay and the nature of the offense.

**INCOME vs. NET INCOME**

This section describes how to calculate a person’s net income and how to calculate a reasonable portion of the income that a person should be expected to pay each month toward financial sanctions. As discussed here, **income** refers to the total amount of money that a person takes home each month after taxes and before any deductions or adjustments. **Net income** refers to a person’s income minus deductions for reasonable cost of living, number of dependents, and any unique circumstances that would further inhibit their ability to pay.

a. Use presumptions to help determine whether financial hardship is likely an issue

Presumptions can be a helpful tool in ability-to-pay determinations. Presumptions are thresholds that, once surpassed, signal to the court that ability to pay will likely be an issue for the person. They serve as a starting point for each ability-to-pay analysis. This does not necessarily mean that someone who meets a presumption will not be subject to fines or that all penalties should automatically be converted to community service. Rather, presumptions signal to courts that they must pay close attention to a person’s financial circumstances, and that a lower fine will likely be necessary — and the repayment terms will need to be adjusted — to ensure proportionate punishment. Bench cards and other tools that help judges make use of presumptions should include clear guidance about what should be done when a presumption is met, including waiving fees and carefully tailoring fine amounts.

In Charlotte–Mecklenburg County, CJPP’s bench card uses this approach. It provides a list of characteristics including eligibility for appointed counsel; income at or below 200% of the poverty guidelines; full-time student status; receipt of means-tested public assistance; and homelessness, incarceration, or residence at a
mental health or other treatment program in the past six months. If someone meets any of the presumptions, the court is instructed to assume that the person is unable to pay court costs at all. As applied to fines, presumptions alert judges that they will likely need to either set low fines to ensure proportionality or use an alternative sentence. This is because most people who trigger the presumptions have limited, if any, current income, thereby raising significant doubts that they can afford basic life necessities and pay case-related fines. By design, the circumstances that trigger these presumptions are easy for the court to discover through a simple self-report or from case file information. Bench cards developed in other jurisdictions also take this approach, using presumptions as an important indicator in ability-to-pay determinations.

b. Calculate monthly net income

Next, policy guidance should include factors that help judges determine a person’s net income, which is calculated by subtracting from current monthly income a standardized cost of living based on family size that accounts for local variations in living expenses.

i. Determine current income

Courts should first assess monthly income. They should measure income as take-home pay after taxes. They should ask people their current yearly salary, their weekly wages, or the amount of their last paycheck, and use the amount to calculate each person’s monthly income. Courts should not ask about past or future wages, unless the person does seasonal or intermittent work. Those people should be permitted to explain that their recent wages are temporary and not reflective of their annual income.

In some jurisdictions, statutes instruct courts to consider a person’s assets. Jurisdictions not required to consider assets may decide not to do so. That was the approach Germany took in adopting its day-fines system, which considers current income only. CJPP believes this is a sound approach because it balances the need to get an accurate sense of a person’s finances without requiring the court to engage in the time-consuming task of inquiring about assets. If courts do take assets into account, it is important that they consider only liquid assets and those that can be used to pay a fine without harm to the person or any dependents. At a bare minimum, courts should not consider assets such as a car, home, or job-related equipment that are necessary for employment, shelter, or sustenance.

It is also important for the court to consider only the person’s income and assets and not the resources of relatives and friends. The person before the court is the only one being sentenced. It is unfair and unrealistic to presume that friends and family should or would donate money to help pay someone else’s fine: “while the institution of the family is widely understood to be a critical source of support for individuals regardless of circumstances, families of formerly incarcerated people are themselves most often poor and struggling, making it particularly burdensome for these families to take on the responsibilities of financial penalties.”
ii. Deduct a reasonable cost of living based on the number of dependents

After calculating monthly income after taxes, courts should subtract a reasonable cost of living according to standardized formulas that account for dependents and local variations in standard expenses. Many countries with day fines systems have methods like this to account for cost of living in a way that protects people’s basic needs while avoiding case-by-case determinations of each person’s particular expenses.

Reasonable cost-of-living deductions should account for basic living expenses, including food, housing and utilities, child care, health insurance premiums, transportation costs, other common expenditures (such as clothing, paper products, diapers, nonprescription medication, and personal hygiene items), and expenses for emergencies. The cost-of-living deduction should also take into account the number of dependents a person has. Statewide court agencies or supreme courts should develop cost-of-living deduction amounts, though jurisdictions can also define policies specific to their community to accommodate outliers or significant variations among counties.

Several tools exist that can help calculate a standard deduction. For example, the “Self-Sufficiency Standard” is an online tool that provides jurisdiction-specific cost-of-living benchmarks which set forth the amount of income a person would need to meet their basic needs without public subsidies or private assistance.

iii. Consider how unique circumstances may further restrict ability to pay

The concrete formulas described above may not fully capture a person’s ability to pay. Courts should make additional deductions based on individual circumstances.

First, courts should deduct known large recurring expenses that people cannot avoid paying, such as some medical expenses (beyond the cost of insurance coverage), expenses related to the care of dependents (other than general child care costs, which are part of the standard deduction described above, but including care for any adult dependents), and child-support orders. Courts should also deduct any required payments toward court debts owed in other cases.

Second, judges should consider the need to adjust downward for equitable reasons, as recommended by recent bench cards across the country. These bench cards recognize that people’s ability to pay may be limited because of factors that are not apparent from their most recent pay stubs. For example, the bench card CJPP developed for Charlotte–Mecklenburg County instructed judges to consider other factors that affect ability to pay, such as “homelessness, health, or mental health issues, including disability; and limited access to public transportation or limitations on driving privileges.” And if someone is required to serve a period of incarceration in addition to paying a fine, the person’s financial circumstances may look drastically different upon release than they did at sentencing. The ability-to-pay determination should therefore consider how incarceration will impede someone’s ability to pay their fine and how making payments may impact their reentry into the community.
By considering these additional factors, judges exercise their discretion to ensure that payment plans are tailored to each individual.

c. Determine the total fine amount by calculating an appropriate monthly payment (based on percentage of net income) and the number of monthly payments (based on the nature of the offense)

After determining net income, judges should calculate a set percentage of the person’s monthly income to pay toward financial sanctions and determine an appropriate number of monthly payments based on the nature of the offense. Multiplying the two together yields a total fine amount.

i. Calculate the amount of monthly net income that can be paid toward the fine

Jurisdictions should select a maximum percentage of monthly net income that judges can require people to pay toward their financial sanctions. For example, jurisdictions may decide that, at most, 5% of a person’s monthly net income can be paid toward fines, although judges should be given discretion to adjust downward when appropriate. Using a fixed percentage ensures that courts calculate monthly payments consistently, even for people with very low incomes. Many people live in deep poverty and lack the financial resources to make even small monthly payments and still afford basic necessities like food and heat.\textsuperscript{78} A fixed percentage with the option of adjusting downward protects the poorest from unaffordable monthly payments.

Some jurisdictions have recently adopted this approach. Louisiana lawmakers worked closely with the Pew Center to set payments at 5% of total monthly income.\textsuperscript{79} This rate contains no deductions for cost of living and is not tailored to individual circumstances. However, it is an example of a percentage cap that helps tailor fines to financial means. Additional research showed that in Louisiana, 5% of monthly income is roughly equivalent to the gross daily income for an eight-hour workday.\textsuperscript{80} Accordingly, state law was amended to require that monthly payment
amounts be set at a person’s daily income for one eight-hour workday. In Charlotte–Mecklenburg County, CJPP recommended a similar approach. The county’s bench card states that, in general, judges should set monthly payment amounts at 10% of a person’s monthly post-tax income after subtracting the cost of basic living necessities. As the bench card notes, such necessities include housing, utilities, food, transportation, and out-of-pocket health costs. This percentage was selected after consultation with poverty experts in the county and was combined with guidance on the duration of payment plans.

Fixed maximum percentages provide a ceiling from which judges can deviate downward as necessary or appropriate. They serve to make ability-to-pay determinations less arbitrary. Using a fixed percentage, such as 10% of net income, is similar to the way the day-fines system discussed in section II.A.1 operates, and brings some of those systems’ benefits without requiring more comprehensive changes. Fixed percentages also help judges feel confident in the payment amounts they are setting and create an easily reviewable record for appeal.

\textit{ii. Use the nature of the offense to set the number of payments and determine the total fine amount}

Setting an appropriate monthly payment amount based on ability to pay is only the first step in ensuring that a person’s fine is proportionate and fair. The next step is to determine the total fine amount proportionate to the offense. To do this, the court should multiply the monthly payment amount by the number of months the person should be required to pay. That number is based on the severity of the offense. Jurisdictions should create guidelines or ranges for offenses to ensure the number of payments required for each type of crime is proportionate. To be clear, the number of months should be used only to calculate the total fine amount; it should not necessarily be the actual time limit for paying the fine.

CJPP worked with the Mecklenburg County District Court, which has jurisdiction over misdemeanors and infractions, to successfully implement this approach. The bench card CJPP developed recommends that people pay a maximum of 10% of net income per month and that the total fine amount be calculated by setting a “reasonable time frame [for monthly payments] based on the severity of the offense.” The bench card lays out allowable sentencing ranges for the offenses, noting that a payment plan should not last longer than the maximum sentence for the offense and that state law provides that remission or waiver of remaining fees should occur when “the proper administration of justice requires resolution of the case.” According to the bench card, most cases in this district court would result in a payment plan of no more than six months.

Under the law Louisiana recently passed, people on payment plans satisfy their obligations in full by making consistent monthly payments for either 12 months or for half of their term of supervision, whichever is longer. That is a long payment length, and because the cap on duration of payments applies only to those who were able to consistently make timely payments, it may not benefit those who are struggling the most. For example, if a person misses one or more payments due to an unexpected expense or temporary unemployment, the court may determine that the person failed to make the statutorily required “consistent” payments. But the
new law is a step in the right direction, especially in its adherence to the principle that there should be a limit on how long a person can be required to make payments on a financial sanction.

The total fine amount should also account for other punishments imposed, including incarceration and probation. It is important to note that courts should not require people to pay off their fines within the payment term used to calculate the total fine amount. Courts should remain flexible in creating and adjusting payment plans to accommodate changes in financial circumstances and prevent default.

To summarize, CJPP recommends that proportionate total fine amounts be calculated using concrete guidelines to determine net income, applying a fixed percentage to determine a monthly payment amount, and setting a reasonable number of required monthly payments based on the nature of the offense. This may seem complicated at first, but as we saw in Charlotte–Mecklenburg County and as we observe in day fines countries, the process is easily implemented. Moreover, courts inquire about relevant financial factors in a variety of other contexts, such as when determining eligibility for appointment of counsel. Setting fines in this way will require changes to current practices in many jurisdictions, but once the new system is established, it will greatly improve the fair administration of justice by avoiding harsh collections practices and the harmful, unconstitutional use of debtors’ prisons.

4. Rely on self-reporting to ascertain ability-to-pay information

Courts should adopt policies allowing people to use an affidavit or other sworn statement to establish their income and expenses. Some states already provide that such documents will be sufficient, either in the ability-to-pay context or for related issues such as determining eligibility for a court-appointed attorney. Using affidavits allows for easy court administration and avoids clogging dockets with prolonged hearings about each person's finances. Requiring documentary proof of financial information would not only increase the administrative burden on courts, it could also disadvantage the very people ability-to-pay reforms are meant to help. Many people who lack the means to pay their financial sanctions find it difficult or impossible to provide documentary evidence of their income or expenses due to periods of homelessness or residential transiency. And people may not have readily accessible documentary proof of many of the special circumstances or expenses discussed above, such as homelessness, mental illness, or costs related to dependent care. In many cases such documents do not exist. Self-reporting is considered adequate and sufficiently reliable in other criminal justice contexts. Empirical evidence also suggests that self-reporting is accurate. One study of self-reporting in the day fines pilot program in Staten Island, New York, found that people “provided truthful financial information 90% of the time, and that inaccuracies were primarily tied to a [person’s] lack of knowledge about some of the information requested.” In general, errors may result from “lack of memory rather than intentional efforts to falsify information.” Policies governing ability-to-pay determinations should therefore allow people to attest to their financial circumstances via sworn affidavit.
Judges can use worksheets or standardized forms to get the information necessary to calculate a proportionate fine. For example, each person could fill out a form prior to sentencing that attests to their occupation; monthly income; whether employment is seasonal or permanent; their number of dependents; and other known recurring expenses, such as required student loan or child support payments, court debt in other cases, or the costs of health insurance or monthly medications. Many jurisdictions already provide such forms at the start of cases to determine eligibility for court-appointed counsel.

Importantly, prosecutors and judges should be prohibited from taking adverse action (such as perjury prosecutions) against people for inconsistencies or inaccuracies in the financial information they provide for ability-to-pay determinations. Courts encourage self-reporting by ensuring that the information people provide cannot be used against them. If the court discovers inaccuracy in the self-reporting, the appropriate response is an adjustment in the fine based on the correct information.

B. Consider alternatives to payment carefully

In many jurisdictions, community service is used as a sentencing alternative to fines. In some cases, judges impose fees and fines at sentencing and then convert them to community service hours for those who are unable to pay. In other cases, including those involving indications of inability to pay, judges may simply sentence people to community service as the sentence itself. In some states and localities, community service is available as an alternative only after nonpayment of a previously imposed sanction. The availability of this alternative may also depend on the type of financial obligation owed. What’s more, the nature of the work and the amount of compensation for community service varies from place to place. The common understanding of community service is volunteer work for a government or nongovernment entity, but some jurisdictions allow a person’s participation in treatment, educational, or other programming to qualify. Jurisdictions are increasingly broadening the types of activities that constitute community service.

When courts impose community service in lieu of fines, the number of required hours is often quite high because it is calculated by dividing the total financial sanction by the minimum wage or some other low wage. Worse yet, without restrictions on the nature and amount of community service to be imposed, community service raises serious concerns about forced labor and conjures up a racist history of peonage. Community service may also expose people to unlawful working conditions without typical protections while having the unintended effect of depressing the labor market.

If implemented more proportionately, community service can be an effective alternative to fines. It can be a way for people to complete their sentences quickly so that they can move on with their lives without becoming poorer. To avoid the same pitfalls that exist with untailored fines — including unachievable terms, overly harsh responses to noncompliance, and extended entanglement with the system — community service sentences should be proportionate to both the offense and the person’s circumstances. Courts should tailor community service sentences so that they do not impose undue burdens such as interfering with employment and family obligations. Research also suggests that many states restrict certain people from
participating based on arbitrary criteria, such as a minimum threshold of money owed. Courts should instead offer alternatives in all cases, and, with the guidance of counsel, people should be able to choose between a tailored fine and a tailored service alternative. Community service compliance should also be monitored and enforced proportionately, as described in sections III.A and B.

1. Ensure proportionate hours and avoid arbitrary completion requirements

A community service sentence usually requires completion of a specific number of hours, although other models exist, such as requiring completion of a particular program. A common way that judges “convert” the financial sanction into community service hours is to divide the total amount owed (without first conducting an ability-to-pay determination) by the minimum wage to arrive at the number of required hours. For example, $500 in fines would be divided by the current federal minimum wage of $7.25 and the sentence would be 70 hours of community service. Other states cap the number of hours of community service according to the type of offense.

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Setting community service hours this way has two major problems. First, the sentence does not take into account a person’s ability to pay. Courts should conduct an ability-to-pay determination and arrive at a fair and proportionate financial sanction before converting that amount into community service hours. In many cases, the proportionate penalty paired with a fair payment plan would be manageable and preferable to community service. Second, this way of calculating community service sentences is a crude way of determining how many hours of work would represent an equivalent and proportionate sentence for the person.
Courts must therefore independently determine the number of community service hours that would be proportionate based on the person’s circumstances and the underlying offense. The first step is to determine the number of hours per week that a person could reasonably devote to community service given their work schedule and other obligations. Policymakers should develop guidelines to assist with this analysis that include evaluation of the person’s other obligations, health limitations (including mental health conditions), the nature of the offense, available community service placements in the area, and other relevant factors. For example, people with full-time child care responsibilities or full-time employment have less discretionary time than those without such obligations. Even people who work only part time may have other obligations that fill their time. When courts impose community service requirements that are unreasonable in light of individual circumstances, they are setting people up to fail. Courts should also account for how long it takes a person to get to and from their community service site and give credit for hours spent commuting. This is especially important in jurisdictions where such sites are remote and for people who rely on public transportation to reach a site.

Next, courts should determine how many weeks of community service would constitute a proportionate sentence given the nature of the offense. For example, if the court determines that a person has three hours per week available for community service and the offense requires four weeks of community service, the person would be sentenced to 12 hours of community service.

Jurisdictions that do not implement the recommendations above and require fines to be “converted” into community service hours should adopt conversion rates of at least $20 to $25 per hour. Although it is an imperfect proxy, researchers estimate that the average value of each volunteer hour performed in the United States is $25.43. This indicates that allowing repayment of court debt through community service with a conversion rate set at only the minimum wage significantly undervalues the work performed.

Finally, courts should give people enough time to complete their community service. For example, in Kansas, where the rate of compensation for community service is $5 per hour, people have only one year from sentencing to complete their service hours. If a person cannot complete their community service obligations, the remainder of their financial sanction becomes due. And in Rock County, Wisconsin, if community service is not completed on time, people are sentenced to one day in jail for every $75 of their remaining debt. This time frame is unrealistic for many people, especially given the large amounts owed and the meager hourly rate in most states. Thus, it is important to not only sentence people to a reasonable number of hours as described in this section, but also to give people plenty of time to complete their hours.
LEGISLATIVE REFORM: REMOVE ELIGIBILITY RESTRICTIONS FOR ALTERNATIVES TO PAYMENT

Many jurisdictions have unnecessary limits on people’s eligibility for alternatives to payment of financial sanctions. Some jurisdictions categorically exclude people based on their conviction offense. In Iowa, judges may not order community service if a person has a total court debt of $300 or less. Other jurisdictions limit the type of financial sanctions that can be converted to community service, such as allowing this alternative for fines, but not for fees, surcharges, or restitution. If people can do community service in lieu of only certain fines or fees, they are forced to shoulder a dual burden of working and paying. Alternatives to payment should be broadly available and there is no principled reason to categorically exclude certain people from eligibility. States that impose such exclusions by law should amend their statutes to remove those barriers and expand access to community service.

2. Provide a broad range of community service alternatives with a flexible schedule

In addition to traditional community service programs involving volunteer work, jurisdictions should offer other options. Several jurisdictions have adopted alternatives such as completion of education or skills programs, drug treatment, and counseling. Although these programs broaden the range of choices available and can be beneficial to people struggling with substance use disorder or mental health problems, they should be imposed only after consultation with the person to ensure that the program is appropriate and feasible. For example, people should not be forced to complete substance use treatment if this is not a concern for them. By the same token, the court should confirm that the program’s requirements will not interfere with the person’s other obligations, including work and child care.

Jurisdictions should continue to experiment with expanding alternatives to payment. Some alternatives might be offense-specific. For example, the National Center for State Court’s National Task Force on Fines, Fees, and Bail Practices recommends that judges order “completion of an online or in-person driving class for moving violations and other non-parking, ticket-related offenses” for “individuals whose financial circumstances warrant it.” Other ideas include crediting hours for service projects people are already engaged in or allowing people to propose their own projects to complete or goals to accomplish in lieu of payment.

Critically, community service placements should not be seen as a mechanism for the state to extract hard labor out of low-income people. Instead, decision makers should think creatively about providing alternatives, involve the community in
developing new options, and avoid restricting community service options to menial labor placements. Such jobs may be physically demanding and not appropriate for all people. This will also help jurisdictions avoid dampening their labor market by filling potential wage-earning jobs in public agencies or community organizations with “free” workers. The court should encourage people to identify opportunities in their own community and select the option that works for them.

Broadening community service alternatives also means removing barriers to participation. The community service options available may be inaccessible or impractical for people with disabilities or those who require accommodations for health reasons. Jurisdictions should adopt community service options and adjust hourly requirements to accommodate all people, including those who have disabilities or mental illness.

Jurisdictions should also ensure that community service options account for the need to schedule service hours around other daily obligations, such as child care and work, and are easily accessible, especially for those who lack reliable transportation. In Nevada, judges make community service more viable by allowing people to complete their service obligations over weekends or “other appropriate times that will allow the convicted person to continue employment and to care for the person’s family.” Oregon provides for individualized community service orders that account for a person’s “capabilities and are to be performed within a reasonable length of time during hours the [person] is not working or attending school.” Consideration of these factors will greatly expand access to community service alternatives and improve the success rates of such programs.

3. Eliminate community service participation fees

Some jurisdictions charge people a fee to participate in community service — a practice that is punitive and counterproductive. Such fees may be prohibitive for low-income people, who are often sentenced to community service precisely because they cannot afford financial sanctions. The ACLU of Colorado found that in Alamosa County, people were required to pay an $80 fee to do community service. In North Carolina, people must pay $250 to take part in the community service program. Some jurisdictions charge participation fees via insurance requirements. For example, in Nevada, to participate in community service, people may be required to deposit “a reasonable sum of money to pay for the cost of policies of insurance against liability for personal injury and damage to property or for industrial insurance, or both.” This is a fee like any other. The jurisdiction should cover the cost of any necessary insurance. States concerned with liability can simply implement statutory immunity against civil liability arising from court-ordered community service.

If community service is to be a viable alternative, jurisdictions must eliminate all fees associated with participating in community service. It makes no sense to charge people fees to complete community service requirements when the only reason they are sentenced to community service is that they cannot afford to pay their financial sanctions.
C. Decouple payment of financial sanctions from probation sentences

Many states sentence people to probation supervision in conjunction with their financial sanctions and make payment a condition of probation. Doing so links successful completion of probation with wealth — a link that leads to poor people’s extended involvement with the criminal justice system and contributes to the staggering size of the U.S. probation population. Indeed, nearly five million adults are currently on probation. For some offenses, such as low-level misdemeanors, probation may be imposed solely (or primarily) for the purposes of collecting court debt (“pay-only probation”).

Using probation to monitor payment of financial sanctions results in extended terms of probation and other harsh consequences. It is inappropriate and disproportionate. It unnecessarily imposes burdens, restrictions, and carceral consequences on people only because they cannot afford to pay. People who are on probation solely because they haven’t paid their monetary sanctions do not benefit from supervision. To the contrary, probation sets them up to fail by imposing additional restrictions and requirements, including monthly supervision fees on top of payments they already cannot afford. The consequences of violating these restrictions or failing to fulfill the requirements are severe and can include incarceration, even for people whose original sentence was merely a fine. Courts should use other non-punitive methods for monitoring payment of monetary sanctions.

1. Remove payment obligations from terms of supervision

CJPP strongly encourages jurisdictions to decouple wealth and supervision by ensuring that payment of financial sanctions is not made a condition of probation and that successful completion of probation is not predicated on full repayment. When payment of monetary sanctions is a condition of supervision, people may face extensions of their probation term if they are unable to pay. When nonpayment becomes a probation violation, people also face escalating punishments ranging from warnings to incarceration, with little transparency and fewer procedural protections. Probation often comes with its own costs, such as monthly supervision fees and fees for classes, treatment programs, and drug testing that may also be made a condition of supervision.

People on probation are often under the direct supervision of a probation officer, rather than the court. Accordingly, the officer is responsible for evaluating people’s compliance with their probation terms and, when the officer believes a condition has been violated, for punishing the person directly or recommending punishment to the presiding judge. Importantly, in most jurisdictions, “any violation of a probation condition is an act of recidivism that can result in a custodial sentence, whether the violation is substantive (a new crime) or technical (any other behavior that violates a condition of probation).” Violation decisions are often made with little transparency and there is no opportunity to challenge the decision and no record to facilitate such a challenge. This is of particular concern when it comes to viola-
tions of payment conditions. Probation officers might sanction a person for nonpayment without conducting the kind of meaningful and robust ability-to-pay inquiry described in section II.A.2 — or they might not even ask about a person’s ability to pay. Finally, even if probation officers do conduct a meaningful ability-to-pay inquiry and document their findings, they may not have the authority to adjust the financial obligation accordingly.

Probation officers can impose sanctions including verbal warnings, more stringent conditions, and additional time under supervision. Extending the term of supervision upon nonpayment is particularly concerning because it is a punitive response to conduct that is often not willful. Extensions also fail to address the underlying problem, which is that the person simply cannot afford the payments.

People also can be — and are — punished for nonpayment in the form of a probation violation. And in many jurisdictions, probation officers are authorized to move for revocation (and therefore, incarceration) based on a violation of any condition. Technical violations “have long been associated with overly punitive revocation.” Data show that in the United States, about 25% of probation revocations in the mid 2000s were a result of nonpayment or similar technical violations. At a revocation hearing, probation violations do not need to be proved beyond a reasonable doubt; most states require only proof “by a preponderance of the evidence.” And, violations are often investigated without the usual Fourth Amendment protections. This means that people can have their probation revoked and be sentenced to jail on allegations for which there would be insufficient evidence to convict had they not been on probation. In some places, probation cannot be revoked when the only violation is nonpayment, but the fact of nonpayment can be used against people in other ways. For example, judges or probation officers may consider a person’s history of nonpayment in determining how to respond to other probation violations. People with financial means who can pay their entire fine immediately never face these restrictions and potential consequences.

Probation also subjects people to a host of additional conditions, heavy monitoring, scrutiny of their behavior, and a reduction in their procedural and constitutional rights.”

"Probation . . . subjects people to a host of additional conditions, heavy monitoring, scrutiny of their behavior, and a reduction in their procedural and constitutional rights."
association with people who have criminal records or "with certain specified persons or particular types of persons." Additional conditions include abstaining from alcohol and other drugs, participating in treatment programs, adhering to a curfew, and avoiding arrest. Even the lowest levels of probation — referred to as unsupervised probation, paper probation, or administrative probation — still come with many conditions such as reporting at kiosks and vague requirements to obey all laws or "be of good behavior." These conditions, even the simplest ones, can have devastating effects. For example, monthly reporting obligations force people to take time off from work and lose wages to visit their probation officer in person. Geographic restrictions may prevent people from obtaining employment, visiting family, or meeting other personal obligations. In no other system involving debt owed to the government or private actors — such as student loan debt — do people face such restrictive requirements.

**LEGISLATIVE REFORM:** **ELIMINATE ALL FEES ASSOCIATED WITH SUPERVISION**

Jurisdictions that charge monthly probation supervision fees should eliminate them. Such fees may force people to go without basic life necessities to avoid probation violations for nonpayment. Charging supervision fees also creates a conflict of interest for the probation officer, whose office benefits financially from extended periods of supervision. Additional fees associated with other conditions of probation, such as mandatory counseling programs or drug testing, may further strain people’s limited financial resources. CJPP therefore recommends that jurisdictions eliminate these fees altogether.

Finally, using probation to monitor payment of financial sanctions disproportionately harms poor people. Those with the means to pay financial sanctions immediately are not forced to endure the burdens and restrictions of probation. And probation supervision typically comes with additional fees and costs. These fees compound the problem of excessive monetary sanctions, making repayment — and thus supervision success — even harder to accomplish. Such fees may require extension of probation, thus making sentences longer and more disproportionate than for people with means. Research also suggests that poor people have a harder time complying with conditions of probation beyond those relating to payment, including requirements to maintain employment and meet regularly with a probation officer. This places them at increased risk for sanctions, including revocation and incarceration. Poor people cannot afford to hire an attorney to advocate for them and court-appointed attorneys are rarely able to help their clients resolve issues related to their probation unless a formal revocation petition is filed. Being on probation also has implications for access to federal assistance programs. People who violate a condition of probation are
ineligible for benefits including Temporary Assistance to Needy Families, Supplemental Nutrition Assistance Program, and federal housing assistance programs, despite how broad and expansive such conditions can be.

2. Eliminate reliance on private probation companies to monitor collection of financial sanctions

Along with implementing the policy changes discussed above, jurisdictions should also enact reforms that prohibit the use of private probation companies to monitor payment of financial sanctions. Some jurisdictions outsource probation supervision, particularly for low-level offenses, to private companies that operate on a for-profit basis. These companies derive their revenue from charging monthly supervision fees and other costs, thereby “creating a direct financial interest in keeping their clients under probation as long as possible, and using every tool available to urge payment of fees, particularly those paid directly to the company.” Using private probation companies to monitor and enforce collection of financial sanctions is antithetical to the reforms discussed above. Eliminating supervision fees, reducing the number and types of conditions people must meet, shortening the length of probation, limiting extensions, and providing graduated sanctions for nonpayment are incompatible with a for-profit model of supervision. For this reason, CJPP strongly recommends that jurisdictions end their contracts with such companies and instead monitor payment plans in a way that is fair, proportional, and fosters success.
III. PROPORTIONATE ENFORCEMENT OF FINANCIAL SENTENCES

If a person is unable to fully pay financial sanctions at sentencing, most jurisdictions establish a payment deadline or set up a payment plan. In most jurisdictions, courts (often the clerk’s office or a separate administrative collections department) or probation agencies monitor compliance with payment plans. As noted above, these tasks are sometimes outsourced to private probation companies. Regardless of which entity oversees repayment, monthly payment amounts are often too high, and in some places, courts require that people on payment plans appear in court regularly even if they have not missed a payment. Missed payments, even if due to someone’s inability to pay, may result in additional required court appearances. Courts issue orders to show cause, requiring that people appear before the court at a set date and time to “show cause” or explain why they should not be held in contempt of court for failing to meet the payment deadline. In many jurisdictions, such orders may be accompanied by a warrant to secure a person’s appearance.

Many courts use warrants as the first attempt to reach someone to follow up about a missed payment. Once a warrant is issued, people often spend time in jail without the opportunity to first explain the reasons for the missed payment. When people fail to appear for hearings about nonpayment — perhaps because they can’t afford to pay or have no access to transportation — they risk additional orders to show cause, warrants, and arrest.

Upon nonpayment — after a hearing or often even without one — courts may impose additional punishments including new criminal charges, more stringent probation conditions, additional monetary sanctions, and incarceration. People may have their driver’s license automatically suspended or revoked or face civil debt collection because of a missed payment. Even those who cannot afford to make their payments — and thus are not acting willfully — face these consequences.

Repeated appearances, hearings, warrants, and other consequences persist for as long as a person has outstanding court debt — and that can be decades. Judges may not view these life-disrupting responses to nonpayment as additional punishment, but instead as benign collection methods or reasonable responses to someone’s failure to comply with a court order. Yet to the people experiencing them, this is a distinction without a difference. The spiral of potential consequences for nonpayment is disproportionate given the underlying offense (which, in many cases, is only a misdemeanor) and the fact that nonpayment is rarely willful. Put another way, if jurisdictions were asked to craft an appropriate sentence for a misdemeanor offense, it is highly unlikely that at the outset, such a sentence would include dozens of court appearances over years, a long period of probation supervision, or suspension.
of a driver’s license. And this disproportionality is not limited to misdemeanors — people who owe financial sanctions from felony cases also face disproportionate consequences as they struggle to make payments after serving time in prison. This is not to say that repayment of financial sanctions should go unmonitored. Rather the system of enforcement should be based on facilitation, collaboration, and ensuring financial sentences are tied to ability to pay. Systems of enforcement do not need to be unduly punitive to be effective. In fact, current enforcement regimes — which include more punitive measures like incarceration and warrants — have not been effective and a large amount of debt remains uncollected.177

Jurisdictions should therefore reform enforcement of monetary sanctions in two ways. First, they should respond to nonpayment in a way that is proportionate to the underlying offense and the circumstances surrounding the nonpayment. This includes not issuing warrants and arresting people, but rather, using reminders, open communication, and outreach to fairly respond to missed payments. Upon nonpayment or a request from the person, judges should review cases and exercise their discretion to waive or tailor outstanding amounts when justice requires. Second, jurisdictions should eliminate the use of overly harsh punishments in response to nonpayment, such as driver’s license revocation and incarceration. They should also regulate civil debt collection tactics, such as wage garnishment and liens, as a tool to enforce unpaid financial sanctions.

A. Develop and implement proportionate responses to nonpayment

Proportionate enforcement of payment plans requires structures that promote successful completion of cases and limit intrusions into people’s lives. Any such system must have three components. First, courts should use open communication and provide opportunities for people to seek adjustments to and relief from payment. Second, courts should send reminders and give proper notice to facilitate payment, rather than ordering people back to court, requiring check-ins, issuing arrest war-

“The impact of warrants is much broader than the court and includes jails, law enforcement, and even service providers.”

— Donald Jacobson, Senior Special Projects Consultant, Arizona Supreme Court (former Court Administrator, Flagstaff, Arizona)
rants, or imposing frequent summonses. Third, at each point of interaction, courts should take the opportunity to reevaluate the case and waive or reduce fines when there is a demonstrated inability to pay or other circumstances that call for equitable relief.

The recommendations in this section should not be viewed in isolation, but rather as pieces of a larger system that works best if all components are implemented together. Reminders — our recommended first response to nonpayment — work best if people know that they can communicate with the court without fear of warrants or other punitive responses. This is only possible if the court is not overly intrusive in its monitoring of payment plans and if the court communicates clearly with people. Courts must also be empowered and willing to do something in response to people’s changed circumstances. For these reasons, CJPP recommends implementing the full package of reforms described below.

1. Provide reasonable, appropriate oversight of payment plans

Proportionate enforcement of financial sanctions begins with payment plan oversight that does not impose unnecessary additional burdens. People should have opportunities to communicate openly with the court to address any issues before default occurs.

a. Monitor payments through an administrative process rather than mandatory court appearances, “pay or appear” deadlines, or supervision

Many jurisdictions require people on payment plans to appear regularly in court (before a judge or some other entity) to “check in” and ensure that repayment is proceeding as ordered. At these appearances, courts will accept payment, confirm that payment has already occurred as expected, or when necessary, ask why payment has not yet occurred. In lieu of regularly scheduled check-ins, some courts use “pay or appear” deadlines to monitor compliance. At sentencing, the court sets a date when payment of fines is due and requires people to pay by that date or appear in court on that date to explain why they have not paid. Courts do not always make it sufficiently clear to people that they must appear in court if they have not paid off their debt. It is also common for people to lose track of their “pay or appear” date, particularly if it is far in the future and the court does not have a reminder or notice system.

Both of these oversight mechanisms are costly to the person who must appear and to society as a whole. In some jurisdictions, courts are hard to access because they are located in remote places, people live far from their sentencing court, or the jurisdiction lacks public transportation. Court appearances require people to take time off from work, find child care (potentially at a cost), and otherwise interrupt their lives. This is more than just an inconvenience — it is counterproductive to the successful completion of payment. Repeatedly requesting time off from work can result in termination and loss of the very income people need to make payments. Similarly, people may be forced to use money they would otherwise put toward their
court debt to pay additional child care expenses or transportation costs. Mandatory in-person hearings also create more opportunities for punitive sanctions that keep people involved in the system. For example, if a person misses a scheduled check-in date, they may be subject to additional sanctions for failure to appear.

Either through the clerk’s office or another court administrative entity, courts should create an administrative process to track payments without ordering people to appear for a hearing or a check-in. This process can be administered by clerks and other court staff, with judicial oversight. Tracking payments through an administrative process would still allow clerks and courts to appropriately respond to nonpayment, such as with reminders.\(^\text{182}^\) It would also reduce the risk of escalating consequences for nonappearance and the unnecessary and inappropriate burden of intense supervision solely to monitor payment.

Courts should make payment as easy as possible by allowing for payment by phone, in person, through drop boxes in the community, or online, and by accepting as many types of payment as possible. Providing ample payment opportunities will help facilitate timely compliance.

Courts should also refrain from charging interest or fees for late payments, or fees for participating in payment plans. Such charges only exacerbate financial strain and make compliance with future deadlines even more difficult.

**b. Provide open channels of communication with the court**

Despite the best intentions of judges and people before the court, it is possible that the payment plan set at sentencing may not end up being workable in practice. Circumstances can change over the course of a payment plan that make the original terms unfeasible. If the ultimate goal is to ensure proportionate payments — thereby achieving justice and facilitating prompt closure of the case — policies must recognize and account for changed circumstances and the realities of poverty. Accordingly, judges, clerks, and other system actors should provide ample opportunities and mechanisms for people to request adjustments to the fine amount and the payment plan terms.\(^\text{183}^\)

Courts and administrative offices should be as open and accessible as possible, so that people can easily notify the court of problems with their payment plan and request any necessary changes.\(^\text{184}^\) In some jurisdictions, litigants can raise these issues with the court only through formal motions\(^\text{185}^\) and during specified court dates and times, during the middle of the workday. These requirements may be intimidating to many people, especially when they cannot afford an attorney and court-appointed counsel is not available at this stage of their case. People may also need to take time off from work, find child care, and secure transportation to attend court in the middle of the day.\(^\text{186}^\) System actors should take concrete steps to make courts more accessible to people.\(^\text{187}^\) For example, they should hold evening hours for those who are unable to miss work to attend court sessions during the day.\(^\text{188}^\)

More fundamentally, courts should provide processes to obtain relief without formal court appearances, either by phone or e-mail or by visiting a clerk’s office in person. Clerks should be able to grant extensions and continuances, approve late payments, adjust payment plan amounts downward, and reduce total fines based on
inability to pay. But clerks should not be given the power to take punitive actions against people — such decisions should be left to judges. Judges should also be responsible for oversight, and jurisdictions should enact policies to guide clerk discretion and judicial supervision. For example, policies may contain presumptions allowing extensions and payment plan modifications upon request and guidelines for reducing total fine amounts based on changed circumstances or a demonstrated inability to pay. Courts should also establish an easy way for people to request relief from a judge or appeal a clerk’s decision.

“[P]olicies must recognize and account for changed circumstances and the realities of poverty. . . . People will not communicate with the court unless they know how to do so and trust that their requests will, within reason, be accommodated without punitive reprisal.”

These reforms will require policy change — perhaps even legislative change — to empower clerks to adjust payment plans or fine amounts downward. Some academics advocate for systems that allow people to resolve their entire case online. J.J. Prescott, a professor at the University of Michigan Law School, created an online court platform, now used in several judicial districts in Michigan, that allows people to resolve smaller legal matters such as civil infractions, minor warrants, and misdemeanor charges without having to go to court at all. More research must be done to evaluate such new tools to ensure that they are easy to use and do not lead to diminished due process and loss of the right to counsel. This is of particular concern whenever people are entitled to the assistance of a free court-appointed lawyer.

These kinds of policy changes will work only if jurisdictions pair concrete rule changes with open communications and outreach efforts. Research on procedural justice shows that when people are comfortable with court proceedings and perceive them to be fair, they will have a more positive view of the court and will be more likely to comply with its orders. People will not communicate with the court unless they know how to do so and trust that their requests will, within reason, be accommodated without punitive reprisal.
c. Implement creative systems to convey information about the collection process

To improve transparency and familiarity with the system, courts should also develop innovative ways of providing clear information about their procedures. Such information should include what to expect at each hearing beyond what is included on the official notice, summons, or order to show cause. Several jurisdictions already post “questions and answers” about court processes on their website. The city of Ferguson, Missouri, pursuant to its court-ordered consent decree with the U.S. Department of Justice, now posts a range of information regarding court processes on the city’s website, including how to seek an ability-to-pay determination, consequences for nonpayment or missed court dates, and how to challenge a charge.194 In Mississippi, the Municipal Court of the City of Biloxi also updated its website language as part of a settlement agreement resolving litigation challenging the city’s practices for imposing and collecting financial sanctions. That website now includes information regarding people’s rights, payment of fines, what will happen at court hearings, and consequences for failure to pay or appear.195 Other jurisdictions may elect to run hotlines that people can call to learn more about the process — or provide more detailed descriptions of courtroom procedures and hearings in various locations, including local schools, libraries, and at the court.

Much like enabling open communication with the court, providing information about the court is a simple way to improve people’s experiences. Information sharing will increase transparency of court operations and increase people’s sense of procedural justice. Those benefits are important for any system of fine enforcement to succeed.

DUE PROCESS AND RESPONSES TO NONPAYMENT

All communications with people about their payment obligations must comply with due process requirements. Courts must ensure that any notice of payment obligations or proceedings — whether through a reminder, summons, order to show cause, or other format — includes information that is constitutionally sufficient to put people on notice of their obligation to respond. This includes notice that ability to pay is a critical issue the court will consider, and that the person will have the opportunity both to provide information relevant to ability to pay and respond to statements or questions about their financial status.196
2. Use nonpunitive responses to missed payments and appearances

Instead of choosing the most punitive possible response to a missed payment — issuing a warrant — courts should instead take more proportionate actions. As a preventive measure, courts should send reminders for upcoming payments and court dates as well as notify people that their payments are past due. The reminders and notices should provide sufficient time for people to make payments or communicate with the court to get an adjustment or review of their obligations. Summons and requests to appear in court should be used very sparingly in response to nonpayment.

a. Eliminate the use of warrants for nonpayment and nonappearance

An arrest warrant is a harmful and punitive enforcement mechanism that courts routinely use when a person misses a payment or a court appearance. Courts should stop using warrants altogether to enforce fines.

Issuing an arrest warrant against a person who misses a payment is likely unconstitutional. Courts rarely ask about whether nonpayment was willful before issuing a warrant. A judge may not even review the warrant before it is sent, let alone consider whether the person had the ability to pay. For example, according to allegations in a recent lawsuit in Arkansas, one judge automatically issues warrants upon failure to pay, and this practice appears to be widespread in the state. As the DOJ’s “Dear Colleague” letter noted, under Bearden v. Georgia the use of arrest warrants as a means of debt collection creates unnecessary risk that individuals’ constitutional rights will be violated and when people are arrested and detained on warrants issued for failure to pay without an ability-to-pay determination, “the result is an unconstitutional deprivation of liberty.”

Using a warrant to bring a person before the court to explain the reasons for nonpayment is disproportionately punitive. Judges often view nonpayment or nonappearance as a direct affront to their authority and the legal system as a whole. But there are many reasonable explanations as to why a person may fail to meet a payment deadline or appear for a hearing on payment matters, many of which are innocuous. Indeed, nonpayment may be due to circumstances beyond the person’s control — for example, the fine amount was not set proportionately, so the person cannot afford to pay it; the person’s income or expenses changed; or a medical emergency has left the person incapacitated during the payment window. Many people in the United States are so financially insecure that a single unexpected expense can prevent them from meeting their minimum monthly obligations.
WARRANTS, SUMMONSES, AND ORDERS TO SHOW CAUSE

Judges can use several tools to request or ensure a person’s appearance in court. **Warrants** are orders issued by a judge that authorize law enforcement officers to arrest and detain a person. In the context of nonpayment of financial sanctions, courts typically issue **bench warrants**, which direct police to arrest people and bring them before the court. If someone comes into contact with a law enforcement officer for any reason and has an outstanding warrant for nonpayment of financial sanctions, the officer may arrest that person. A **summons**, on the other hand, does not give law enforcement the authority to arrest a person. Instead, it informs the individual that there is an action or proceeding in court that involves them, and instructs them to appear before the judge at a specific date and time. Finally, an **order to show cause** is a particular type of order, sometimes served via a summons, that requires a person to appear on a specific date and time and demonstrate why they should not be held in contempt of court for failing to pay or appear.

Regardless of the reason someone missed a payment, the consequences that flow from a warrant are not proportionate to the “offense” of nonpayment or nonappearance. People who are arrested on a warrant for failure to pay or appear may spend hours or days in jail awaiting a hearing, and recent research has shown that even one night in jail can result in disastrous consequences for the incarcerated individual. Time in jail may lead to lost wages, inability to provide family support, and even loss of employment. A person’s arrest history may limit future job prospects, and access to vocational or other programs that might otherwise help lift the person out of poverty. In some jurisdictions, arrest warrants for failure to pay bring new municipal charges or additional fines and fees.

Localities across the country are reducing the use of warrants by requiring, at the very least, that courts first use summonses or orders to show cause. Colorado recently prohibited courts from issuing arrest warrants for failure to pay fines. Similarly, in response to DOJ findings in the Ferguson investigation about the need for more graduated, proportionate responses to nonpayment, Missouri passed legislation reforming enforcement of financial sanctions. The Missouri Supreme Court then issued revised court rules, instructing that courts first use orders to show cause to secure appearance and only use warrants after a person fails to appear on the order to show cause. Under its consent decree, the city of Ferguson cannot use arrest warrants to collect debt related to municipal code violations until “all other mechanisms available for securing a person’s appearance in court have been exhausted.” Alternative mechanisms include providing notice of a missed payment and setting new court dates and payment deadlines, and then conducting a hearing as to why a warrant should not issue. The city of Biloxi likewise reformed its use of warrants in response to litigation. The bench card provides that the court “shall not issue any warrant directing arrest for alleged [financial sanction] nonpayment absent a Compliance Hearing.” The court must provide people with 21 days’ notice prior to holding a compliance hearing, and that notice must be given via an official order.
Along with the order, the court mails an “advisement of rights,” which emphasizes the right to counsel and explains that the person can ask for waiver or reduction of the debt owed. These reforms reflect an understanding that warrants are an unnecessarily intrusive enforcement response to nonpayment.

Switching from warrants to summons is a step in the right direction, but it is not enough. In many cases, a summons is unnecessary. Worse, courts may move quickly from a summons to a warrant without giving someone meaningful time to respond. In such cases, the summons merely delays the harms of the warrant for a short period.

b. Rely on reminders and open communication to respond to nonpayment and nonappearance

Using reminders instead of warrants or summonses is a reasonable and proportionate response to a missed payment. Court reminders notify people of their court obligations in a non-threatening way that tends to elicit appearance or response, and initial research shows that reminders are an effective tool to respond to nonpayment.

"Using reminders instead of warrants or summonses is a reasonable and proportionate response to a missed payment. Court reminders notify people of their court obligations in a non-threatening way that tends to elicit appearance or response."

Reminder programs can be structured in a variety of ways. Courts should remind people of their obligations at set intervals — for example, in advance of deadlines or court dates. Courts should also send reminders and official notice whenever a court or payment date is missed. Reminders can be sent via text, phone call, mail, or a combination of methods. More research is needed about how reminders should be structured and implemented, but courts should experiment to find the best solution for their jurisdiction. Ideally, people should be allowed to choose the method of communication that is most cost-effective (given text fees and calling-plan minutes) and convenient for them.
Regardless of the method, people receiving reminders should have the opportunity to respond and make up the missed payment(s) or otherwise seek relief without having to return to court, perhaps by paying online or contacting the court by phone. This allows people to get back on track or get relief without the need to take time off from work or pay for child care and transportation to court. Reminders, in combination with opportunities for active, open communication, (as described in section III.A.1.b), and with proactive review (as discussed in section III.A.3.b), have the potential to greatly change court operations to more proportionately respond to nonpayment and nonappearance.

Reminder programs should be designed with certain guidelines in mind, including first, providing an appropriate number of nonthreatening reminders at reasonable intervals that allow for response; and second, ensuring that reminders do not supplant or replace more traditional forms of notice.

i. Set number of reminders and intervals between reminders that provide a meaningful opportunity for people to respond

Developing a meaningful reminder program requires setting clear guidelines for the number of reminders for nonpayment the court will issue as well as the time between those reminders. This ensures that people have a fair opportunity to respond.

Providing three reminders set one month apart typically strikes an appropriate balance. Consent decrees in cases challenging punitive enforcement schedules have required similar terms for reminder programs. For example, after advocates sued the city of Sherwood, Arkansas, the city adopted several changes, among them implementing graduated responses to nonpayment that include reminders. Now, when a person in Sherwood Municipal Court misses a payment or community service hours, the court will first call the person or send a letter to ask whether the individual would like to provide updated ability-to-pay information. If people fail to respond to the court’s phone calls or letters for two consecutive months, the court will serve an order to show cause, directing them to appear in court and explain their nonpayment. In Mecklenburg County, the courts and administrative collection body now send at least three reminders, set one month apart, before considering a hearing. This process gives people a few opportunities over a reasonable period of time to address nonpayment.

Importantly, participation in a reminder program should not be held against a person if they still fail to pay or respond on time. The reminders should not contain threats of harsh consequences for nonpayment, but rather facilitate and encourage compliance in a nonthreatening way.

The three-month grace period afforded by a reminder system will not unduly delay resolution of the case. Those additional few months may allow people to catch up on missed payments. People can also use this time to explain changed circumstances to the court and seek a revision of their payment plans. Because a reminder is much less threatening than an order to show cause or a warrant, people will be less fearful about responding. In this way, reminders have the potential to rebuild trust between the community and the courts.
Reminders should be used to supplement, not replace, formal notice of proceedings and deadlines. Text or e-mail reminders alone, in lieu of more formal written notice regarding court dates or payment obligations, likely do not satisfy constitutional requirements. Due process requires that service and notice be “reasonably calculat-ed, under all the circumstances, to apprise interested parties of the pendency of the action.” In the nonpayment context, electronic notice alone may not be sufficient to inform people of their missed payment obligations or court dates, especially because their liberty may be at risk. Low-income people are also less likely to have reliable internet access to check e-mail, and this may make relying only on e-mail notice less effective.

Courts should allow people to opt in to reminder programs at sentencing and choose their preferred method of notification in addition to traditional forms of notice. Courts should also repeatedly request updated contact information from people when they connect with the court because addresses and phone numbers may change.

c. Use orders to show cause to secure voluntary appearance only in limited circumstances

Only after reminders and notices fail should courts be permitted to use more stringent measures to secure appearance or payment, such as a summons or an order to show cause. And before issuing summonses or orders to show cause and requiring an in-person hearing, judges should again take the opportunity to reassess cases to determine whether continued enforcement of the case is merited. One goal of a proportionate system should be to reduce the number of unnecessary court appearances. Although there may still be times when the court would like to schedule an in-person appearance, in those limited circumstances, proportionality principles dictate that courts should rely on the least punitive method of calling people into court.

Summons, unlike warrants, do not require or result in arrest. Instead they notify people of the date and time they are required to appear in court to respond to the allegation that they failed to make one or more payments as ordered. Summons are sometimes issued along with an “order to show cause,” which directs people to “show cause” as to why they should not be held in contempt of court for failing to pay as required. Both summonses and orders to show cause result in a hearing at which people should be given counsel and the opportunity to present a defense. At these hearings, courts should conduct an ability-to-pay determination that considers the factors described in section II.A.
A NOTE ON BEARDEN AND THE USE OF SECURED CASH BONDS

In some jurisdictions, if a warrant issues for failure to pay or failure to appear for a hearing about payment, courts set bail or a cash bond to secure release. The amount set is often equal to the payment amount due or the total outstanding amount of debt. Setting a cash bond in this way requires that the person (or family members) pay money to secure their freedom, even before the court considers ability to pay. This could result in people being required to pay money they cannot afford, or, more likely, remain incarcerated simply because they are poor. In some jurisdictions, bail is seized and applied to outstanding debts automatically,\textsuperscript{231} without regard for ability to pay. These practices are in direct violation of \textit{Bearden}.

If a warrant is issued, courts should avoid setting cash bonds and release people on their own recognizance. People are not a threat to public safety or a flight risk — common conditions for pretrial detention — merely because they did not pay their court debt on time. People should not be forced to stay in jail only because they have failed to pay their court debt. And because those who have fallen behind on their court debt will be less likely to be able to pay a money bond to secure their release, secured money bonds in any amount should be avoided altogether.\textsuperscript{232}

3. Review cases and use waiver and remittance authority whenever possible

Before escalating to the next graduated response to nonpayment, the court should review the case. As part of such reviews, judges should consider the person’s ability to pay and should waive or reduce fines based on their current financial circumstances, as described in section II.A. Courts should also look at the underlying offense, how long the case has been open, and other factors to evaluate whether the court should use its equitable powers to waive or suspend outstanding debts. If the person has made all of their payments in the past, for example, the court may determine that it is more appropriate to simply waive the remaining debt than keep the person in the legal system. Or if the file indicates significant financial problems, the court may assume that failure to respond to a summons or a show cause order is due to inability to pay rather than willful disregard for those orders. Accordingly, the judge may decide to waive or reduce fines or take additional steps to contact the person.

Under their new bench card, Mecklenburg County District Court judges are encouraged to conduct a review of the case (which does not require the person to appear) prior to issuing orders to show cause or warrants.\textsuperscript{233} CJPP recommends that jurisdictions adopt a similar process of active judicial case review at the time of missed
payment and prior to issuing a summons. Reevaluating cases before issuing further reminders or summonses results in more proportionate, individualized outcomes.

Jurisdictions should issue recommendations as to when judges should review cases and should implement procedures to facilitate such review. For example, jurisdictions may instruct judges to review cases before issuing a third reminder. Each locality should determine its precise policy to institutionalize frequent, robust review of cases.

In Mecklenburg County, judges are permitted to issue an order to show cause or a warrant once three reminders fail to induce payment, but only after reviewing the case and determining that modification of the amount owed, waiver, or conversion to a civil judgment\textsuperscript{234} of the remaining fees and fines would not better serve the interests of justice. Mecklenburg reports that judges issue warrants only in rare cases such as repeated failures to appear. Instead judges work hard to use one of the other tools. Data suggest that Mecklenburg’s policies are working. The court has been able to resolve cases more fairly without unnecessarily burdening people with appearances. From October 1, 2017 through June 30, 2019, only 11.4% of people who initially defaulted required an official appearance in court to resolve their delinquent debt.\textsuperscript{235}

North Carolina is not the only state to adopt such an approach. A bench card issued by the Ohio Supreme Court in 2014 likewise states that, “[i]f at any time the court finds that an amount owed to the court is due and uncollectible, in whole or in part, the court may direct the clerk of the court to cancel all or part of the claim.”\textsuperscript{236} And under the legislative reforms recently passed in Louisiana, “prior to the enforcement of [financial sanctions] . . . the court shall determine whether payment in full . . . would cause substantial financial hardship to the defendant or his dependents,” and if so, the court may “waive all or any portion of the financial obligations.”\textsuperscript{237} Additionally, under that law, once people make their required payments for 12 consecutive months, or half their term of supervision — whichever is longer — the court is required to waive all remaining debt.\textsuperscript{238}

All of these reforms recognize that in many cases, the appropriate and proportionate response to missed payments is not attempted collection, but rather waiver or dismissal. Even in jurisdictions where waiver of debt is not possible under state statutes, judges can and should exercise their equitable powers to suspend enforcement of the debt.

B. Avoid overly punitive measures in response to nonpayment

Many jurisdictions use harsh punitive measures in response to nonpayment. These measures are often disproportionate to the original offense and the “offense” of nonpayment. Severe punitive measures can include driver’s license revocation, liens or other civil debt collection actions, and even incarceration. Each of these consequences can bring significant harms that can transform a financial sanction into a disproportionately harsh punishment.

Consider as an example a man convicted of misdemeanor theft and sentenced to pay $150 in fines. When he misses a monthly payment, the court refers him to the
department of motor vehicles for an automatic license suspension under state law, without any consideration of the reasons why he failed to pay. Once his license is suspended, he is unable to get to work or medical appointments because his community lacks public transportation. This in turn prevents him from earning wages to pay for basic life necessities to say nothing of his court debt. He also misses vitally important medical appointments (which perhaps exacerbate his condition and create a need for more costly treatments) and, because he cannot drive legally, he cannot get to court for his next court date. Now that he is unemployed and not earning wages, he misses a second payment. Due to the second missed payment and failure to appear, the court issues a warrant for his arrest and puts him in jail. At no point has the court determined whether his nonpayment was willful or due to a lack of money. With this simple example, it is easy to see how a system of overly punitive responses to nonpayment is vastly disproportionate to the person's underlying offense of misdemeanor theft and to his failure to pay the associated court debt. It also demonstrates the way that these responses layer upon one another, making it increasingly difficult for people to get back on track and comply with the court's orders.

To achieve proportionate responses to nonpayment, judges should reflect on two distinct and equally important concepts: first, the original purposes of the sentence imposed — the financial sanction — and whether the additional responses would further that purpose; and second, any potential further harm that additional responses may cause. When a person is initially sentenced to pay a financial sanction rather than serve a term of incarceration, for example, that sentence reflects the judge's (or the legislature's) determination that incarceration was not an appropriate or proportionate sentence for the original offense. Why, then, should incarceration be available as a automatic punishment for nonpayment of the financial sanction? How would that further the ultimate goal or purpose of the original sentence imposed? Is the act of nonpayment alone so severe that it merits a much harsher punishment than the original offense did? Considering these questions is crucial to ensuring the proportionality of punishment.

1. Eliminate incarceration as a response to nonpayment

Incarceration for nonpayment is not only excessively harsh, it is often unconstitutional. Pursuant to Bearden, courts can incarcerate someone for nonpayment only if the nonpayment was willful — i.e., the person had the means to pay but refused to do so. But Bearden is merely the constitutional floor. Because of the harms of incarceration — and because incarceration is vastly disproportionate to the original offense and the act of nonpayment — CJPP recommends that courts avoid incarcerating people for failing to pay court debt, regardless of their reasons for nonpayment.

Many courts used to see the threat of incarceration as an important deterrent and necessary punishment for those who have the financial ability to pay yet willfully disregard their payment obligations. But incarceration is too severe even for those who willfully refuse to pay. In most cases, the imposition of a financial sanction as the sole punishment is an indication that the sentencing court decided that the original offense did not require incarceration. For those cases, imposing incarceration significantly elevates the punishment. Even in cases for which incarceration was
imposed along with a financial sanction, incarceration for noncompliance with the fine is still too harsh. As discussed elsewhere, recent research has shed a bright light on the harmful effects of incarceration, including job loss, further restrictions on economic mobility, and continued entanglement in the criminal justice system.²⁴⁰

"To achieve proportionate responses to nonpayment, judges should reflect on two distinct and equally important concepts: first, the original purposes of the sentence imposed — the financial sanction — and whether the additional responses would further that purpose; and second, any potential further harm that additional responses may cause."

Policymakers are recognizing the problems with using incarceration or even the threat of incarceration as a debt collection tool. The Conference of State Court Administrators suggests that courts use graduated sanctions short of incarceration, even for people who willfully fail to pay.²⁴¹ Some jurisdictions have enacted policy reforms geared toward encouraging alternatives to incarceration for nonpayment, including willful nonpayment. For example, under the policy guidance CJPP helped create in Mecklenburg County, judges are encouraged to take alternative steps to incarceration such as remitting debts owed, converting the debt to a civil lien, allowing additional time to pay, or providing community service as an alternative.²⁴² Under state law, judges are permitted to impose jail time, but the policy guidance strongly encourages judges to seek alternatives. Likewise, Arizona’s bench card instructs judges to “consider alternative sanctions for both those who have been found willful and not willful of nonpayment” pursuant to state law.²⁴³ Such sanctions include ordering community restitution and wage garnishment.
BEARDEN AND THE REQUIREMENT OF POST-DEFAULT ABILITY-TO-PAY DETERMINATIONS

In addition to the harmful impacts of incarceration for nonpayment, the risk of unconstitutional incarceration is high. Given current practices, ability-to-pay determinations are not a sufficiently strong protection against this risk. Under Bearden v. Georgia, a person may not be incarcerated for failure to pay a court-imposed fine or restitution “absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate.” Based on principles of due process and equal protection under the Fourteenth Amendment, Bearden requires courts to “inquire into the reasons for the failure to pay” and determine whether the person “willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay.” As the Supreme Court noted, “if the [individual] has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair” to incarcerate the person.

Policy changes across the country over the past several years have attempted to bring court practice into compliance with the letter and spirit of Bearden and prohibit unconstitutional debtors’ prison practices. Yet problems persist. One particularly troubling misinterpretation of Bearden is that because the case includes language regarding the “sufficient bona fide efforts” of people to pay their debts, courts may incarcerate a person upon a finding that they didn’t try hard enough to pay back the debt on time. Courts should not engage in this type of subjective assessment of efforts to make payments. It is important to distinguish between “reasonable inferences of a defendant’s ability to pay based on existing or prospective employment and an unproven ability to pay grounded in ‘speculation and guesswork.’” When determining someone’s ability to pay, courts should not speculate or make predictions that are not grounded in evidence or rely too heavily on assumptions, including about the person’s potential employability. Instead, judges should make objective assessments of people’s current financial circumstances.
2. Eliminate driver’s license suspensions as a response to nonpayment

In addition to eliminating incarceration in response to nonpayment, jurisdictions should end driver’s license suspension and revocation programs. These programs unfairly target poor people and threaten the livelihoods, health, and safety of those who are unable to pay monetary sanctions.253 Suspending a driver’s license is an inappropriate and disproportionate enforcement mechanism for debt collection under any circumstance because the consequences of losing one’s license are so severe. When people can’t drive, they may be unable to work, attend medical appointments, care for family members, or comply with other terms of their sentence, such as community supervision reporting requirements.254 This puts people in an unten-

"When people can’t drive, they may be unable to work, attend medical appointments, care for family members, or comply with other terms of their sentence, such as community supervision reporting requirements."

able predicament of choosing between sacrificing basic life necessities and driving with a suspended license, which risks arrest for a new offense. Like incarceration, suspending driver’s licenses is counterproductive. Because many people must drive to work, license suspension often prevents people from earning the money they need to pay off their court debt.255 And as described recently by one federal district judge, driver’s license suspension create a two-tiered system of justice that disproportionately burdens low-income people: “[b]eing unable to drive is the equivalent of a recurring tax or penalty on engaging in the wholly lawful ordinary activities of life — a tax or penalty that someone who was convicted of the same offense, but was able to pay his initial court debt, would never be obligated to pay.”256 Yet many states continue to suspend driver’s licenses for unpaid court debt.
LEGISLATIVE REFORM:
ELIMINATE LICENSE SUSPENSION AND REVOCATION SCHEMES AND LICENSE REINSTATEMENT FEES

CJPP recommends that state legislatures and administrative agencies eliminate any license suspension/revocation schemes provided by state law. And wherever the law gives courts discretion to refer cases for license suspension or revocation due to unpaid court debt, judges should as a matter of policy, decline to do so.

CJPP also recommends that states stop charging license reinstatement fees for those who cannot afford them. After a person’s license is revoked for any reason, the reinstatement fees can be prohibitively high. In Tennessee, for example, license restoration costs an additional $65 “for each and every offense committed that provides for the revocation . . . of driving privileges.”257 Payment plans for restoration fees are available only for those “whose reinstatement fee totals more than two hundred dollars.”258 In Texas, the state’s Driver Responsibility Program was the subject of a lawsuit, in part because it imposed yearly $100 surcharges for three years after an offense before a license could be reinstated.259 (The legislature recently voted to repeal the program, effective September 1, 2019).260 A report by the Legal Aid Justice Center noted that license reinstatement fees in Alabama, Michigan, New Hampshire, Nebraska, Virginia, and the District of Columbia range from $100 to $145, on top of any amount still owed for the original court debt.261 The Chicago Jobs Council’s survey of people who had their license suspended for outstanding court debt found that 49% of respondents reported trying but failing to get their license reinstated, in part because of the down payments required to do so. Some respondents reported having to pay $500 to $1,800 against their outstanding debt in order to have their license reinstated.

Reinstatement fees and mandatory down payments further compound the myriad difficulties that low-income people face as they try to navigate the legal system and put their lives back together after a conviction. Jurisdictions should enact legislative and other policy changes that remove these barriers to license reinstatement and promote policies to help people move on with their lives.
Driver’s license suspension schemes raise serious constitutional questions. In the past several years, federal courts have repeatedly held that suspending driver’s licenses upon nonpayment of court debt violates the Equal Protection Clause and Due Process Clauses of the Fourteenth Amendment. Courts have found that these schemes impermissibly impose harsher consequences on people based on their poverty. Those who have the ability to pay their monetary sanctions may keep their driver’s license but those who cannot will lose their license and suffer the attendant consequences.

Driver’s license suspension and revocation schemes are also disproportionate because they can force people deeper into poverty, threatening their livelihoods and those of their families. As United States District Judge Aleta A. Trauger in Tennessee recently explained, driver’s license suspension schemes “impose a significant material hardship on the driver that is likely to make him less able to develop the resources and, if possible, the economic self-sufficiency necessary to pay the underlying debt. Suspending the driver’s license of a poor person because he has failed to pay his traffic debt is not only wholly ineffective, but powerfully counterproductive.” In California, a 2015 report found that roughly four million people had their licenses suspended for failure to appear or pay court debt, yet the state still had more than $10 billion in uncollected court debt. Another study of license suspensions due to outstanding court debt in New Jersey found that 42% of suspended drivers lost their jobs when their license was suspended, and of those who lost their job, 45% could not find another job while their license was suspended. For those who were able to find another job, 85% reported that their new job provided a lower income. A 2018 survey conducted by the Chicago Jobs Council found that 52% of respondents whose licenses had been suspended for non-traffic-related offenses missed out on an employment opportunity as a result of the suspension. Many reported that they needed a license to apply for jobs, regardless of whether the job required driving. It goes without saying that without a job, a person will not be able to make payments to the court. It is also obvious that creating additional barriers to gainful employment pushes people further into poverty.

Several states have begun to dismantle their license revocation programs as a result of litigation or public pressure. Following a lawsuit challenging the state’s license revocation scheme, the Mississippi Department of Public Safety agreed to stop suspending licenses solely for failure to pay court debt. Maine and California have also gotten rid of their license suspension programs. In May of 2019, the governor of Montana signed into law a bill ending that state’s license suspension scheme. Other states, such as Illinois and New York, are considering similar changes.
EXECUTIVE REFORM: DECLINE TO PROSECUTE PEOPLE FOR DRIVING WITHOUT A VALID LICENSE WHEN THEIR LICENSE IS TEMPORARILY SUSPENDED OR REVOKED DUE ONLY TO NONPAYMENT

License suspension can lead to new criminal charges, such as driving without a license, when people are forced to drive to meet basic necessities, obtain medical care, or care for children. The National Center on State Courts reports that 75% of drivers will continue to drive after their license is suspended because the financial and familial consequences of license suspension are so severe.\textsuperscript{274} But driving with a suspended license can also have devastating results. In all 50 states, driving with a suspended license is a separate offense that carries a high fine or more serious consequences than other traffic violations.\textsuperscript{275} In Washington, D.C., for example, driving with a suspended license can result in up to a year of incarceration or a $5,000 fine.\textsuperscript{276} And these charges are not rare: over a three-year period in Texas, license suspension for failure to pay traffic surcharges resulted in 400,000 new charges of driving with a suspended license.\textsuperscript{277} Such charges bring additional fees. Documents in Michigan showed that in fiscal year 2016 alone, the state assessed $40.4 million in fees for charges of driving with a suspended license.\textsuperscript{278}

Prosecutors should exercise their discretion and decline to prosecute charges related to license suspension for failure to pay court debt. In Illinois, Cook County state’s attorney recently ended the practice of prosecuting misdemeanor cases of driving with a suspended license when the underlying cause of the suspension was the failure to pay tickets, fines, or fees.\textsuperscript{279} Similarly, the district attorney in Shelby County, Tennessee, dismissed more than 3,000 cases for driving with a suspended license when the suspension was due to nonpayment.\textsuperscript{280}

3. Limit the use of civil debt collection enforcement mechanisms

In addition to eliminating or limiting the criminal enforcement mechanisms discussed above, jurisdictions should also limit coercive civil collections practices, using them only as a last resort. Such practices include automatic wage garnishment, mandatory offsets of public benefits and tax refunds, and liens on personal property.\textsuperscript{281} These types of enforcement mechanisms may lead to an abrupt loss of wages or benefits that are already insufficient to meet someone’s daily needs. And courts often do not provide sufficient notice and an opportunity to be heard before
imposition, as required by the Due Process Clause. Although there are some local, state, and federal “debtors’ exemption” laws that protect certain kinds of income from garnishment, it is unclear whether such laws apply to criminal court debt. Many exemption statutes explicitly do not apply to criminal court debt. Many jurisdictions — even those that have implemented reforms — quickly or automatically turn to civil debt collection tools without first trying less invasive and punitive enforcement measures. But civil debt collection is not a significant reform: wage garnishments and liens are still experienced as punishments, and can have significant consequences for people who are trying to make ends meet. At the very least, jurisdictions should first use the other tools described above — including reminders, review, and summonses — and conduct ability-to-pay determinations prior to initiating collection through wage garnishment, offsets, or other civil-collection mechanisms.

Civil debt-enforcement practices threaten the poorest and most vulnerable, further entrenching them in poverty by making them seem undesirable or risky to potential employers and landlords. Liens, garnishments, and tax interception can “dissuade employers from hiring people subjected to such restrictions,” and also compromise credit, which may impede access to housing, automobiles, or other needed loans. In this way, such enforcement mechanisms can be felt as additional punishment. Jurisdictions should therefore eliminate or greatly limit the availability of civil enforcement mechanisms.
IV. CONCLUSION

Moving to a system of proportionate sentencing and enforcement of fines requires holistic, concrete policy reforms. Such reforms include requiring courts to consider ability to pay upfront using clear guidance; setting monthly payment amounts that are reasonable and account for net income, standard cost of living, and other key expenses, as well as unique circumstances that may make repayment difficult; and tailoring the total fine to the nature of the offense. Courts should also consider appropriate alternatives to payment and avoid linking probation success to fine repayment. More proportionate enforcement can be achieved by using non-invasive administrative oversight mechanisms, avoiding the use of warrants, and prohibiting the use of punitive tools like driver’s license suspension and incarceration to respond to nonpayment.

None of these reforms will solve the problem of excessive monetary sanctions, however, if they exist solely on paper. Achieving a truly proportionate system of fines requires a meaningful shift in the culture and attitudes of courts. Judges will have to adopt the foundational viewpoint that imposing and enforcing financial sanctions proportionately is more fair and more just than our current system. And, judges will have to appreciate the importance of using their discretion to consider each person’s circumstances and determine a financial sanction or enforcement strategy that is truly proportionate.

If judges do not accept the central premise of the reforms we recommend in this report, those reforms will fail. If judges are not truly interested in reform, they can work around new polices and guidance documents and use their discretion to maintain the status quo. The work of those committed to reform is therefore to change both current policies and culture by holding judges accountable for implementation.

Finally, this report addresses reforms that judges and courts should make. Moving toward a truly proportionate criminal justice system will require additional legislative reforms, including eliminating fees and decriminalizing certain offenses. Nevertheless, the reforms set forth here are an important step and can be implemented immediately. Doing so would do much to move our civil and criminal legal systems toward more proportionate and humane financial sentences.
To the extent that jurisdictions continue to impose fees, many of the recommendations in this report may require such as money bail and charges to incarcerated people for services (such as for medical care) and to their loved ones (such as for phone calls).

See generally Michael W. Sances and Hye Young You, Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources, 79 THE J. OF POLITICS 1090–94 (2017), https://www.journals.uchicago.edu/doi/pdfplus/10.1086/691354 (finding that “municipal governments with higher black populations rely more heavily on fines and fees for revenue” and interpreting results of their study to show that “cash-strapped cities target poor and minority voters” through policing “simply because they are less likely to comply and not due to any inherent bias,” or, alternatively, because “fines and other law enforcement policies are intended as methods of social control”). For a discussion of how these policies cause particular harm for low-income and minority communities, see CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 1-2 (Sept. 2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf.

See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MIDSEMANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE INEQUAL (First ed. 2018) (arguing that many people are sentenced in misdemeanor courts for behavior that does not appear to be criminal in the traditional sense — such as jaywalking, speeding, or loitering — because of race-driven policing practices, low evidentiary standards, and over-criminalization, in addition to revenue-raising reasons.)

For example, some states require a supermajority vote to impose or increase taxes. See Nat’l Conference of State Legislatures, Supermajority Vote Requirements to Pass the Budget, http://www.ncsl.org/research/fiscal-policy/supremacy-vote-requirements-to-pass-the-budget635542510.aspx (last accessed July 15, 2019).

Although the use of fines as a sentence may also require a fundamental rethinking, given the poverty of people in our system, for the purposes of this paper we assume that fines will continue to exist and provide guidance on how to use them as proportionately as possible.

CJPP has worked in Charlotte–Mecklenburg County, North Carolina; and in Arizona: Arkansas; Massachusetts; Philadelphia, Pennsylvania; and Iowa.

To the extent that jurisdictions continue to impose fees, many of the recommendations in this report may be applied to mitigate the harms of those fees. As noted throughout this report, however, the use of fees is fundamentally unfair. Strategies to collect fines in a more proportionate manner may therefore still be overly harsh when applied to fee collection.

CJPP recognizes that monetary sanctions are just one component of the economic burdens our court system imposes on people. This report does not cover other payments that the legal system


19 Indeed, even before sentencing, when prosecutors and defense attorneys engage in plea discussions, determining a person’s ability to pay is critical to fair outcomes. For the purposes of this report, however, we start at the point when judges accept or reject a plea agreement.

20 See, e.g., John Raine, Eileen Dunstan, and Alan Mackie, Financial Penalties: Who Pays, Who Doesn’t, and Why Not?, 43 How. J. Crim. Just. 518, 522 (Dec. 2004) (explaining that an effective system of “financial penalties really begins at the point of imposition and needs to be thought of in a wider sense, embracing a range of aspects about the organisation and procedures of the courts as much as the interventions that might be made when an account is not settled”). See also ABBY SHAFROTH, NAT’L CONSUMER LAW CTR., CRIMINAL JUSTICE DEBT IN THE SOUTH: A PRIMER FOR THE SOUTHERN PARTNERSHIP TO REDUCE DEBT 8 (Dec. 2018), https://www.nclc.org/images/pdf/criminal-justice/white-paper-criminal-justice-debt-in-the-south-dec2018.pdf (“Fines should be scaled according to income or ability to pay. Doing so not only protects low-income residents’ financial stability and reduces recidivism and unnecessary interactions with the criminal justice system, but also promotes fairness by ensuring that everyone faces a proportionate penalty for violating the law.”).

21 Fla. Stat. § 28.24 (authorizing the clerk’s office to charge $5 per month, or a one-time fee of $25, to set up a payment plan to receive and disburse partial payments other than restitution payments); see also Adm. Order No. 07-99-26-5 (9th Circuit) (authorizing payment plan fee of $5 per month); Idaho Code § 31-3201 (imposing a handling fee of $2 on each monthly installment of criminal or infraction fines, forfeitures, and other costs paid on a monthly basis); Tex. Gov’t Code § 2.103.001 (imposing an administrative fee of $2 per transaction for collection of fines, fees, restitution, and other costs, if court-ordered); Ala. Code § 12-19-26 (imposing an administrative fee of $1 per each periodic payment made to the clerk’s office of the circuit and district courts for receipt and disbursement of alimony, child support, or court-ordered restitution); Clev. Mun. Ct. L. R. Prac. Proc. 17(d) (charging a “Time to Pay Monthly Fee” of $5 for criminal cost payment plans); N.J. Stat. § 2C:46-1 (“The Department of Corrections shall promulgate a transaction fee schedule for use in connection with installment payments made pursuant to this paragraph; provided, however, the transaction fee on an installment payment shall not exceed $1.00.”); S.C. Code Ann. § 14-17-725 (“Where criminal fines, assessments, or restitution payments are paid through installations, a collection cost charge of three percent of the payment also must be collected by the clerk of court, magistrate, or municipal court from the defendant[,]”).

22 ELLA BAKER CTR. FOR HUMAN RIGHTS, FORWARD TOGETHER, AND RESEARCH ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 12-15 (Sept. 2015), http://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf (reporting that because of exorbitant court fines and fees, family members of loved ones sentenced to financial sanctions struggle to cover basic expenses such as food and rent).


25 Vanita Gupta, Principal Deputy Attorney General, U.S. Department of Justice Civil Rights Division, and Lisa Foster, Director, U.S. Department of Justice Office for Access to Justice, Dear Colleague Letter at 3 (Mar. 14, 2016), https://www.courts.wa.gov/subsite/mjc/docs/DOJ-DearColleague.pdf (advocating for conducting an ability-to-pay determination at sentencing rather than waiting until a person fails to pay, so as to minimize the problems associated with being assessed unaffordable financial sanctions).


30 Research from the ACLU of Pennsylvania found that “defendants can and will pay off smaller amounts of money.” In a review of criminal misdemeanor and felony cases from August 17, 2008 through August 16, 2018, the ACLU found that nearly 90% of people paid off $100 or less, and 75% paid off $200 or less. See COLIN SHARPE, JON DILKS, AND ANDREW CHRISTY, ACLU OF PENNSYLVANIA, IMPROSION AND COLLECTION OF COURT COSTS IN PENNSYLVANIA CRIMINAL CASES: PRELIMINARY RESULTS FROM AN ANALYSIS OF 10 YEARS OF COURT DATA 7 (Nov. 13, 2018), https://www.aclupa.org/files/9015/5172/4420/Impoision_and_Assessment_of_Court_Costs_in_Pennsylvania_Criminal_Cases_Final_Revised.pdf.

31 Beth A. Colgan, Graduating Economic Sanctions According to Ability to Pay, 103 Iowa L. Rev. 53, 66 (2017) (citing Albert Bandura, Self-Efficacy: Toward a Unifying Theory of Behavioral Change, 84 Psychol. Rev. 191 (1977)). For more on procedural justice and its impact on compliance with the law, see generally Tom R. Tyler and Justin Sevier, How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth,
Punishing Justly, and/or Acting Through Just Procedures, 77 ALB. L. REV. 1095 (2014).

32 See, e.g., CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, IMPROVING CALIFORNIA'S CRIMINAL FINES AND FEE SYSTEM 8 (Jan. 2016), https://lao.ca.gov/reports/2016/3322/criminal-fines-and-fee-system-010516.pdf (explaining that the total amount of outstanding court debt in California grows each year, and a large portion may not be collectable as the costs to collect would outweigh the amount actually collected); COLIN SHARPE, JON DIKES, AND ANDREW CHRYST, ACLU OF PENNSYLVANIA, IMPOSITION AND COLLECTION OF COURT COSTS IN PENNSYLVANIA CRIMINAL CASES: PRELIMINARY RESULTS FROM AN ANALYSIS OF 10 YEARS OF COURT DATA 7 (Nov. 13, 2018), https://www.aclupa.org/files/9015/5172/4420/Impo
tion_and_Assessment_of_Court_Costs_in_Pennsylvania_Criminal_Cas-es_Final_Revised.pdf (finding fines and costs assessed in the 1970s in more than 1 million cases remained unpaid between 2008-2018, and that 38% of costs assessed in 2008 for misdemeanors and felonies in Pennsylvania remained unpaid a decade later).

33 See Haley Holik and Marc Levin, Texas Pub. Policy Found., Confronting the Burden of Fines and Fees on Fine-Only Offenses in Texas: Recent Reforms and Next Steps 3 (Apr. 2019). Texas also requires providing notice and a hearing before issuing a warrant for failure to pay.

34 E-mail from Erica C. Adams, Operations Administrator, North Carolina Judicial Branch, to Sharon Brett (July 8, 2019).

35 E-mail from Erica C. Adams, Operations Administrator, North Carolina Judicial Branch, to Mitali Nagrecha (Sept. 14, 2017).

36 From September 1, 2018 through February 28, 2019, Texas Justice and municipal courts (which handle low-level offenses) issued 276,510 warrants for failure to pay and 456,220 cases were resolved by “jail credit,” where people spend days in jail to pay off their fines. Tex. Office of Court Admin., Indicators of Impact of Fines, Fees & Court Costs (2018), http://www txcourts .gov/media/ 144 2212/ff -indicators .pdf.

37 Given the cost of living in many jurisdictions and the number of people living below the federal poverty level, even small additional monthly payment amounts may be unaffordable. See generally Bd. of GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS in 2017 at 2 (May 2018), https://www.federalreser
derve.gov/publications/files/2017-report-economic-well-being-us-
households-201805pdf (finding that four in 10 adults, if faced with an unexpected expense of $400, would either not be able to cover it or would cover it by selling something or borrowing money, and that one-fifth of adults are not able to pay all of their current month's bills in full). Matthew Shear, How Cities Make Money by Fining the Poor, N.Y. TIMES (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html?searchResultPosition=5; U.S. Census Bureau, “Poverty Thresholds,” U.S. Dept. of Commerce (last revised Sept. 6, 2018), https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html (finding that in 2017 the federal poverty level for a family of four was $25,094; $12,752 for one person under age 65; $11,756 for one person age 65 or older; $16,493 for two-person households wherein the head of the household is under age 65; $14,828 for two-person households wherein the head of the household is age 65 or older; and $19,515 for three-person households); Economic Policy Inst., “Family Budget Calculator” (Mar. 2018), https://www.epi.org/resources/budget (describing city-level variation in cost of living in the United States, ranging from, e.g., $32,587 per year for a single adult with no children in San Antonio, to $69,072 per year for a comparable single adult in San Francisco).

38 See section II.A.2.


40 Gerhardt Grebing, Probleme der Tagessatz-Geldstrafe, ZSW 88, 1976 (“Determination of the amount of a daily rate in accordance with the economic...circumstances is from the outset so extremely obvious and convincing. Its success depends, crucially, on how the legislator implements this daily rate system and how it is put into practice.”) (translated from German).


42 For example, in Arkansas, state law requires the courts to consider ability to pay only when raised by the person being sentenced. Ark. Code Ann. § 16-13-702(a)(5)(A). This is bad policy because it puts the onus on each individual to raise the issue, even though people may not know how or when to do so.

43 Joseph Shapiro, Supreme Court Ruling Not Enough to Prevent Debtors Prisons, NAT. PUBLIC RADIO, May 21, 2014, https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons (“Judges say it’s difficult to determine who can and cannot afford to pay their fines and fees.”); TEXAS MUNICIPAL COURTS EDUC. CTR., Fines, Fees, Costs, & Indigence, in THE RECORDER: THE J. of TEX. MUNICIPAL COURTS 1, 15 (2016) (stating that “access to financial information by the courts” is a major obstacle to means-tested financial penalties, and asking how judges can know if a person is indigent when courts do not have access to financial information and self-reporting can be unreliable); Audie Cornish, Facing Doubts About Court Fines, Lawmakers Take Questions To Heart, ALL THINGS CONSIDERED ON NPR NEWS, June 4, 2014, https://www.npr.org/templates/ transcript.php?storyId=318888275 (reporting that retired Judge John Homan, now the state court administrator of Michigan, says that judges want guidance on how to tell when someone is truly too poor to pay).

44 Indeed in some states, judges do not consider ability to pay at sentencing, because their criminal code explicitly prohibits the consideration of ability to pay. In Pennsylvania, for example, judges may not consider a person's financial resources when assessing restitution. 18 Pa. Cons. Stat. § 1106 (2018) (mandating that the court shall order full restitution "regardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss").

45 Georgia is one of the few states with a clear statute authorizing the court to “waive, modify, or convert fines, statutory surcharges, probation supervision fees, and any other moneys assessed by the court” upon a determination that the person has significant financial hardship, inability to pay, or other extenuating factors. Ga. Code. Ann.
In Iowa, for example, ability to pay may be considered when imposing indigent defense fees and certain types of other debts, but surcharges, fines, and victim restitution are considered mandatory financial sanctions and are therefore not eligible for reduction or waiver. See Iowa Code § 910.2 (fines, penalties, and some surcharges considered mandatory debts which are not waivable). Under Arizona law, victim restitution is exempt from any payment alternatives imposed for other types of financial obligations but may be included in a payment plan. See, e.g., Ariz. Rev. S. § 13-603(C) and 13-804(C)-E) (in criminal cases, a court must impose “the full amount of the economic loss to the victim as determined by the court and in the manner as determined by the court or the court’s designee”). Many states have a statute for each type of financial penalty, and penalties may be waivable in different situations and according to different standards. In Colorado, for example, there is no umbrella statute allowing for waiver of all assessed financial penalties based on inability to pay. But Colorado courts may waive all or a portion of certain surcharges to the extent that the court finds the person unable to pay. See, e.g. Colo. Rev. Stat. § 18-26-101(3) (regarding the statewide discovery sharing system surcharge); Colo. Rev. Stat. § 18-25-101(4) (regarding the state’s restorative justice surcharge); Colo. Rev. Stat. § 18-21-103(4) (regarding the state’s sex crimes surcharge). Further, Colo. Rev. Stat. § 16-18-101 provides that a person does not have to pay criminal case costs “if the court determines he is unable to pay them.” In California, numerous standard fines and fees are levied on top of a base fine, and only some are waivable. See, e.g., Cal. Pen. Code § 1464(d) (allowing the court to waive the State Penalty Assessment, which adds an additional $10 fee for every $10 of the payer’s base fine if the payer will be in prison until the fine is satisfied and if payment of the fine would “work a hardship” on the payer or their immediate family); Cal. Pen. Code § 273dc(c)(3) (B) (allowing the court to reduce or waive counseling program fees for people on probation if the court finds inability to pay due to changed circumstances). But the statute that imposes the Court Operations Assessment, an assessment of $40 on every criminal conviction, does not provide for waiver. Cal. Pen. Code § 1465.8. North Dakota applies different ability-to-pay standards to waiver of different financial penalties. Courts may waive administration fees or community service supervision fees upon a showing of indigence. N.D. Cent. Code § 29-26-224(4). Indigent defense costs and expenses imposed as a condition of probation may be waived only if the court finds that reimbursement would impose “undue hardship” on the person or their immediate family. N.D. Cent. Code § 12.1-32-08(4)(b).

Compare Cal. Gov. Code § 70372(e) (allowing waiver of court construction penalty if the payment of it “would work a hardship on the person convicted or their immediate family”) with Cal. Pen. Code § 1001.90(c) (allowing waiver of diversion restitution fee if there are “compelling and extraordinary reasons”) and Cal. Pen. Code § 594(d) (if a minor is convicted of vandalism, the parent of the minor is liable for the payment of a fine, but the court may waive payment of the fine “upon finding of good cause”) and Cal. Pen. Code § 1210.15 (allowing for waiver of costs of electronic monitoring “upon a finding of inability to pay”).


Fees are subject to the protections of the Excessive Fines Clause of the Eighth Amendment when they are at least partially punitive. See Austin v. United States, 509 U.S. 602 (1993) (finding that in rem forfeitures, which are not a fine, are subject to protection when they are at least partially punitive); see also Timbs v. Indiana, 139 S. Ct. 682, 689-90 (2019) (declining to revisit the holding in Austin).

This is especially important given the severity of poverty experienced in the United States. The U.S. Census Bureau defines “deep poverty” as a household living below 50% of the poverty level. See U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2017 at 17 (2017), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf; see also Univ. of Cal., Davis, Ctr. For Poverty Research, What Is “Deep Poverty?” https://poverty.ucdavis.edu/faq/what-deep-poverty. In 2017, 18.5 million people nationwide were living in deep poverty — that represents 5.7% of all people living in the United States and 46.7% of everyone in the country who is living in poverty. U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2017 at 17 (2017), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf.

See CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 27 (2016). For example, South Carolina Supreme Court Chief Justice Donald Beatty issued a memorandum to all magistrate and municipal judges in 2017 reminding them that when setting fines and fees, “consideration should be given to a defendant’s ability to pay.” Memorandum from Chief Justice Donald W. Beatty to South Carolina Magistrates and Municipal Judges, Sept. 15, 2017, https://www.sccourts.org/summaryCourtBench-Book/MemosHTML/2017-09.htm. Chief Justice Beatty’s memorandum did not provide any further instruction, casting doubt on whether such a reminder could or would be followed. Similarly, legislative reforms passed in Texas merely require an inquiry into “whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs,” yet provide no details about how to conduct that inquiry. Tex. Code Crim. P. § 42.15(a-1). Other state statutes are overly simplistic, providing little guidance to judges. See Haw. Rev. Stat. § 706-641 (prohibiting imposition of a fine “unless the defendant is or will be able to pay the fine”); Mont. Code Ann. § 46-8-113 (“The court may not sentence a defendant to pay the costs for assigned counsel unless the defendant is or will be able to pay the costs imposed... [and ][i]n determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant, the nature of the burden of the payment of costs will impose.”).

See also, e.g., Tex. Code Crim. Proc. Art. 45.0491 (allowing municipal courts to waive a person’s fines and costs if the court determines that the person is indigent or cannot pay, and that payment would impose an undue hardship on the individual); Mo. S. Ct. R. 037.65(c) (providing that the judge shall waive, lower, or modify “any fine, fee, or cost or the amount previously assessed and due” if the judge “finds the defendant does not have the ability to pay the amount when assessed or due and is unable to acquire the resources to pay”). Washington recently enacted “An Act Relating to Legal Financial Obligations,” which makes most financial penalties discretionary and therefore allows judges to waive them if the person is indigent. Wash. H.B. 1783, Wash. Sess. Laws. Illinois recently enacted the Criminal and Traffic Assessment Act, effective July 2019, that consolidates criminal court fees and allows for full or partial waivers of fees, fines, costs, and assessments based on inability to pay in certain circumstances. Pub. Act 100-0987, 705 ILCS 135.
For examples of judges who have conducted ability-to-pay determinations "based on subjective and arguably inappropriate criteria," see Andrea Marsh and Emily Gerrik, Why Motive Matters: Effective Policy Responses to Modern Debtors’ Prisons, 34 YALE L. & POL’Y REV. 93, 102 (2015) (such as physical appearance, manicured nails, and donations made to churches).

For example, in addition to a bench card, judges in Biloxi, Mississippi, are using a checklist that helps judges identify factors that trigger a presumption of inability to pay. See Exhibit 1, pg. 21, Supplement to the Settlement Agreement, Kennedy v. Biloxi (Sept. 27, 2016), https://www.aclu.org/supplement-kennedy-v-biloxi-settlement-agreement.

As discussed more fully later in this report, calculations regarding income should be based on current income, but judges may need to consider how the full sentence — including any periods of incarceration — may reduce current income to below 200% of the poverty level. The 200% threshold was selected in North Carolina based on the cost of living. Different thresholds will apply in different places.

For example, the bench card developed by the Alabama Access to Justice Commission instructs that “a defendant whose income is at or below 125% of the Federal Poverty Level is presumed to be indigent,” and that “in determining indigence and ability to pay, the court cannot consider the assets of relatives or friends.” Alabama Access to Justice Commission, Bench Card, http://nacmconference.org/wp-content/uploads/2014/01/Bench-Card-11-10-15.pdf. The Ohio Supreme Court’s bench card includes both presumptions and factors to consider (see below for a discussion how factors should be used), but does not differentiate between the two. That bench card states that when assessing ability to pay, courts should consider whether a person’s income is at or below 125% of the Federal Poverty Guidelines, or if the person is on needs-based, means-tested public assistance, such as Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), or Social Security Disability Insurance (SSDI).

The Brennan Center for Justice offers a variation on CJPP’s model for calculating ability to pay. In their model legislation regarding proportional fines and fees, the Center suggests that net income be defined as “self-reported income after taxes, from whatever source derived, whether lawful or unlawful . . . for the one (1) year period immediately preceding the date on which the offense was committed, minus Deductions.” The model legislation then sets out standard deductions, including percentages for self-support, a dependent spouse, non-spouse dependents, other debt payments, and set percentages depending on where the person’s remaining income falls relative to the federal poverty line. PRIYA RAGHAVAN, BRENNAN CTR. FOR JUSTICE, “The Proportional Fines and Fee Elimination Act” in CRIMINAL JUSTICE SOLUTIONS: MODEL STATE LEGISLATION 18 (2018), https://www.brennancenter.org/publication/criminal-justice-solutions-model-state-legislation.

For more discussion of community service in lieu of payment, see section II.B.

For example, in addition to a bench card, judges in Biloxi, Mississippi, use a checklist that helps judges identify factors that trigger a presumption of inability to pay. See Exhibit 1, pg. 21, Supplement to the Settlement Agreement, Kennedy v. Biloxi (Sept. 27, 2016), https://www.aclu.org/supplement-kennedy-v-biloxi-settlement-agreement.
Sanctions that depend on ability to pay 24, (Mar. 2019) (citing Jeffrey C, Moore, Karen Bogen, and Kent H. Marquis, U.S. Census Bureau, A ‘Cognitive’ Interviewing Approach for the Survey of Income and Program Participation: Development of Procedures and Initial Test Results (2010)). It may be more difficult for people to recall information significantly predating the request for information. Id. at 24.


64 See, e.g., Mecklenburg County District Court, Bench Card: Imposition of Fines, Costs, Fees, and Restitution, https://finesanďfeesjustice-center.org/content/uploads/2018/11/Meklenburg-Final-Imposition-Bench-Card-10.16.17.pdf. This is the approach followed for debt collection in certain aspects of the civil legal system as well. For example, in the bankruptcy context, certain assets — such as aggregate interest in real property, aggregate interest up to a certain amount in the value of a motor vehicle, and funds in a tax-exempt retirement account — are considered “exempt” from liquidation to pay off creditors. See 11 U.S.C. § 522. State laws also provide for certain debtor’s exemptions, which protect specific types of assets from being subject to garnishment or liquidation to pay off debts. See, e.g., Wisc. Stat. § 815.18 (listing types of property exempt from attachment and execution, stating that the statute shall be construed “to advance the humane purpose of preserving to debtors and their dependents the means of obtaining a livelihood, the enjoyment of property necessary to sustain life and the opportunity to avoid becoming public charges”); Maine Rev. Stat. § 4422 (listing different types of property exempt from attachment and execution); 735 ILCS § 12-1001 (listing types of personal property exempt from judgment, attachment, and distress for rent), CJP&P does not advocate for one particular approach to handling assets in the calculation of net income, but jurisdictions should decide on a consistent way of handling this issue across cases.

65 See The American Civil Liberties Union, A Pound of Flesh: The Criminalization of Private Debt 13 (2018), https://www.aclu.org/%2Fsites%2F-default%2Ffiles%2Ffield_document%2Fpound_of_flesh_debt-collectionreport.pdf&usg=AOvVaw0JhZDo21vJY-FLgmsHTV (reporting that “[i]n the cases we examined, debtors often failed to appear because… they were unable to pay the judgment and feared that appearing in court or responding to inquiries would result in garnishment of their wages or seizure of their assets, like the car they needed to get to work”); see also id. at 35 (“While laws exempting certain assets from collection differ from state to state, they generally protect Social Security payments, pension income, veterans’ benefits, child support and alimony, unemployment compensation, worker’s compensation, disability benefits, and certain percentages of wages.”); cf. Rebecca Vallas and Joe Valenti, Ctr. for Am. Progress, Asset Limits Are a Barrier to Economic Security and Mobility (Sept. 10, 2014), https://www.americanprogress.org/issues/poverty/reports/2014/09/10/96754/asset-limits-are-a-barrier-to-economic-security-and-mobility (arguing for allowing people to access public benefits even if they have some assets because “[h]aving even a few hundred dollars in savings can make it easier to weather financial setbacks without facing the risk of eviction or having utilities shut off, and assets such as a vehicle can be key to securing and maintaining employment”).


67 Mitali Nagrecha and Mary Fainsod Katzdenstein, with Estelle Davis, Ctr. for Community Alternatives, When All Else Fails, Firing the Family: First Person Accounts of Criminal Justice Debt 23 (2013), http://www.communityalternatives.org/pdf/Criminal-Justice-Debt.pdf. Reliance on family members for financial support can also “create interpersonal tensions that impede successful reentry.” Id. at 24. See also Ella Baker Ctr. for Human Rights, Forward Together, and Research Action Design, Who Pays? The True Cost of Incarceration on Families 13-18 (Sept. 2015), http://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf (describing how, in many instances, family members are primarily responsible for paying financial sanctions for a loved one who cannot afford to pay, and this pushes the family members to take out loans or “fall into financial dire straits as a result,” which impedes successful reentry).

68 Jakub Drápal, Day Fines: A European Comparison and Czech Malpractice, 15 European J. of Cem. 461-80 (July 2018) (listing countries that take into account cost of living, including Finland, Croatia, Denmark, France, Portugal, Serbia, Slovenia, San Marino, Spain, Sweden, Switzerland).

69 See, e.g., Ctr. for Women’s Welfare, Univ. of Washington, Self-Sufficiency Standard, http://www.selfsufficiencystandard.org/ (providing “a budget-based measure of the real cost of living and an alternative to the official poverty measure,” which considers housing (including utilities), child care costs, food, transportation for employment, health care costs based on average statewide premiums, taxes, and more); Supreme Court of Ohio, Collection of Court Costs & Fines in Adult Trial Courts, https://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf; Mecklenburg County Bench Card; Colo. Rev. Stat. § 18-1.3-702(4); Arizona Supreme Court, Bench Card for Ability to Pay at Time of Sentencing in Criminal Cases and Civil Traffic Cases, https://www.azcourts.gov/Portals/22/admorder/Orders17/2017-81%20FINAL.pdf (requiring examination of “basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support”).

70 The Self-Sufficiency Standard includes a catch-all provision for 10% of all other costs to account for difficult to quantify, but practically necessary expenses. Ctr. for Women’s Welfare, Univ. of Washington, Self-Sufficiency Standard, http://www.selfsufficiencystandard.org/.

71 One helpful resource for determining general cost of living based on location is the IRS’s calculator for setting back-tax payment. See Internal Revenue Service, Collection Financial Standards (eff. Mar. 25, 2019), https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards (explaining the use of both national and local standards for common expenses such as food, transportation, and housing/utilities, and how those standards are used to assess what a person can pay toward their delinquent taxes). Notably, cost of living may vary considerably within a state; courts should be mindful that it may make sense to adjust assessment of living expenses if the actual cost of living in that jurisdiction is higher than county or state averages.

73 The bench card developed by the National Task Force on Fines, Fees and Bail Practices, which addresses what courts must consider in determining whether nonpayment was willful, states that in addition to considering basic living expenses, courts should also weigh other expenses such as medical expenses and child support.


75 See Bench Card, Biloxi Municipal Court Procedures for Legal Financial Obligations & Community Service, https://biloxi.ms.us/wp-content/uploads/2016/03/BenchCard.pdf; Bench Card, Mecklenburg County District Court, Bench Card: Imposition of Fines, Costs, Fees, and Restitution, https://www.azcourts.gov/Portals/22/admorder/Orders17/2017-81%20FINAL.pdf; Mo. Sup. Ct. R. 37.04 App. D (requiring courts to consider limitations due to disability or residence in a mental health facility when determining ability to pay at sentencing); Supreme Court of Ohio, Office of Judicial Services, Collection of Court Costs & Fines in Adult Trial Courts (updated Jan. 2019), https://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf (listing “limitations to secure paid work due to disability, homelessness, institutionalization, lack of transportation, or driving privileges” among the factors that courts may consider when assessing ability to pay); Arizona Supreme Court, Bench Card for Ability to Pay at Time of Sentencing in Criminal Cases and Civil Traffic Cases, https://www.azcourts.gov/Portals/22/admorder/Orders17/2017-81%20FINAL.pdf; see also Mo. Sup. Ct. R. 37.04 App. D, Lawful Enforcement of Legal Financial Obligations: a Bench Card for Judges ( instructing Missouri judges to consider “whether the defendant is homeless, incarcerated, or resides in a mental health facility” and “any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges”); see also Mo. Sup. Ct. R. 37.04 App. D, Lawful Enforcement of Legal Financial Obligations: a Bench Card for Judges ( instructing Missouri judges to consider “whether the person is homeless, incarcerated, or resides in a mental health facility” and “any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges” and “other LFOs owed to the court or other courts”).

76 The Brennan Center for Justice’s model legislation also provides that courts should retain the discretion to adjust a person’s net income downward due to special circumstances, such as “the loss of a job, a temporary disability or medical event that limits one’s ability to work, or other similar events.” See Priya Ragahvan, Brennan Ctr. for Justice, “The Proportional Fines and Fee Elimination Act” in Criminal Justice Solutions: Model State Legislation 23 (2018), https://www.brennancenter.org/publication/criminal-justice-solutions-model-state-legislation.


79 E-mail from Terry Schuster, Associate Manager, Public Safety Performance Project at Pew Charitable Trusts, to Ranit Patel, Legal Fellow, Criminal Justice Policy Program (Mar. 6, 2018); see also PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: POLICY SOLUTIONS 29 (2003), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/pwpaydaypolicysolutionsoct2013.pdf.

80 E-mail from Terry Schuster, Associate Manager, Public Safety Performance Project, The Pew Charitable Trusts to Ranit Patel, Legal Fellow, Criminal Justice Policy Program (Mar. 6, 2018).


82 See Mecklenburg County District Court, Bench Card: Imposition of Fines, Costs, Fees, and Restitution, https://finesandfeesjusticecenter.org/content/uploads/2018/11/Mecklenburg-Final-Imposition-Bench-Card-10.16.17.pdf. In this bench card, payment plan length guidelines were another important mechanism to keep fines reasonable, and these two policies should be read together.

83 In this report, the number of months plays a similar role to units in the day fines system described in section II.A.1 above.


87 Important convictions alone carry significant collateral consequences. See Amer. Bar Assoc., Collateral Consequences of Conviction Database, https://www.americanbar.org/groups/criminal_justice/niccc/ (online catalog of over 45,000 federal and state statutes and regulations that impose collateral consequences on people convicted of crimes); Gabriel J. Chin, Collateral Consequences, in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/Criminal_Justice_Reform_Vol_4_Collateral-Consequences.pdf. Courts should account for this and ensure that the total sentence is proportionate.

88 See, e.g., N.H. R. Crim. Pro. 29(e)(1) (“Where a defendant indicates an inability to pay [fines, fees, or restitution] forthwith, the defendant shall complete an affidavit of resources, under oath, prior to leaving the courthouse. The court will then determine whether the defendant has the financial ability to pay the assessment.”); Tex. Crim. Proc. Code Ann. § 26.04 (allowing for sworn statements of financial resources for purposes of determining eligibility and eligibility for court-appointed counsel); Instructions for Users of Affidavit of Indigency and its Supplement, Massachusetts State Courts, https://www.mass.gov/files/documents/2016/08/on/instructionsforaffidavit.pdf (last accessed July 8, 2019).


90 See Beth A. Colgan, Graduating Economic Sanctions According to Ability to Pay, 103 IOWA L. REV. 53, 63-64 (2017) (describing study showing that people provide consistent, but not perfect, estimates of their legal income); Beth A. Colgan, BROOKINGS INST., THE HAMILTON PROJECT, ADDRESSING MODERN DEBTORS’ PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY 23 (Mar. 2019).


92 Beth A. Colgan, BROOKINGS INST., THE HAMILTON PROJECT, ADDRESSING MODERN DEBTORS’ PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY 24 (Mar. 2019). Drawing on research conducted in the context of applications for public benefits, Professor Colgan explains that memory errors are more likely “where the mechanism [to glean information] relies on immediate recall of information to complex questions regarding income sources, especially where those sources are irregular or vary over time, where people have difficulties in translating known information into the data requested, and where people are asked to recall information about benefits receipt significantly predating the request for information.” Id.

93 For example, Alabama’s bench card regarding ability-to-pay determinations provides that the court may “develop a form to uniformly collect earning and asset information . . . which may be required to be completed under oath.” Alabama Access to Justice Commission, Bench Card (Nov. 2015), http://nacmconference.org/wp-content/uploads/2014/01/Bench-Card-11-10-15.pdf.


95 See, e.g., Nev. Rev. Stat. Ann. § 176.087 (“Except where the imposition of a specific criminal penalty is mandatory, a court may order a convicted person to perform supervised community service [. . . in lieu of all or part of any fine or imprisonment that may be imposed for the commission of a misdemeanor.”).

96 See, e.g., Del. Code Ann. tit. 11, § 4105 (“Where a person sentenced to pay a fine, costs, restitution or all 3, on conviction of a crime is unable or fails to pay such fine, costs, restitution or all 3, . . . the court may order the person to . . . work for a number and schedule of hours necessary to discharge the fine, costs or restitution imposed.”).


98 E.g., Fla. Stat. Ann. § 318.18 (defining community service as “uncompensated labor for a community service agency,” which is “a not-for-profit corporation, community organization, charitable organization, public officer, the state or any political subdivision of the state, or any other body the purpose of which is to improve the quality of life or social welfare of the community”); Or. Rev. Stat. Ann. § 137.126 (community service constitutes “uncompensated labor for an agency,” which is “a nonprofit organization or public body” “whose purpose is to enhance physical or mental stability, environmental quality or the social welfare”); N.M. Stat. Ann. § 31-12-3 (community service is a type of labor “that benefits the public at large or any public, charitable or educational entity or institution”); W. Va. Code Ann. § 62-4-16 (community service “shall be performed for government entities or charitable or nonprofit entities”); Wis. Stat. Ann. § 800.09 (community service may be performed “for a public agency or a nonprofit charitable organization”); Alaska Stat. Ann. § 12.55.055 (“Community work
includes work on projects designed to reduce or eliminate environmental damage, protect the public health, or improve public lands, forests, parks, roads, highways, facilities, or education. Community work may not confer a private benefit on a person except as may be incidental to the public benefit;”); Tex. Crim. Proc. Code Ann. § 45.0492 (noting that, in the context of juvenile offenders, community service can be done for either “a governmental entity” or “a nonprofit organization or another organization that provides services to the general public that enhance social welfare and the general well-being of the community”).


See NOAH ZATZ ET AL., UCLA INST. FOR RESEARCH ON LABOR AND EMPLOYMENT, UCLA LABOR CTR., A NEW WAY OF LIFE REENTRY PROJECT, GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT (Mar. 2016), https://www.labor.ucla.edu/wp-content/uploads/2018/06/Get-to-Work324.pdf (describing how community service programs for repayment of court debt force people “to choose between work or jail” and that such programs depress labor standards, suppress workers’ voices, and allow programs to threaten people with incarceration for nonparticipation).

Forcing low-income people to do menial or demeaning labor — reimbursed at low rates — in order to avoid incarceration or payment of high fines and fees, makes such sentences much closer to forced prison labor, indentured servitude, or slavery than a reasonable, proportionate alternative. See Noah Zatz, What’s wrong with ‘work or jail’, L.A. Times (Apr. 8, 2016), https://www.latimes.com/opinion/op-ed/la-oe-0408-zatz-debt-peonage-20160408-story.html (describing the tremendous pressure on workers who face imprisonment if their work is unsatisfactory, and how the choice between “work or jail” arguably violates the 13th Amendment); see also Norval Morris and Michael Tonry, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 151 (Oxford Univ. Press 1990) (describing how the “modern resurgence of community service as a punishment has, of course, several punitive antecedents” and that “the community service order is involuntary servitude”). For an explanation of the history of prison labor and the historical relationship between such forced labor and slavery, see Tessa M. Gorman, Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs, 85 CALIF. L. REV. 441 (1997).


See ROOPAL PATEL AND MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 23-25 (2012), https://www.bren-
110 Time poverty — a term frequently used to describe how people lack discretionary time given their myriad responsibilities — may be more acute for those living in actual poverty. For example, people who do not own a car and have to rely on public transportation lose precious hours each day traveling to work and school or even running simple errands, such as grocery shopping. See Andrew S. Harvey and Arun K. Mukhopadhyay, When Twenty-Four Hours is not Enough: Time Poverty of Working Parents. 82 Soc. Indicators Res. 57 (2007), https://link.springer.com/content/pdf/10.1007%2Fs11120-006-9002-5.pdf; Gabrielle Emanuel, Time Poverty, Mich. Radio (Sept. 3, 2013), https://stateofopportunity.michiganradio.org/post/time-poverty (explaining that “time poverty is especially hard if you also struggle with material poverty”).

111 Research by the Hamilton Project of the Brookings Institute found that there are a variety of reasons why people who are living in poverty do not have full time employment. One third are involuntarily employed part time, meaning they would work more if such work were available; but 23% work part time because they have caregiving responsibilities, 21% because they are students, 5% because they are living with disabilities, and 17% for other reasons. See JAY SHAMBAUGH, LAUREN BAUER, AND AUDREY BREITWIESER, THE HAMILTON PROJECT, WHO IS POOR IN THE UNITED STATES? A HAMILTON PROJECT ANNUAL REPORT 6 (Oct. 2017), https://www.brookings.edu/wp-content/uploads/2017/10/es_10112017_who_poor_2017_annual_report_hamilton_project.pdf. For many of those people, completing large amounts of community service hours would not be feasible due to their other obligations or their disability.

112 One piece of scholarship that discusses the use of community service as an alternative sentence generally (as opposed to just for repayment of monetary sanctions) suggests taking an approach similar to day fines in setting an appropriate number of service hours based on the number of “units” that correspond to the severity of the crime. See NORMAN MORRIS AND MICHAEL TONY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 173-74 (Oxford Univ. Press 1990).

113 The Brennan Center recommends that community service should be calculated by dividing half of the fine amount (which, according to other aspects of the Center’s platform, would be proportionate and account for ability to pay) by $20/hour reimbursement rate. PRIYA RAGHAVAN, BRENNAN CTR. FOR JUSTICE, “The Proportional Fines and Fee Elimination Act” in CRIMINAL JUSTICE SOLUTIONS: MODEL STATE LEGISLATION 22 (2018), https://www.brennancenter.org/publication/criminal-justice-solutions-model-state-legislation.


115 Jurisdictions have successfully implemented rates that are higher than the minimum wage. See, e.g., Cal. Pen. Code § 1209.5(c)(1) (allowing for reimbursement at twice the minimum wage); Wash. Lakewood Mun. Ct. L.R. 7.2(c) (allowing for reimbursement at $15/hour in Lakewood Municipal Court in Washington).


119 See, e.g., Co. St. § 18-1-302(2)(a) (stating that people who are convicted of a crime of violence, certain felony offenses against children, or a sex offense are not eligible for a community service sentence).

120 Iowa Court Rule 26.4.

121 See generally ROOPAL PATEL AND MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 23 (2012) (explaining that the conversion of mandatory criminal debt into community service sometimes applies only for certain types of legal financial obligations, “leav[ing] poor people saddled with significant amounts of debt in other categories”). For specific state examples, see, e.g., Or. Rev. Stat. Ann. § 144.089 (allowing community service to be used to pay conviction costs, attorney fees, costs incurred during incarceration, and other monetary obligations, but not restitution or compensatory fines, misdemeanor fines, traffic fines, or felony fines); Vt. Stat. Ann. tit. 13, § 7180 (“A conversion of a fine to community service … shall not apply to surcharges, court costs, or other assessments.”); Wis. Rock Cty. Ct. R. 317 (allowing people to use community service to pay down some types of criminal justice debt, but not court costs, victim and witness fees, or mandatory surcharges and fees); Id. (prohibiting the application of community service to repayments of “court costs, victim/witness fees, and other mandatory surcharges and fees”); Wis. Stat. Ann. § 800.09 (excluding restitution unless “the person to whom restitution is owed” agrees to community service as an alternative); Va. R. Chesapeake Cir. Ct. Rule 11 (allowing people to “discharge[e] all or part of the fines and/or costs (not restitution) by performing community service”); Ga. Code Ann., § 17-10-1(d) (ostensibly authorizing the court “to allow the defendant to satisfy [their] fine or any fee imposed in connection with probation supervision through community service”), But see ALICIA BANNON, MITALI NAGRECHA, AND REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY, n. 68 (2010) (noting that, despite Georgia’s on-the-books policy: “[i]nterviewees in Georgia indicated that community service did not apply to all financial obligations in their jurisdictions”).

122 The Texas Office of Court Administration’s new fines and costs bench card states that community service options have been expanded, and judges may, in their discretion, allow a person to complete service hours by “attending a work and job skills training program, a preparatory class for the GED, an alcohol or drug abuse program, a rehabilitation program, a counseling program, a mentoring program, or any similar activity.” Texas Office of Court Administration, Bench Card for Judicial Processes Relating to the Collection of Fines and Costs, http://www.txcourts.gov/media/1440393/sb-1913-justice-municipal.pdf. Georgia courts may likewise order people to attend educational programs, instead of traditional community service work. See Ga. Code Ann. § 17-10-1.


People with disabilities may have a difficult time completing certain tasks. Therefore, people with physical disabilities may be unable to complete service hours if the only placements available require tasks beyond their physical capabilities. The Americans with Disabilities Act (ADA) prohibits discrimination against people on the basis of their disability in employment and in other aspects of community life. See 42 U.S.C. § 12101 et seq. However, “a striking employment gap persists between Americans with and without disabilities,” with statistics showing that only 20% of people with disabilities participate in the workforce, as compared to 69.1% of people without disabilities. See Jamie Rall, James B. Reed, and Amanda Essex, Nat’l Conf. of State Legislatures, Employing People with Disabilities (Dec. 15, 2016), https://www.ncsl.org/research/labor-and-employment/employing-people-with-disabilities.aspx; see also Boston Univ. Ctr. for Psychiatric Rehabilitation, How does mental illness interfere with work performance?; https://cpr.bu.edu/resources/reasonable-accommodations/how-does-mental-illness-interfere-with-work-performance/ (last accessed June 17, 2019) (discussing the ways in which psychiatric disabilities may impact work functioning). The same barriers that prevent people with disabilities from finding suitable gainful employment may also prevent them from finding appropriate community service placements to repay their court debt.

More research is necessary to determine which effective, options best accommodate the needs of low-income people with mental illness or disabilities. However, anecdotal evidence indicates that it can be difficult to find appropriate community service placements, even without these additional barriers. See, e.g., Betty Adams, Finding community service opportunities can prove hard for defendants, KENNEBECK J. (Mar. 17, 2018), https://www.centralmaine.com/2018/03/17/finding-community-service-opportunities-can-prove-hard-for-defendants/ (describing the difficulty multiple people had with securing community service placements necessary to complete the terms of their deferred judgements).

See, e.g., Abby Shaffer et al., NAT’L CONSUMER LAW CTR., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR LITIGATION 46 (2016); see also Roopali Patel and Meghna Philip, Brennan Ctr. For Justice, Criminal Justice Debt: A Toolkit for Action 23 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf (“Compulsory community service can interfere with employment or job training, but time-limited voluntary community service that is directly tied to job training and placement is a useful model for addressing criminal justice debt.”).

Nev. Rev. Stat. Ann. § 176.087(3). This provision applies to both liability insurance for personal injury and damage to property, and industrial insurance. If the supervising authority provides industrial insurance, that insurance requirement is waived. Id. In Idaho, people completing community service requirements must remit sixty cents for every hour worked, which is deposited into a state insurance fund for the purposes of providing workers compensation insurance. If the county is self-insured and provides insurance for community service participants, or if the person is determined to be indigent, the court may waive the fee. Idaho Code Ann. § 31-3201C.

See, e.g., N.M. Stat. Ann. § 31-12-3 (providing that people “performing community service pursuant to court order shall be immune from civil liability arising out of the community service other than for gross negligence”).

Notably, little research has been done to study the true effects and consequences of making payment of financial sanctions a condition of probation, or the use of probation specifically to monitor payment. More is needed to fully understand the depth and breadth of this problem.

See, e.g., Cecilia Klingele, Rethinking the Use of Community Supervision, 103 J. CRIM. L. AND CRIMINOLOGY 1015, 1055 (2013) (explaining that when probation is imposed but is not an appropriate sanction, such as when it is “imposed merely to oversee the payment of restitution,” it is either destined to fail, does not advance public safety, or performs a function that could be easily accomplished outside the criminal justice system”).


See Ebony RuhlAnd, ROBINA INST. OF CRIMINAL LAW AND CRIMINAL JUSTICE, THE IMPACT OF FEES AND FINES FOR INDIVIDUALS ON PROBATION AND PAROLE, https://robinainstitute.umn.edu/news-views/impact-fees-and-fines-individuals-probation-and-parole (discussing how Bearden v. Georgia technically prohibits incarceration for non-willful failure to pay, but that this limitation “do[es] not protect individuals under supervision from other forms of punishment, such as extension of the supervision term or imposition of stricter conditions”).

For example, under Washington law, the court can order, as a condition of probation, that a person participate in “crime-related treatment or counseling services” or “participate in rehabilitative programs.” Wash. Rev. Code § 9.44A.703(3). If the individual was convicted of an alcohol or drug-related traffic offense, the court may order the person to complete a substance use disorder treatment program or complete a course in “an alcohol and drug information school licensed or certified by the department of health,” with the individual paying for all costs associated with evaluation, education, and treatment ordered by the court, unless the person is eligible for an existing free program offered by the department of social and health services. Id. See also Boone County, Indiana, Adult Probation, Drug Testing Policy, https://boonecounty.in.gov/Offices/Adult-Probation/Drug-Testing-Policy (last accessed June 21, 2019) (stating that “probationers are responsible for the cost of all drug screens . . . in addition to any fees already assessed by the Court”).

See, e.g., Ala. Code § 15-22-53 (describing duties of probation officers under the Board of Pardons and Parole); Cal. Penal Code § 1202.8 (providing that “persons placed on probation by a court shall be under the supervision of the county probation officer who shall determine both the level and type of supervision consistent with the court-ordered conditions of probation”); Ohio Rev. Code § 2929.25(c) (providing that if a court sentences a person to misdemeanor probation, the court shall “place the offender under the general control and supervision of the court or of a department of probation in the jurisdiction that services the court”).

Fiona Doherty, Obey All Laws and Be Good: Probation and the Meaning of Recidivism, 104 GEO. L. J. 291, 295 (2016). Failure to make a payment can result in administrative sanctions, such as written reprimands and increased reporting requirements.


See ROBIN A INSTITUTE, CRIMINAL LAW AND CRIMINAL JUSTICE, PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES 6 (2014); see also ALEXIS LEE WATTS, ROBIN A INSTITUTE, CRIMINAL LAW AND CRIMINAL JUSTICE, PROBATION IN-DEPTH: THE LENGTH OF PROBATION SENTENCES (2014) (explaining that, in many states, “the extension of probation can occur upon failure to complete specific conditions, often related to financial obligations”). Some states allow probation terms to last decades, and others have no limit on term length at all. See, e.g., Colo. Rev. Stat. Ann. § 18-1-3-202(1) (for felony offenses, there is no statutory limit on the maximum term of probation, and instead it is left to the discretion of the court); Kan. Stat. Ann. § 21-6608(c)(7) (permitting court to extend probation period for “as long as the amount of restitution ordered has not been paid” when person has been ordered to pay restitution). Other jurisdictions have shorter caps on initial probation sentences but allow probation to be extended beyond those caps if conditions are not fulfilled. See, e.g., Del. Code Ann. Tit. 11 § 4333(d)(3) (allowing court to extend probation period beyond statutory maximum if it determines that a longer probation sentence will reduce the likelihood that the person will commit a sex offense or other violent offense in the future, enhance the public safety, or ensure the collection of restitution); Ariz. Rev. St. Ann. § 13-902(c) (certain misdemeanors carry a maximum probation term of one year but can be extended up to two years if restitution has not been paid); Iowa Code Ann. § 907.71(1) (allowing the court to extend the probation period by up to one year beyond the maximum two-year term for a misdemeanor and five-year term for a felony).

See, e.g., 42 Pa. C. S. § 7771(b) (“The court may revoke an order of probation upon proof of the violation of specified conditions of the probation. Upon revocation the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing, due consideration being given to the time spent serving the order of probation.”); N.Y. Crim. Pro. § 410.70 (providing that the court may revoke a sentence of probation if the person is found to have violated a condition of the sentence and had an opportunity to be heard).

Cecilia Klingele, Rethinking the Use of Community Supervision, 103 J. CRIM. L. AND CRIMINOLOGY 1015, 1047 (2013). See also ROBINA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE, PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES 6 (2014) (“[T]he great majority of state’s laws [studied] provide that any violation of probation conditions is ground for revocation, without qualification as to the seriousness of the violation[,]”); PEW CHARITABLE TRUSTS, PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 11 (Sept. 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities (“[R]esearch suggests that many [probation revocations] may be the result of supervision practices that focus on catching mistakes through surveillance and monitoring, rather than on promoting success via rehabilitation and support.”).

Recently, some states have limited revocation to non-technical violations, such as absconding or committing new offenses. See 2011 North Carolina Justice Reinvestment Act; Equal Justice Initiative, Alabama Reforms Probation Law to Promote Safety and Reduce Prison Crowding (May 2010); Ala. Code § 15-22-54. For discussion of additional states that have enacted such restrictions, see Cecilia Klingele, Rethinking the Use of Community Supervision, 103 J. CRIM. L. AND CRIMINOLOGY 1015, 1047-49 (2013). In general, limiting revocation to violations that are more serious is an important reform to prevent probation systems from contributing to back-door incarceration. This is especially true when nonpayment is due to inability to pay. Under Bearden, courts are prohibited from incarcerating such people. Bearden v. Georgia, 461 U.S. 660 (1983).

See Michelle S. Phelps, Mass Probation and Inequality: Race, Class, and Gender Disparities in Supervision and Revocation, in HANDBOOK ON PUNISHMENT DECISIONS: LOCATIONS OF DISPARITY 149 (Jeffery T. Ulner and Mindy S. Bradley eds., 2017).


Probation officers may circumvent traditional constitutional protections while exercising oversight over probationers. “[U]nlike in Fourth Amendment law, there is no requirement that the officer be investigating a crime” to conduct warrantless searches and seizures, so probation officers can use the authority granted to them by basic supervision conditions to circumvent typical Fourth Amendment pro-
151 Some jurisdictions have even more encompassing restrictions: in Marion County, Indiana, probationers are required to comply with the condition that they “not be charged with any new criminal offense based on probable cause.” See Fiona Doherty, Obey All Laws and Be Good: Probation and the Meaning of Recidivism, 104 Geo. L. J. 291, 301 (2016) (citing Superior Ct. Marion Cnty., Ind., Order of Probation). Doherty also points out that in many jurisdictions, there is a standard probation condition to “obey all laws” with no distinction between civil and criminal, and that in some jurisdictions, probationers can be revoked for violating municipal ordinances, such as traffic regulations. Id. at 302. Also, because of the lower standard of proof, if a person is arrested on suspected criminal conduct, revocations are generally easier to pursue than are new criminal charges. Id. at 301.

152 Interviews between CJPP and Public Defenders in Maryland, Indiana, and Texas (Fall 2018); see also Alícia Bannon, Mitali Nagrecha, and Rebekah Diller, Brennan Ctr. for Justice The Hidden Costs of Criminal Justice Debt 22 (2010) (explaining that in some jurisdictions, “missed payments are also regularly listed in supervision reports as one of many reasons for revocation, placing the defendant in a negative light even if the court formally revokes supervision on another ground”) (citing telephone interviews with public defenders).


154 See, e.g., Ind. Stat. 35-38-2-2.3(a)(10) (providing that, as a condition of probation, the court may require a person to report to a probation officer at reasonable times as directed by the court or the probation officer); 28 Vt. Stat. Ann. Tit. 28 § 252(b)(9) (same); Tex. Crim. Pro. Art. 42A.301(a)(4) (providing that the court may require the individual to report to their supervision officer as directed by the judge or supervision officer).

155 See, e.g., 42 Pa. C. S. § 9754(c)(2) (providing that, as a condition of its probation order, the court may require the person to “devote himself to a specific occupation or employment”); Ariz. Rev. Stat. Ann. § 13-918(B) (“The person’s wages shall be monitored by the person’s probation officer to ensure the collection of restitution, probation fees, fines and other payments.”); Vt. Stat. Ann. tit. 28, § 252(b)(1) (providing that the court may require the individual to “[w]ork faithfully at a suitable employment”); Ind. Stat. 35-38-2-2.3(a)(1) (providing that, as condition of probation, the court may require people to “work faithfully at suitable employment or faithfully pursue a course of study or career and technical education”).

156 See, e.g., Fl. Stat. Ann. § 948.03(1)(k) (listing as a potential condition of probation that the person may “not associate with persons engaged in criminal activities”).


160 See Fiona Doherty, Obey All Laws and Be Good: Probation and the Meaning of Recidivism, 104 Geo. L. J. 291, 303 (2016). Additionally, nearly all states include a requirement to refrain from criminal conduct. See, e.g., Ark. Code Ann. § 5-4-303(b) (requiring the express condition of probation that the person not commit an offense punishable by imprisonment during the probation period); La. Code Crim. Proc. Ann. art. 895(A) (requiring, as a condition of probation, that the person refrain from criminal conduct); Mich. Comp. Laws Ann. § 771.3(1) (requiring, as a condition of probation, that the person not violate any municipal, state, or federal criminal law).

161 See, e.g., N.C. Gen. Stat. Ann. § 15A-1343(b) (requiring people on probation to remain within the jurisdiction of the court unless granted written permission by the court or probation officer); Ariz. Rev. Stat. Ann. § 13-914(e) (requiring people in “intensive probation” to remain in their place of residence at all times except to go to work, attend school, perform community restitution, or perform other activities specifically allowed by probation officer).

162 See American Law Inst., Model Penal Code § 6.04D (recommending elimination of probation supervision fees and noting that “persons convicted of crimes should not be regarded as a special class of taxpayers called upon to make up for inadequate legislative appropriations for criminal-justice agencies and programming”).

163 See Mitali Nagrecha and Mary Farnood Katzenstein, with Estelle Davis, First Person Accounts of Criminal Justice Debt: When All Else Fails, Finding the Family 17 (2013), http://www.communityalternatives.org/pdf/Criminal-Justice-Debt.pdf (discussing a person named Af and how her $30 parole supervision fee would, at times, be impossible to pay while also feeding herself, and added up to a significant sum over the course of her parole).


165 Like other fines and fees imposed by courts, many jurisdictions charge these fees to make up for budget deficits. This gives probation officers a significant incentive to strictly enforce orders to pay supervision fees and ensure high collection rates. See Columbia Univ. Justice Lab, Too Big to Succeed: The Impact of the Growth of Community Corrections and What Should Be Done about It 4 (Jan. 29, 2018) (explaining that decreased spending on community corrections has “led policy makers from coast to coast to rely on fees paid by people on probation and parole to bail out shrinking community corrections budgets”); see also Robina Inst. Of Criminal Law and Criminal Justice, Exploring Supervision Fees in Four Probation Jurisdictions in Texas 3-4 (2017) (discussing how probation departments in Texas “depend on supervision fees for a large share of their operating budgets” and how “line probation officers [in Texas] felt pressure from their managers . . . [because] obtaining fees was vital to the agency’s survival”).

166 See Cecilia Klingele, Rethinking the Use of Community Supervision, 103 J. CRIM. L. AND CRIMINOLOGY 1015, 1035 (2013) (discussing the costs of such programs and how they are passed on to the probationer).
See, e.g., Ohio Rev. Code Ann. § 2951.021(A) (permitting the court to impose a supervision penalty of up to $50 per month); S.C. Code Ann. § 24-21-80 (requiring adults placed on probation or community supervision to pay a regulation supervision fee not less than $20 and no more than $100 per month); Tex. Crim. Proc. Code Ann. § 42A.652(a) (requiring judges to impose a fee no less than $25 and no more than $60 per month for each month of community supervision). See generally Jarred Williams, Vincent Schraldi, and Kendra Bradner, COLUMBIA UNIV. JUSTICE LAB, THE WISCONSIN COMMUNITY CORRECTIONS STORY 9 (Jan. 2019), https://justicelab.columbia.edu/sites/default/files/content/Wisconsin%20Community%20Corrections%20Story%20final%20online%20copy.pdf (discussing how supervision fees in Wisconsin can range from $240-$720 per year based on income and may also carry additional fees, for example, for payment of electronic monitoring costs each month); HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY 24 (Feb. 5, 2014), https://www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry#d781ca (discussing how, at one point, supervision fees in Montana reached as high as $100 a month).


7 U.S.C. § 2020(e)(8)(E) (barring people from receiving SNAP benefits if they violate a condition of probation or parole under federal or state law); 42 U.S.C. § 1382(e)(4)(A)(iii) (same for SSI disability); 42 U.S.C. § 1437d(1)(9) (same for public housing).

For more explanation of how courts can and should use less intrusive measures to monitor repayment of financial sanctions, see section III.A.


174 For more explanation of how courts can and should use less intrusive measures to monitor repayment of financial sanctions, see section III.A.

175 Terminology varies from jurisdiction to jurisdiction, but by “warrant,” CJPP means arrest warrants, bench warrants, and other court orders that permit arrest.

176 See Ariz. Rev. Stat. § 13-810 ("If a defendant who is sentenced to pay a fine, a surcharge, a fee, an assessment or incarceration costs defaults in the payment of the fine, surcharge, fee, assessment or incarceration costs or of any installment as ordered, the court, on motion of the prosecuting attorney or on its own motion, shall require the defendant to show cause why the defendant’s default should not be treated as contempt and may issue a summons or a warrant of arrest for the defendant’s appearance."); N.M. Stat. Ann. § 31-12-3 ("When a defendant sentenced to pay a fine in installments or ordered to pay fees or costs defaults in payment, the court, upon motion of the prosecutor or upon its own motion, may require the defendant to show cause why his default should not be treated as contemptuous and may issue a summons or a warrant of arrest for his appearance."); Utah Code Ann. § 78B-6-317 (allowing the court to issue an arrest warrant to compel the person to appear at the show cause hearing if it appears to the court that the individual is not likely to appear); Ohio Rev. Code 2947.14 ("If the court or magistrate has found the offender able to pay a fine at a hearing conducted in compliance with divisions (A) and (B) of this section, and the offender fails to pay the fine, a warrant may be issued for the arrest of the offender."); Miss. Code. Ann. § 99-37-7 ("Subject to the provisions of section 99-19-20.1, when a defendant sentenced to pay a fine or to make restitution defaults in the payment thereof or of any installment, the court, on motion of the district attorney, or upon its own motion, may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance."). For more discussion of the problems associated with the use of arrest warrants, see section III.A.2.a.

In Iowa, for example, outstanding court debt has grown 410.4% since fiscal year 1998, and at the end of fiscal year 2017, the total outstanding court debt was $731.9 million. See IOWA LEGISLATIVE SERV. AGENCY, ISSUE REVIEW – FISCAL SERVICES DIVISION 3 (Jan. 3, 2018), https://www.legis.iowa.gov/docs/publications/IR/916685.pdf.

CJPP has observed this practice in various jurisdictions (notes on file with authors).

See, e.g., Paul Gottlieb, Judge halts pay or appear: New state law to impact finances in Clallam, Jefferson counties, PENINSULA DAILY NEWS (Apr. 23, 2018), http://www.peninsuladailynews.com/news/judge-halts-pay-or-appear-new-state-law-to-impact-finances-in-clallam-jefferson-counties/ (reporting that recent changes to state law in Washington State prompted a state court judge to eliminate his “pay or appear” program, which required that people either pay their fines, do community service, or appear in court to explain why they were delinquent); see also Jefferson County Pay or Appear Program, https://www.jeffersoncountypublichealth.org/DocumentCenter/View/72/Pay-or-Appear-Program-PDF?bid=1 (explaining the Pay or Appear program in Jefferson County, Washington).

For more discussion on the use of reminders and notices, see section III.A.2.b. In the medical context, research has shown that people will forget 40-80% of information given to them by doctors at medical appointments, and the greater amount of information presented, the less information will be recalled. Further, people frequently recall information incorrectly, and factors such as low education levels can further impede retention of important treatment-related information.

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See Roy P.C. Kessels, Patients' memory for medical information, 96-5 J. ROYAL SOC. MED. 219-22 (2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC539473/. There is reason to believe that people may experience similar difficulties retaining information about future court dates or payment deadlines given to them during prior court proceedings.

181 See J.J. Prescott, Symposium: Improving Access to Justice in State Courts with Platform Technology, 70 VAND. L. REV. 1993, 2004 (2017) ("Related to economic costs, many physical obstacles — sometimes referred to as costs of the 'built environment' — systematically limit courthouse access. For example, an individual's lack of proximity to a courthouse, combined with little or no access to dependable public or private transportation, amounts to a major impediment to attending a court proceeding or successfully meeting with a decisionmaker. In a study of legal services in Minnesota, 95% of legal services providers identified 'transportation' as an area in which their clients had unmet needs. These transportation difficulties derive 'both from structure problems (lack of public transport) and from an individual's personal circumstances (lack or loss of a driver's license): Moreover, people with physical or mental disabilities or who belong to more vulnerable groups — like the elderly — often experience additional deprivations and constraints that can make physically going to a courthouse from home and back again even more onerous.")

182 See section III.A.2.b.


184 See Judge Edward Spillane, Why I refuse to send people to jail for failure to pay fines, WASH. POST (Apr. 5, 2016), https://www.washingtonpost.com/posteverything/wp/2016/04/08/why-i-refuse-to-send-people-to-jail-for-failure-to-pay-fines/?utm_term=.a5b94ea04c0f ("Courts must be as accessible as possible, and that starts with allowing children to accompany their parents."); Nat‘l Ctr. for State Courts, Nat‘l Task Force on Fines, Fees, and Bail Practices, Principles on Fines, Fees, and Bail Practices, https://www.ncsc.org/-/media/Files/PDF/Topics/Fines%20and%20Fees/Principles%200shaded%209%2024%2018asd.ashx, ("Principle 1.4. Access to Courts. All court proceedings should be open to the public, subject to clearly articulated legal exceptions. Access to court proceedings should be open, as permissible, and administered in a way that maximizes access to the courts, promotes timely resolution, and enhances public trust and confidence in judicial officers and the judicial process. Judicial branch leaders should increase access to the courts in whatever manner possible, such as by providing flexibility in hours of service and through the use of technology innovations, e.g., online dispute resolution where appropriate, electronic payment of fines and costs, online case scheduling and rescheduling, and e-mail, text messages, or other electronic reminder notices of court proceedings."); Quisha Mallette, The Debt Spiral: Enforcement of Criminal Justice Debt in North Carolina, in Enforcing Inequality: Balancing Budgets on the Back of the Poor 44, 62 (2018) ("The court system should be accessible to all people regardless of income. Individuals should not be penalized for not being able to afford legal representation or pay legal financial obligations such as bail and court costs. The state Judicial Department should also make sure the payment system is accessible for users with special needs.")

185 See Iowa Code § 910.7.

186 See Maximilian A. Bulinski and J.J. Prescott, Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency, 21 MICH. J. RACE & L. 205, 225 (2016) (describing the difficulty some people face when they must care for children or ill family members during the court’s normal operating hours); California Judicial Council’s Access and Fairness Advisory Comm., Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee (1997) (reporting that “most survey respondents felt that court sessions and schedules are not flexible in response to the needs of persons with disabilities who depend on limited accessible public transportation, availability of attendants, and those who have medication schedules or difficulties”); ABA Standing Committee on Research About the Future of the Legal Profession, Working Notes: Deliberations on the Current Status of the Legal Profession, 17 Maine Bar J. 48, 48-49 (2002) ("In addition to geographic constraints, courthouses and centers for civil dispute resolution tend to operate only during daytime hours of workdays. This limitation makes access particularly difficult for those with child care obligations and the working poor, who are less likely to be excused from work and almost certain to lose money from the job when they are able to leave.")


Judges, too, acknowledge the importance of treating each person with respectful treatment, and engendering trust in authorities. by attention to the key element of procedural fairness: voice, neutrality, respectful treatment, and engendering trust in authorities. The basics — treating people with respect, listening to them, making eye contact, encouraging questions, not shaming people when they do not have the resources to pay — may improve collection rates and increase respect for the court.

Some judges may argue that certain people will not respond to any communication or attempts to compel compliance with payment orders or court dates absent a warrant. Although some people may be motivated by fear of additional punishment and respond accordingly, enforcement systems should not start with such a presumption, because structuring an enforcement system around the most punitive tactics will result in responses to nonpayment that are highly disproportionate for many people. Instead, the use of warrants should be limited to the greatest extent possible.


See Compl. ¶ 6, Mahoney et al. v. Derrick (Ark. Cir. Court, Aug. 8, 2018), https://lawyerscommittee.org/wp-content/uploads/2018/08/2018-08-09-White-County-Complaint.pdf. Arkansas state statute requires that if a person is ordered to pay their court debt within one day of sentencing and they do not appear to make a payment, the court must issue an arrest warrant. Ark. Code Ann. 16-13-702(a)(4)(A)(i)-(ii). However, the court must comply with the Constitution and the law is silent on when the arrest warrant must issue — thereby leaving open the possibility that courts could use their discretion to employ other responses first.
Polling by NPR found that “a substantial number (40%) of rural Americans struggle with routine medical bills, food and housing” and “about half (49%) say they could not afford to pay an unexpected $1,000 expense of any type.” See National Public Radio, Poll: Many Rural Americans Struggle with Financial Insecurity, Access to Healthcare, NPR.org (May 21, 2019). See also Bo. of Governors of the Fed. Reserve Sys., Report on the Economic Well-Being of U.S. Households in 2017 at 2 (May 2018), https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf (finding that four in ten adults, if faced with an unexpected expense of $400, would either not be able to cover it or would cover it by selling something or borrowing money, and that one-fifth of adults are not able to pay all of their current month’s bills in full).

See Rebekah Diller, Brennan Ctr. for Justice The Hidden Costs of Florida’s Criminal Justice Fees 14-19 (2010), https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf (explaining that, in Florida, failure to appear charges stemming from failure to pay can result in arrests and pre-trial detention lasting days); Mathilde Laisne et al., Vera Inst. of Justice, Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans (Jan. 2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans/legalacy_downloads/past-past-due-costs-consequences-charging-for-justice-new-orleans.pdf (reporting that in New Orleans, people who were arrested for failure to pay or failure to appear were detained for six days on average); Texas Appleseed and Texas Fair Defense Project, Pay or Stay: The High Cost of Jailing Texans for Fines & Fees 16, 18 (2017), https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf (explaining that in 2014, across seven Texas counties, more than 24,000 people were jailed for failure to pay fees or fines, 11% of whom were jailed for more than two days).

See, e.g., Shane Shifflett, Hilary Fung, and Alissa Scheller, “Since Sandra” (Database), July 16, 2016, http://data.huffingtonpost.com/2016/jail-deaths (documenting 815 people who died in jail in one year, many of whom died within just three days of incarceration); Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, Jr., Laura and John Arnold Found., The Hidden Costs of Pretrial Detention 4 (2013) (pre-trial detention for two or more days linked to increased risk of recidivism); Paul Heaton, Sandra Mayson, and Megan Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 Stan. L. Rev. 711, 713 (2017) (people detained pre-trial, even for only a few days, can lose their job, housing, or custody of their children).


See Marina Diuna et al., Justice Policy Ctr., Criminal Background Checks: Impact on Employment and Recidivism (March 2017), http://www.urban.org/sites/default/files/publication/88621/criminal-background-checks-impact-on-employment-and-recidivism.pdf (explaining that although employers may not dismiss an employee solely on the basis of an arrest, rather than a conviction, criminal background checks may be unclear about whether or not an arrest resulted in a conviction); see also Employment Background Checks and the Use of Arrest Records by State, https://www.backgroundchecks.com/Portals/0/Docs/Employment%20Background%20Checks%20and%20the%20Use%20of%20Arrest%20Records%20by%20State.pdf (stating that Georgia, Maryland, New Jersey, Washington, and Texas all allow inquiries into arrest records with restrictions and Alabama, Alaska, Arkansas, Idaho, Iowa, Kentucky, Louisiana, Missouri, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wyoming, and Washington, D.C. have no laws banning or restricting the use of arrest information for employers).

For example, some courts in Texas will charge additional fees for the issuance of warrants. See Website for Harris County, TX, http://www.jp.hctx.net/criminal/fta.htm. Warrant fees in some jurisdictions in Arizona are as high as $125. See Jessica L. Cortes, Comparative Analysis of Arrest Warrant Issuance and Enforcement, Supreme Court of Arizona 36 (May 2014), https://www.ncsc.org/-/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2014/Arrest%20Warrant%20Issuance%20and%20Enforcement.ashx.


Mo. Sup. Ct. R. 37.65 (requiring that the court use show cause orders rather than arrest warrants to secure appearance upon nonpayment) (eff. Jan. 1, 2019).


Other jurisdictions have implemented similar changes as a result of litigation. For example, following a lawsuit by the ACLU of South Carolina, South Carolina Supreme Court Chief Justice Donald Beatty issued new instructions to state court judges that resulted in magistrates recalling tens of thousands of warrants for outstanding court debt and failure to appear. See Andrew Knapp, Thousands of arrest warrants for low-level offenders recalled under directive from South Carolina’s chief
218 Indeed, preliminary research shows that reminders can meaningfully reduce the rate of failures-to-appear (FTA). For example, a postcard reminder program in Nebraska reduced FTA rates from 12.6% to between 10.9% and 8.3%, depending on the type of postcard sent. Postcards containing more information about the implications of failure to appear resulted in a greater decrease in FTA rates. PRIETAL JUS TiCE CT. FOR COURTS, NAT’ L CT. FOR STATE COURTS, USE OF DATE REMINDER NOTICES TO IMPROVE COURT APPEARANCE RATES (Sept. 2017), https://www.nccsc.org/~media/Microsites/Files/PJCC/PJCC%20Brief%202010%20Sept%202017%20Court%20Date%20Notification%20Systems.aspx; see also Alan Tomkins, Brian H. Bornstein, Mitchel Norman Herian, David I. Rosenbergbaum, and Elizabeth Neeley, An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court, CT. REV.: THE J. OF THE AM. JUDGES ASS’N (2012), http://digitalcommons.unl.edu/ajacourtreview/395. Many of these programs have been developed in the context of reducing FTA rates, although the lessons learned are likely equally applicable to failure-to-pay.


220 For example, in New York City, researchers from Ideas42 and the University of Chicago Crime Lab designed a text message pilot program in an attempt to reduce the FTA rate in New York courts. The researchers found that the most effective type of text message reminder, which included information about the consequences for failing to appear and how to prepare for the court date, reduced FTA rates by 26% relative to those receiving no text message. The researchers also found that the text messaging program reduced open warrants for FTA by 32%, relative to those receiving no text messages. Univ. of CHICAGO CRIME LAB, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT 4 (Jan. 2018), https://urbanlabs.uchicago.edu/attachments/3b3125276b28d-3b44aad1a8d964d0f1e9128af34/store/9c6b123c3b0a5da-58318f438a6e878dd016d6e6efad54d666a232a6473/f2-954-NYCsummonsPaper_Final_Mar_2018.pdf. A similar text message reminder program is currently under consideration in Massachusetts. Matt Rocheleau, Some court systems are texting people to get them to show up. Could it work here?, BOSTON GLOBE (Feb. 18, 2018), https://www.bostonglobe.com/metro/2018/02/18/some-court-systems-are-texting-people-get-them-show-could-work-here/qvl7179AXZ9aop-IUr5Wi/story.html. And, under a grant from the MacArthur Foundation to reduce its jail population, Charleston County, South Carolina implemented an automated text message reminder program to help people keep track of court appearance dates. See MACARTHUR FOUNDATION SAFETY AND JUSTICE CHALLENGE, CHARLESTON COUNTY, SOUTH CAROLINA, SUMMARY AND OUTCOMES, http://www.safetyandjusticechallenge.org/challenge-site/charleston-county/. These reminders launched in October 2018. See CHARLESTON CTY, CRIMINAL JUSTICE COORDINATING COUNCIL, ANNUAL REPORT 2018 at 32 (2018), https://cjcc.charlestoncounty.org/files/FINAL%202018%20ANNUAL%20REPORT.pdf.

221 A live-caller telephone reminder program in King County, Washington resulted in a reduction of FTA rates by up to 22%, depending on the locality, with greater reductions observed in localities with higher baseline FTA rates. See also Timothy R. Schnacke, Michael R. Jones, and Dorian M. Wilderman, Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program, CT. REV.: THE J. OF THE AM. JUDGES ASS’N (2012), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1396&context=ajacourtreview.


226 A study of the Nebraska reminder system confirms this, finding that the most effective type of reminders used there not only facilitated appearance, but also increased people’s sense of procedural justice and understanding of the court system. See Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neely, Mitchel N. Heian, and Joseph A. Hamm, Reducing Courts’ Failure-to-Appear Rate by Written Reminders, 19 PSYCHOL., PUB. POL’Y, AND L. 70, 78-79 (2013), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&amp;article=1601%context=psychfacpub.


228 Generally, courts will allow non-traditional, electronic forms of notice only if more traditional forms of notice will not suffice and the electronic form of notice is expected to be more effective. See, e.g., Rio Properties, Inc. v. Rio Intern. Interlink, 284 F.3d 1007, 1017-18 (9th Cir. 2002) (holding that because a business structured itself so that it could be contacted only via e-mail, service via e-mail was permissible).

229 See, e.g., NAT’L TELECOMMA. & INFO. ADMIN. & ECON. & STATISTICS ADMIN., U.S. DEP’T OF COMMERCE, EXPLORING THE DIGITAL NATION 26 (2013) (finding that while 72% of American households enjoy internet use, only 46% of households earning $25,000 or less can say the same); Kyle McGee- ney, Appending a Prepaid Phone Flag to the Cell Phone Sample, 8 Survey Practice, no. 3 (2015), www.surveypractice.org (citing David Dutwin, Cellular Telephone Methodology: Present and Future, American Associa-
Such forms include providing written information at sentencing and sending reminders via certified mail. See Nat’l Consumer Law Ctr., Paper Statements: An Important Consumer Protection 6-7 (Mar. 2016), http://www.ncb.org/images/pdf/banking_and_payment_systems/paper-statements-banking-protections.pdf (noting that, in the consumer context, paper statements may be better than electronic statements because of the “digital divide,” where many low-income households lack reliable internet access); but see Brian Highsmith, A Simple Plan to Make Moving Less Awful, Wash. Monthly (Apr./May/June 2019), https://washingtonmonthly.com/magazine/april-may-june-2019/a-simple-plan-to-make-moving-less-awful/ (arguing in favor of a permanent postal PIN for people and highlighting the problem of traditional mail for low-income consumers who are likely to move frequently, thereby increasing the risk that traditional mail may be lost or undeliverable).

For a general explanation of secured vs. unsecured bonds, Criminal Justice Policy Program, Harvard Law School, Moving Beyond Money: A Primer on Bail Reform 6 (Oct. 2016), http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf. In general, a secured bond to get out of jail requires that the person deposit money up front; an unsecured bond allows for the release of the individual without providing the money up front, but if the person violates the terms of the bond/release — for example, by failing to appear at the next hearing — the court will assess the amount of the unsecured bond.


There are also problems associated with the use of civil judgments but the jurisdiction included this as an option for judges under current state law. For more about civil judgments, see section III.B.3.

E-mail from Erica C. Adams, Operations Administrator, North Carolina Judicial Branch, to Sharon Brett (July 8, 2019).


See, e.g., R. Barry Ruback et al., Economic Sanctions in Criminal Justice, 33 Crim. Just. and Behavior 242, 258 (2006) (arguing that fines can serve as an alternative punishment that can be closely tailored to the seriousness of certain offenses).

Bruce Western et al., The Pew Charitable Trusts, Collateral Costs: Incarceration’s Effect on Economic Mobility (2010), https://www.pewtrusts.org/mediacenter/documentation/2010/collateral-costs1pdf (finding that being in jail reduces future wages by 11%, cuts average future annual employment by nine weeks, and cuts future yearly earnings by 40%). Some studies also suggest that the costs of warrants and incarceration are greater than the money recovered through the use of those enforcement tactics. See Mathilde Laine et al., Vera Inst. of Justice, Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans (Jan. 2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf (stating that, in New Orleans, the costs of incarceration for fines and fees outweigh the revenue brought in by 1.9 million); see also Katherine Beckett et al., On Cash and Conviction: Monetary Sanctions as Misguided Policy, 10 Criminality & Pub. Pol’y 505, 509 (2011) (finding that Washington State brings in less than 6 million a year from fines and fees due to the costs of fine and fee collection, even without considering the cost of jail for nonpayment); Christian Henrichson et al., Vera Inst. of Justice, The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration (2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/price-of-jails.pdf (finding that the cost of a night in jail per inmate per day in King County, Washington is $192.85).


Mississippi recently passed legislation providing that “incarceration shall not automatically follow the nonpayment of a fine, restitution or court costs” and “may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant was not indigent or could have made payment but refused to do so.” Miss. H.B. No. 387 (2018). Litigation in several states, including Arkansas, Georgia, Mississippi, Louisiana, and more, has also resulted in significant policy changes via settlements and court rulings prohibiting the practice of incarcerating people for failure to pay without first conducting ability-to-pay determinations. See e.g., Cain v. City of New Orleans, No. 15-4479 (E.D. La. Dec. 13, 2017), ECF No. 279; Dade v. City of Sherwood, Arkansas, No. 16-602 (E.D. Ark., Nov. 14, 2017), ECF No. 112-1; Settlement Agreement, Thompson v. DeKalb County, Georgia, No. 15-280 (N.D. Ga., Mar. 2015); Supplement to Stipulated Settlement Agreement,
Even though Bearden has been the law for some time, many jurisdictions have been slow to adopt even the bare minimum reform of requiring ability-to-pay determinations prior to ordering incarceration, and litigation surrounding these issues remains ongoing. The ACLU’s lawsuit against Lexington County, South Carolina is currently on appeal to the Fourth Circuit and alleges that the plaintiffs were illegally incarcerated in the Lexington County Detention Center for weeks to months because they were unable to pay fines and fees associated with traffic citations and other low-level offenses adjudicated in the County’s magistrate courts. Brief for Plaintiffs-Appellees at 24, Brown et al v. Lexington County, South Carolina et al., No. 18-1524 (4th Cir., Aug. 8, 2018), ECF No. 25. Litigation is also currently ongoing against sheriffs across the state of Oklahoma for operating unconstitutional debtors’ prisons. See Amended Compliant, Wilkins et al. v. Aberdeen Enterprizes II, Inc., et al., No. 17-606 (N.D. Okla., Feb. 1, 2018), ECF No. 76.


See Karin D. Martin, et al., Monetary Sanctions: Legal Financial Obligations in US Systems of Justice, 1 ANN. REV. OF CRIMINOLOGY 471, 476 (2018) (“[I]n practice, judges have interpreted these legal concepts [such as ‘bona fide effort’] as requiring defendants, even those who are indigent and homeless, to go to great lengths to secure the means for payment, including seeking loans from friends, family members, and employers, or taking day-laborer jobs.”) (internal citation omitted).


Tenn. Code Ann. § 55-12-129(b).


See Bell v. Busron, 402 U.S. 535, 539 (1971) (stating that driver’s licenses “may become essential in the pursuit of a livelihood … [and are not to be taken away without that procedural due process required by the Fourteenth Amendment”).


276 D.C. Code § 50-1403.01; see also D.C. Code § 22-3571.01.


280 Yolanda Jones, *Shelby County DA’s office won’t prosecute many revoked driver’s license cases*, Daily Memphian (2018), https://www.dailymemphian.com/article/789/Shelby-County-DA-office-wont-prosecute-many-revoked-drivers-license-cases%20and (reporting that Shelby County, Tennessee ADAs are dismissing more than 3,000 driver’s license suspension and revocation cases where a license could have been suspended for nonpayment, and quoting the DA stating “if your driver’s license has been revoked only because you owe fines or child support, the case will be dismissed”).


284 See, e.g., Haw. Rev. Stat. § 651-122 (“No exemption for personal property shall apply to attachment or execution issued upon a judgment … for taxes or fines or any debt due the State.”); Neb. Rev. Stat. 29-2407 (someone sentenced to less than two years of incarceration has no debtor’s exemptions in regard to fines, costs, and forfeited recognizances); N.C. Gen. Stat. § 1C-1601(e) (exemptions do not apply to appearance bonds, criminal justice debt liens, and restitution); 42 Pa. Cons. Stat. 8127(a)(5); Newburn v. RFB Petroleum, Inc., 775 P.2d 93 (Colo. Ct. App. 1989) (exemptions do not apply to collection of fines).
