SMALL FINES AND FEES, LARGE IMPACTS: ABILITY-TO-PAY HEARINGS

TIA LEE KERKHOF*

* Senior Editor, *Southern California Law Review*, Volume 95; J.D. Candidate 2022, University of Southern California Gould School of Law; B.A. Political Science 2019, California Lutheran University. Thank you to Maggie Kerkhof, Rudy Kerkhof, Nicole & Zach Grau, Delaney Kerkhof, and my dearest friends for their unwavering support and encouragement throughout my time in law school. I would also like to thank Professor Clare Pastore for her topic inspiration and guidance. Finally, many thanks to all the *Southern California Law Review* members for their invaluable work on my piece.

INTRODUCTION

Imagine, for example, that a woman fails to have auto insurance,[1] which carries a minimum fine of $500 in Massachusetts.[2] In addition, she will be charged a $500 payment or one full year premium of compulsory insurance (whichever is larger), a $45 late fee and a $25 filing fee if she chooses to request a hearing, and a $500 fee to reinstate her license and registration after having them suspended for sixty days—for a minimum total of $1,500 with the possibility of receiving up to one year in jail.[3] She is also one of about forty-six percent of Americans who cannot cover a $400 emergency expense upfront,[4] so the legal financial obligations ("LFOs") that she owes as part of her fine remain unpaid, making matters worse. Her driver's license was suspended due to not paying, so she risks illegally driving to her job or taking public transportation if there is any available, which imposes further economic burdens.[5] A background check shows not only her conviction, but

1. The most recent data from the Insurance Research Council estimates that approximately over twelve percent of the driving population, or one in eight drivers, is uninsured. David Corum, *One in Eight Drivers Uninsured*, INS. RSCH. COUNCIL (Mar. 22, 2021), https://www.insurance-research.org/sites/default/files/downloads/UM%20NR%20032221.pdf [https://perma.cc/HUD5-YLDN].

2. MASS. GEN. LAWS ANN. ch. 90, § 34J (West 2021).

3. *Id.*; *see also* Mark Fitzpatrick, *Penalty for Driving Without Insurance in Massachusetts*, VALUEPENGUIN (Mar. 16, 2021), https://www.valuepenguin.com/auto-insurance/massachusetts/penalties-driving-without-insurance [https://perma.cc/6XBN-X7XL].

4. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015, at 1 (2016) ("Forty-six percent of adults say they . . . could not cover an emergency expense costing $400 . . . ."); *see also* PHILIP ALSTON, REPORT OF THE SPECIAL RAPPORTEUR ON EXTREME POVERTY AND HUMAN RIGHTS ON HIS MISSION TO THE UNITED STATES OF AMERICA (2018); Kathryn Vasel, *6 in 10 Americans Don't Have $500 in Savings*, CNN MONEY (Jan. 12, 2017, 8:21 AM), https://money.cnn.com/2017/01/12/pf/americans-lack-of-savings/index.html [https://perma.cc/JFY4-DUSK] ("Nearly six in [ten] Americans don't have enough savings to cover a $500 or $1,000 unplanned expense . . . ."); THE PEW CHARITABLE TRS., WHAT RESOURCES DO FAMILIES HAVE FOR FINANCIAL EMERGENCIES? 1 (2015) ("One in [three] American families reports having no savings at all, including [one] in [ten] of those with incomes of more than $100,000 a year.").

5. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 5 (2010); *see, e.g.*, *Fares Overview*, MASS. BAY TRANSP. AUTH., https://www.mbta.com/fares [https://perma.cc/F8Q4-94ZZ] (costing $90 for a monthly "LinkPass"); *Fares, Passes, and Discounts*, METRO, https://www.metro.net/riding/fares [https://perma.cc/AP3F-2CUV] (regularly costing $100 for a thirty-day Los Angeles "Metro Rail Pass"); *Everything You Need to Know About Fares and Tolls in New York*, METRO. TRANSP. AUTH., https://new.mta.info/fares [https://perma.cc/95F7-XTLD] (costing $127 for a thirty-day "Unlimited New York City MTA MetroCard"); *Unlimited Ride Passes*, CHI. TRANSIT AUTH., https://www.transitchicago.com/passes [https://perma.cc/BN5U-6UZC] (costing $75 for a thirty-day "CTA/Pace Pass"); *Cost to Ride*, WASH. METRO. AREA TRANSIT AUTH., https://www.wmata.com/fares/basic.cfm [https://perma.cc/3JGW-QTXB] (costing $58 for a seven-day "Unlimited WMATA Pass"); Jonathan English, *Why Public Transportation Works Better Outside the U.S.*, BLOOMBERG CITYLAB (Oct. 10, 2018, 6:00 AM), https://www.bloomberg.com/news/articles/2018-10-10/why-public-transportation-works-better-outside-the-u-s [https://perma.cc/45QB-ZVX2] (comparing public transportation in the United States to that of other countries to explain America's poor public transport system).

also that her case is still active because of the unpaid LFOs.[6] Also, the LFOs have ruined her credit, causing higher interest rates on her credit cards and loans and making permanent housing harder to find even if she could afford the rent.[7] Now there is a warrant for her arrest for the unpaid LFOs.[8] If she is picked up and jailed, she will miss her interview for a second job, lose her temporary housing, and possibly lose custody of her children.[9]

Jurisdictions across the country use fines and fees to help finance elements of their criminal justice and court systems.[10] These fines and fees are referred to as LFOs and include, but are not limited to, traffic infractions, felony-related fines, and court fees, such as filing fees, attorney dues, and transcript costs.[11] Many of these are levied regardless of one's guilt.[12] Although some of these LFOs may be small when isolated, they impose major burdens on low-income individuals, their families, and the government.[13] This creates a "poverty penalt[y]" because these charges are imposed regardless of one's income.[14] Excessive charges on low-income individuals create larger long-term costs as criminal justice debt can increase the likelihood of later criminal activity.[15] Thus, statutes and courts imposing these large, unpayable LFOs on indigent defendants who may or may not be convicted of a crime burdens the individuals, their families, and even

6. Theresa Doyle, Opinion, *End the Cycle of Debt for Indigent Defendants*, SEATTLE TIMES (Feb. 20, 2016, 4:01 PM), https://www.seattletimes.com/opinion/end-the-cycle-of-debt-for-indigent-defendants [https://perma.cc/84XM-75ED].

7. *Id.*

8. *See, e.g.*, WASH. REV. CODE § 10.01.180(1) (2016) (allowing arrest warrants for defaulting); MASS. GEN. LAWS ANN. ch. 276, § 31 (West 2021) (allowing default warrants solely due to a person's failure to pay a fine, assessment, court cost, restitution, support payment, or other such amount); Doyle, *supra* note 6.

9. Doyle, *supra* note 6.

10. *See* COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1 (2015). In 1991, just twenty-five percent of inmates reported receiving court-ordered fines and sanctions, but by 2004, sixty-six percent did. ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 23 (2016).

11. ANNE TEIGEN, NAT'L CONF. OF STATE LEGISLATURES, ASSESSING FINES AND FEES IN THE CRIMINAL JUSTICE SYSTEM 1 (2020).

12. FAIR & JUST PROSECUTION, FINES, FEES, AND THE POVERTY PENALTY 1 (2017).

13. *Id.* at 1–2.

14. Rebecca Vallas & Roopal Patel, *Sentenced to a Life of Criminal Debt: A Barrier to Reentry and Climbing Out of Poverty*, 46 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 131, 133 (2012).

15. EXEC. OFF. OF PUB. SAFETY & SEC., REPORT OF THE SPECIAL COMMISSION TO STUDY THE FEASIBILITY OF ESTABLISHING INMATE FEES 4 (2011), https://www.mass.gov/doc/report-of-the-special-commission-to-study-the-feasibility-of-establishing-inmate-fees-july-2011/download [https://perma.cc/RK7U-GCHM]; *see also* Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 372–73 (2009).

governments.[16] This issue is rapidly transforming and gaining attention in courts,[17] academia,[18] and legislatures[19] with recent advocacy and legislation changes, such as the elimination of juvenile fines[20] and the abolishment of driver's license suspension for failure to pay in some states.[21] One possible

16. *See* COUNCIL OF ECON. ADVISERS, *supra* note 10, at 3–4.

17. *See infra* Part II; *e.g.*, Cain v. White, 937 F.3d 446, 454 (5th Cir. 2019) (finding that judges' exclusive authority over how the Judicial Expense Fund ("JEF"), a fund that derived money from fines and fees imposed on defendants to pay for court expenses, was spent violated due process); State v. Blazina, 344 P.3d 680, 680 (Wash. 2015) (holding that Washington trial courts have an obligation to conduct an individualized inquiry into a defendant's ability to pay discretionary and most mandatory LFOs); State *ex rel.* Pedersen v. Blessinger, 201 N.W.2d 778, 782 (Wis. 1972) (finding that "one who has been convicted of a crime and fined is not to be imprisoned in satisfaction of the fine or in lieu thereof if he is unable to pay the fine"); Will v. State, 267 N.W.2d 357, 360 (Wis. 1978) (encouraging but not requiring judges to consider a defendant's ability to pay LFOs at the time of sentencing); People v. Dueñas, 242 Cal. Rptr. 3d 268, 273 (Ct. App. 2019) (finding that due process "requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments"); People v. Kopp, 250 Cal. Rptr. 3d 852, 893 (Ct. App.) (agreeing with *Dueñas* that due process requires courts to conduct an ability-to-pay hearing before imposing criminal justice administration fees if a defendant requests such a hearing), *review granted*, 451 P.3d 776 (Cal. 2019).

18. Organizations, such as the Fines and Fees Justice Center, Fair and Just Prosecution, Brennan Center for Justice at New York University Law School, and PolicyLink, are bringing to light the harsh impacts LFOs can have on individuals, their families, and society. *See generally About Us*, FINES & FEES JUST. CTR., https://finesandfeesjusticecenter.org/about-fines-fees-justice-center [https://perma.cc/6C4Y-2TCF]; *Addressing the Poverty Penalty and Bail Reform*, FAIR & JUST PROSECUTION, https://fairandjustprosecution.org/issues/addressing-the-poverty-penalty-and-bail-reform [https://perma.cc/T4ZH-KPXF]; *About Us*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/about [https://perma.cc/C4LG-68TU]; *Eliminating Fines and Fees*, POLICYLINK, https://www.policylink.org/our-work/just-society/fines-fees [https://perma.cc/59Q9-8YC3].

19. Many jurisdictions are reexamining various fines and fees. *See, e.g.*, ALA. R. CRIM. P. 26.11(b) (directing sentencing courts to consider a defendant's ability to pay when imposing a restitution fine); A.B. 1869, 2020 Leg. (Cal. 2020) (eliminating twenty-three administrative fees in the criminal legal system); *California AB 1869 Criminal Fees*, FINES & FEES JUST. CTR. (Oct. 1, 2020), https://finesandfeesjusticecenter.org/articles/california-ab-1869-criminal-fees [https://perma.cc/3A3F-CDEV]; H.B. 2048, 2019 Leg. (Tex. 2019) (waiving all DUI fines if a court determines a defendant is unable to pay); S.B. 1637, 2019 Leg. (Tex. 2019) (requiring deferred payment, payment plans, community service, or full or partial waivers for LFOs if a defendant is unable to pay); H.B. 1178, 2020 Leg. (Md. 2020) (requiring courts to use a formula to determine the amount that an individual can pay).

20. *See, e.g.*, S.B. 190, 2017 Leg. (Cal. 2017) (eliminating almost all juvenile court fines and fees); H.B. 36, 2020 Leg. (Md. 2020) (eliminating all juvenile fines and fees and making all such previously imposed LFOs unenforceable and uncollectable); A.B. 439, 2019 Leg., 80th Sess. (Nev. 2019) (eliminating fines and fees charged to families of criminal justice system–involved juveniles); S.B. 48, 218th Leg. (N.J. 2019) (eliminating all juvenile fines and financial penalties); H.B. 1162, 2020 Leg., 2020 Sess. (N.H. 2020) (eliminating costs of services imposed on parents of youth in the justice system); S.B. 422, 81st Leg., Reg. Sess. (Or. 2021) (eliminating fees and court costs associated with juvenile delinquency matters). See generally JESSICA FEIERMAN, NAOMI GOLDSTEIN, EMILY HANEY-CARON & JAYMES FAIRFAX COLUMBO, JUV. L. CTR., DEBTORS' PRISON FOR KIDS?: THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM (2016) for a discussion on state laws and a national survey that documents fines, fees, and restitution consequences for failure to pay in the juvenile justice system.

21. Seventeen states, including California, Colorado, Georgia, Idaho, Illinois, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, New York, Oregon, Utah, Virginia, West Virginia,

solution to this issue is to require ability-to-pay determinations ("ATP determinations") before a court can impose LFOs on indigent criminal defendants. The California Supreme Court, in *People v. Kopp*, is currently determining whether courts must consider a defendant's ability to pay before imposing LFOs, and if so, which party bears the burden of proof regarding the defendant's inability to pay.[22]

This Note examines whether the United States Constitution requires ATP determinations before imposing fines and fees. To that end, Part I distinguishes the various kinds of financial obligations imposed on defendants, then provides a background on the burdens LFOs impose on society. Part II analyzes United States Constitution Fourteenth and Eighth Amendment violations when LFOs are imposed without ATP determinations.[23] Part III addresses likely concerns about the administrability of ATP determinations, the fear of revenue downturn by requiring these hearings, and the corresponding racial justice issues. Pilot projects, along with data from other sources, offer promising evidence that a properly designed-and-operated system can result in highly accurate data upon which the ability to pay can be efficiently and effectively calculated, and that this will result in stable, and even improved, fiscal

and Wyoming, do not suspend driver's licenses for failure to pay. *See, e.g.*, CAL. VEH. CODE § 13365 (West 2017) (allowing suspension for failure to appear in court, but not failure to pay); H.B. 21-1314, 2021 Gen. Assemb., 2021 Reg. Sess. (Colo. 2021) (repealing the Department of Revenue's authority to cancel, renew, or reinstate a driver's license for failure to pay an outstanding monetary judgment); H.B. 599, 2018 Leg., Reg. Sess. (Idaho 2018) (ending suspension); H.B. 3653, 2021 Gen. Assemb. (Ill. 2021) (ending license suspension for unpaid automated speed and red-light camera ticks and rescinding license holds and suspensions for unpaid traffic tickets and unpaid automated speed and red light camera tickets); H.B. 5846, 2020 Leg., 2020 Reg. Sess. (Mich. 2020) (stopping suspending drivers' licenses for failure to pay in all cases unrelated to the underlying offense being public-safety related); H.F. 336, 2021 Leg. (Minn. 2021) (ending suspension); H.B. 217, 2019 Leg., Reg. Sess. (Mont. 2019) (ending suspension); S.B. 219, 2021 Sess. (Nev. 2021) (ending suspension); N.Y. VEH. & TRAF. LAW § 510(4-a) (McKinney 2021) (ending suspension); H.B. 4210, 80th Leg., Spec. Sess. (Or. 2020) (eliminating the imposition of driving privilege restrictions for failure to pay fine); H.B. 143, 2021 Leg., Gen. Sess. (Utah 2021) (ending the suspension of driver's licenses solely for the nonpayment of fines); S.B. 1, 2020 Gen. Assemb., 2020 Sess. (Va. 2020) (ending suspension); H.B. 4958, 2020 Leg., Reg. Sess. (W. Va. 2020) (ending suspension); WYO. STAT ANN. § 31-9-302 (2021) (ending suspension). Only four states—Louisiana, Minnesota, New Hampshire, and Oklahoma—require a determination that a person had the ability to pay and intentionally refused to do so. MARIO SALAS & ANGELA CIOLFI, LEGAL AID JUST. CTR., DRIVEN BY DOLLARS: A STATE-BY-STATE ANALYSIS OF DRIVER'S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT 8 (2017), https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf [https://perma.cc/3GKU-H2BH].

22. *Kopp*, 250 Cal. Rptr. 3d at 852 (holding that defendants are entitled to an ability-to-pay hearing under *Dueñas* but that they bear the burden of demonstrating their inability to pay). This issue has also been the subject of considerable litigation in other states and will be discussed later in this Note. *See infra* Part II.

23. State constitutional and statutory arguments may be made but are outside of the scope of this Note.

outcomes. This Note concludes that the development of a meaningful system for ATP determinations is both feasible and constitutionally required for all LFOs.

I. BACKGROUND

While all criminal justice–related financial obligations can have similar harmful impacts, their original goals are distinct. *Fines* are typically imposed once one is convicted and are designed to deter and punish illegal behavior, such as traffic violations, misdemeanors, and felony offenses.[24] By contrast, *fees* are intended to raise revenue and to recoup operating costs of the justice system and often bear no relation to the offense committed.[25] Fees cover every part of the criminal justice process and can include court-appointed attorney fees, court clerk fees, filing clerk fees, DNA database fees, jury fees, crime lab analysis fees, late fees, installment fees, room and board for jail stays, and various other surcharges.[26] In numerous jurisdictions, some fees are imposed regardless of one's guilt, such as fees for public defender services.[27] Lastly, *restitution* is typically a court-imposed fee to compensate

24. TEIGEN, *supra* note 11; MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES (2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [https://perma.cc/R7EQ-NX6Q].

25. TEIGEN, *supra* note 11; MENENDEZ ET AL., *supra* note 24; COUNCIL OF ECON. ADVISERS, *supra* note 10, at 3.

26. TEIGEN, *supra* note 11, at 1–2; MENENDEZ ET AL., *supra* note 24; COUNCIL OF ECON. ADVISERS, *supra* note 10, at 3.

27. Twenty-five states have the discretion to charge upfront registration or "administrative" fees, some of which may be subject to deferral, remission, reimbursement, or waiver, for services provided by public defenders. *See* ARIZ. REV. STAT. § 11-584(b) (LexisNexis 2021); ARK. CODE ANN. § 16-87-213(b)(1) (2021); CAL. PENAL CODE § 987.5 (West 2021) (repealed 2021); COLO. REV. STAT. § 21-1-103(3) (2021); CONN. GEN. STAT. ANN. § 51-298 (West 2021); DEL. CODE ANN. tit. 29, § 4607 (2021); FLA. STAT. ANN. § 27.52(1)(b)-(c) (West 2021); GA. CODE ANN. § 15-21A-6(c) (2021); IND. CODE § 35-33-7-6(c) (2021); KAN. STAT. § 22-4529 (2020); KY. REV. STAT. ANN. § 31.211(1) (LexisNexis 2021); LA. STAT. ANN. § 15:175(A)(1)(d) (2021); MASS. GEN. LAWS ANN. ch. 211D, § 2A (West 2021); MINN. STAT. § 611.17 (2021), *invalidated in part by* State v. Tennin, 674 N.W.2d 403 (Minn. 2004) (invalidating a mandatory fee on Sixth Amendment grounds but condoning the imposition of a fee on a discretionary basis); N.J. STAT. ANN. § 2B:24-17(a) (West 2021); N.M. STAT. ANN. § 31-15-12(C) (2021); N.C. GEN. STAT. § 7A-455.1 (2021), *invalidated in part by* State v. Webb, 591 S.E.2d 505, 511 (N.C. 2004) (concluding that the assessment of counsel fees on acquitted defendants under subsection (b) violated the state constitution); N.D. CENT. CODE § 29-07-01.1(1) (2021); OHIO REV. CODE ANN. § 120.36(A) (LexisNexis 2021); OKLA. STAT. ANN. tit. 22, § 1355A (West 2021); OR. REV. STAT. ANN. § 151.487(1) (West 2021); S.C. CODE ANN. § 17-3-30(B) (2021); TENN. CODE ANN. § 40-14-103(b)(1) (2021); VT. STAT. ANN. tit. 13, § 5238 (2021); WIS. STAT. § 977.075 (2021). In addition, Missouri law seemingly authorizes the assessment of an application fee. *See* MO. ANN. STAT. § 600.090.1.(1) (West 2021) (stating that qualified indigents shall be required to pay a fee if "[they] [are] able to provide a limited cash contribution toward the cost of [their] representation without imposing a substantial hardship upon [themselves] or [their] dependents").

victims for emotional and psychological losses.[28] It bears mentioning that cash bail also contributes to criminal justice debt but is outside of the scope of this Note. States and counties differ in which fines and fees they impose, but most states impose high-interest charges,[29] have additional costs for installment payments,[30] and require mandatory fees for electronic monitoring, public defender fees, and "pay-to-stay" fees.[31]

A. NEGATIVE IMPACTS

While many LFOs impose small individual costs, these costs can quickly accumulate and amount to insurmountable debt, especially when charges can accrue interest rates nearly ten times standard borrowing rates.[32] With nearly half of American adults in 2015 reporting that they could not cover a $400 emergency expense, limited charges can contribute to an endless cycle of debt and place individuals in "debtors' prison."[33] The United

28. Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 93 (2014). Some argue that ATP hearing requirements are not applicable to this form of financial obligation because restitution has become a mechanism of imposing additional punishment, which should have its own constitutional protections. *See id.* at 102–03.

29. *See, e.g.*, 18 U.S.C. § 3612(g) (penalizing delinquent fines with ten percent of the principal amount and default fines with fifteen percent of the principal amount); MICH. COMP. LAWS ANN. § 600.6013(7) (West 2021) (capping interest at thirteen percent).

30. *See, e.g.*, ARIZ. REV. STAT. § 12-116(A) (LexisNexis 2021) (adding a twenty-dollar, one-time fee); N.C. GEN. STAT. § 7A-304(f) (2021) (adding a twenty-dollar, one-time fee); TEX. CODE CRIM. PROC. ANN. art. 102.072 (West 2021) (adding a discretionary two-dollar transaction fee for every payment transaction); VA. CODE ANN. § 19.2-354(A) (2021) (adding a discretionary "one-time fee not to exceed [ten dollars]" if a defendant is unable to make payment within ninety days of sentencing); FINES & FEES JUST. CTR., PAYMENT PLANS AS A COMPLIANCE TOOL: BEST PRACTICES FOR FLORIDA COURTS 4 (2019), https://finesandfeesjusticecenter.org/content/uploads/2020/05/Payment-Plans-Final-1.pdf [https://perma.cc/47PS-8WSN] (requiring a down payment of one-third of the total amount owed plus a twenty-five dollar administrative fee to set up a payment plan in some counties).

31. Thirty-nine states charge for electronic monitoring, forty-three states use some form of cost-recovery for public defenders, and forty-one states charge for room and board. *State-by-State Court Fees*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees [https://perma.cc/YEW7-G8MM] (conducting a nationwide survey with NYU's Brennan Center for Justice and the National Center for State Courts). Twenty-seven jurisdictions in the United States charge upfront registration fees, with fees going up to $480. Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2052–53 (2006).

32. *See* FAIR & JUST PROSECUTION, *supra* note 12, at 2; *see, e.g.*, CAL. VEH. CODE § 21453 (West 2017) (imposing a $100 citation for failure to stop at a red light that jumps to $815 for missing a payment deadline); FLA. STAT. ANN. §§ 775.089(5), 28.246(6) (West 2021) (allowing private debt collectors' interest rates to reach forty percent); ALA. CODE § 12-19-311(c) (2021) (allowing private debt collectors to charge up to thirty percent interest on unpaid debts).

33. BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 4; ALSTON, *supra* note 4; *see* BANNON ET AL., *supra* note 5, at 2 (explaining that "debtors' prison" is illegal in all states, but that "reincarcerating individuals for failure to pay debt is . . . common in some—and in all states new paths back to prison are emerging for those who owe criminal justice debt").

States Supreme Court ruled that typical debtors' prisons violate the Fourteenth Amendment.[34] However, new forms of debtors' prisons have emerged. At least fifteen states allow incarceration for willfully missed payments of LFOs, arrest for failure to pay or appear at debt-related hearings, the "choice" to spend time in jail to pay down court-imposed debt, and incarceration while awaiting ability-to-pay hearings ("ATP hearings").[35] Furthermore, in almost half of all states, nonpayment of LFOs can lead to a driver's license suspension, even when the underlying offense does not involve a vehicle.[36] This leads to individuals either not being able to legally travel to work and earn money to pay the debt if there is no viable public transportation, or risking severe criminal penalties for driving with a suspended license.[37]

34. The Supreme Court held that extending a prison term because a person is too poor to pay violates equal protection under the Fourteenth Amendment. Williams v. Illinois, 399 U.S. 235, 241 (1970). More recently, the Supreme Court ruled that the Fourteenth Amendment bars courts from revoking probation for failure to pay without inquiring into the defendant's ability to pay. Bearden v. Georgia, 461 U.S. 660, 672 (1983). These are the typical debtors' prisons that are illegal.

35. *See, e.g.*, ALA. CODE § 15-22-52 (2021) (allowing courts to make fines or costs a condition of probation); ARIZ. REV. STAT. § 13-808(B) (LexisNexis 2021) (requiring courts to impose the payment of fines, fees, and restitution as a condition of probation); CAL. PENAL CODE § 1202.4(m) (West 2021) (requiring courts to make the payment of restitution fines a condition of probation); FLA. STAT. ANN. § 948.09(6) (West 2021); GA. CODE ANN. § 17-14-3 (2021) (making restitution a condition of probation or a suspended, deferred, or withheld sentence); 730 ILL. COMP. STAT. ANN. 5/5-6-3(b) (LexisNexis 2021) (allowing courts to require a person to pay a fine, costs, and restitution as a condition of probation); LA. CODE CRIM. PROC. ANN. art. 895 (2021) (requiring a supervision fee to be a condition of probation); MICH. COMP. LAWS ANN. § 771.3(2) (West 2021) (allowing courts to condition probation on payment of fines, legal expenses, and other assessments); MO. ANN. STAT. § 600.093 (West 2021) (allowing courts to condition probation on the repayment of the value of the public defender services rendered); N.Y. CRIM. PROC. LAW § 420.10(1)(c) (Consol. 2021); N.C. GEN. STAT. § 15A-1343(b) (2021) (allowing, as a regular condition of probation, courts to require defendants to pay a supervision fee, court costs, defender costs, any fine imposed, and restitution); 18 PA. CONS. STAT. § 1106(b) (2021); TEX. CODE CRIM. PROC. ANN. art. 42.037(h) (West 2021) (requiring restitution to be a condition of community supervision, parole, or mandatory supervision). In California and Missouri, defendants can choose to sit in jail to fulfill debt obligations. CAL. PENAL CODE § 1205(a) (West 2021); MO. ANN. STAT. § 543.270 (West 2021); *see also* AM. C.L. UNION OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES 6 (2013), https://www.acluohio.org/sites/default/files/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf [https://perma.cc/ZJ2S-EBXA] ("In the second half of 2012, over [twenty percent] of all bookings in the Huron County Jail were related to failure to pay fines.").

36. *See supra* note 21; FAIR & JUST PROSECUTION, *supra* note 12, at 3; U.S. COMM'N ON C.R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 73–74 (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf [https://perma.cc/U4PQ-Q2BT].

37. Numerous states have been reported to suspend driver's licenses for failure to pay some forms of criminal debt. *Compare* BANNON ET AL., *supra* note 5, at 24 (identifying at least eight states), *with* JON A. CARNEGIE, DRIVER'S LICENSE SUSPENSIONS, IMPACTS AND FAIRNESS STUDY 56–57 (2007) (identifying at least half of all states and finding that forty-two percent of survey respondents lost their

In addition to creating debt, LFOs impact voting rights after a conviction and affect families with members involved in the criminal justice system. In seventeen states, payment of criminal justice debt is a precondition to restoring voting rights after a conviction, which essentially disenfranchises individuals based on income.[38] Also, these negative impacts extend beyond criminal justice system–involved individuals to their families with immediate court-mandated costs and indirect costs resulting from both lost wages and added childcare burdens.[39]

B. FISCALLY UNSOUND

Numerous studies have established that many LFOs imposed on indigent people are counterproductive because collection costs offset amounts collected and because criminal justice debt increases future costs because individuals struggle to support themselves.[40] For example, in Minnesota, a four-month program collected $7,261 but cost $13,000.[41] In 2009, in Chippewa County, "$44,325 was billed and less than half, $20,257.16 was paid."[42] In New Orleans in 2015, the costs of jailing people in the city who could not pay fines, fees, or bail amounted to $6.4 million.[43]

jobs when they had their driver's licenses suspended, including sixty-four percent of those with incomes below $30,000, in New Jersey in 2004).

38. Miriam Krinsky & Lisa Foster, Opinion, *Eliminate Court Fines and Fees that Penalize Poverty*, USA TODAY (Jan. 4, 2019, 12:07 PM), https://www.usatoday.com/story/opinion/policing/2019/01/04/court-fines-policing-usa-prosecutors/2463222002 [https://perma.cc/P2Z2-RULC]; Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 55 (2019) (finding that forty-eight states and the District of Columbia authorize voting restrictions for failure to pay monetary sanctions).

39. FAIR & JUST PROSECUTION, *supra* note 12, at 4.

40. *Id.*; *see also* EXEC. OFF. OF PUB. SAFETY & SEC., *supra* note 15, at 3–4 (finding that introducing a room and board fee to Massachusetts prisons and jails would not feasibly increase revenue and would create additional barriers to successful reentry); REBEKAH DILLER, JUDITH GREENE & MICHELLE JACOBS, BRENNAN CTR. FOR JUST., MARYLAND'S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY 2 (2009), https://www.brennancenter.org/sites/default/files/legacy/publications/MD.Fees.Fines.pdf [https://perma.cc/B4CK-DECR] (finding a collection rate of seventeen percent for supervision fees assessed in Maryland in 2008); COUNCIL OF ECON. ADVISERS, *supra* note 10, at 5 (finding a collection rate of zero in half of sentenced felonies in Washington over three years and finding that, in 2006, Washington collected over $21 million in fee revenue but saw only a net gain of less than $6 million).

41. Julia Silverman, *'Pay to Stay' in Jails Is Gaining Popularity*, WASH. POST (June 6, 2004), https://www.washingtonpost.com/archive/politics/2004/06/06/pay-to-stay-in-jails-is-gaining-popularity/9c3d80a0-6630-4dad-bcd8-30793cd23b1e [https://perma.cc/EY69-KWWR].

42. Judy Swenson, *Supreme Court Decision Means Changes in State's 'Pay-to-Stay' Jail Program*, MONTEVIDEO AM.-NEWS (Dec. 12, 2009, 11:00 AM), https://www.montenews.com/article/20091212/NEWS/312129992 [https://perma.cc/6WQC-MSQ2].

43. MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 5, 7 (2017), https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf [https://perma.cc/5GE5-XG9S].

Comparing this with the $4.5 million in revenue obtained from the LFOs shows that imposing LFOs rarely justifies the cost of the collection efforts.[44] Collection processes are expensive as well, especially against indigent individuals for smaller sums of money, with staff time for court costs, prosecution costs, and costs of extending probation for nonpayment to pursue LFOs—ultimately, offsetting the revenue secured.[45] These costs can result in cycles of poverty for indigent defendants, which have long-term effects on the criminal justice system, such as an increased probability of recidivism, increased homelessness rates due to hurdles to finding housing and to poor credit scores, increased unemployment, the loss of public benefits due to ineligibility for programs like Temporary Assistance for Needy Families ("TANF") and Supplemental Security Income ("SSI"), and barriers to paying child support.[46]

C. CONFLICTS OF INTEREST

Along with being fiscally unsound, many of these LFOs directly fund criminal justice systems, creating conflicts of interest.[47] In Ferguson, Missouri between 2010 and 2014, enforcement of LFOs financially benefitted those who imposed municipal code violations, like traffic violations, through direct personal benefits with increased police statistics and indirect additional revenue, which led to the state financially sustaining itself through criminal law, instead of advancing public safety.[48] In New Orleans, the Judicial Expense Fund ("JEF") derives a large portion of its money from fines that pay for a massive number of unnecessary expenses,

44. *Id.* at 22–23. In Washington, a man was jailed for two weeks for missing $60 in LFO payments, and, in Ohio, a woman was jailed for over a month for an unpaid legal debt of $251. AM. C.L. UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 8–9, 45 (2010) ("[I]ncarcerating indigent defendants unable to pay their LFOs often ends up costing much more than states and counties can ever hope to recover.").

45. *See* Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate [https://perma.cc/7295-WGTN].

46. BANNON ET AL., *supra* note 5, at 27–29. Failure to pay criminal justice debt is a violation of probation or parole in many states. *See supra* note 35 and accompanying text. Under federal law, probation violations render individuals ineligible for public benefits, such as TANF and SSI. 42 U.S.C. §§ 608(a)(9)(A), 1382(e)(4)(A)(ii).

47. U.S. COMM'N ON C.R., *supra* note 36, at 72 ("Dependence on traffic citations to fund local governments creates an incentive for law enforcement to issue as many citations and fines as possible, regardless of the severity of the offense. Such revenue systems can result in abuse when raising funds replaces public safety as the primary goal of law enforcement.").

48. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/V2S4-RCY2].

such as salaries of court reporters and clerks, law books, and courthouse coffee.[49] After the Fifth Circuit deemed the judges' exclusive authority over the JEF unconstitutional, the state legislature reconfigured the way these fines and fees were distributed by creating a special account for the city council to administer the funds. The city council encouraged judges to use their discretion to not impose fines or set money bail.[50] In many states with municipal courts, there is no limit on the amount of revenue that courts can raise or where the money can be spent, and some courts are not funded by the state, making them responsible for generating their own funding.[51] This leads to judicial policymakers and judges using courts as moneymaking institutions with a large potential for abuse.[52]

D. RACIAL DISPARITIES

Lastly, LFOs contribute to racial disparities with charges falling disproportionately on Black and Latinx communities. Disproportionate policing in marginalized communities through racial profiling and bias contributes to the over-policing of people of color and to the excess imposition of violations for minor, nonviolent offenses, such as traffic infractions.[53] Prosecutors give severe fines during the plea bargaining process, and Black male offenders receive longer sentences than white male offenders, so this and over-policing contribute to more LFOs being levied against people of color because some jurisdictions require these offenders to pay room and board.[54] Additionally, the municipalities that rely most heavily

49. Cain v. White, 937 F.3d 446, 448–50 (5th Cir. 2019) (holding judges' exclusive authority over the JEF unconstitutional); *see also* Emma Cueto, *5th Circ. Gives Fresh Momentum to Fine and Fee Reformers*, LAW360 (Sept. 8, 2019, 8:02 PM), https://www.law360.com/articles/1192260/5th-circ-gives-fresh-momentum-to-fine-and-fee-reformers [https://perma.cc/8PDR-HKNV] (explaining that this funding system is unconstitutional due to the conflict of interest for "judges to levy fines and set bail amounts while also controlling the fund that money was paid into").

50. *Cain*, 937 F.3d at 454; *see also* Emma Cueto, *New Orleans Threatens to Defund Court Over Fines and Fees*, LAW360 (Aug. 30, 2020, 8:02 PM), https://www.law360.com/articles/1305163/new-orleans-threatens-to-defund-court-over-fines-and-fees [https://perma.cc/3KTE-28NX].

51. Dick Carpenter, Ricard Pochkhanawala & Mindy Menjou, *Municipal Fines and Fees: A 50-State Survey of State Laws*, INST. FOR JUST. (2020), https://ij.org/report/fines-and-fees-home#findings [https://perma.cc/95R9-Q6JD]; Emma Cueto, *Citizens in This State Face the Biggest Risk on Court Fines*, LAW360 (May 10, 2020, 8:02 PM), https://www.law360.com/articles/1271797/citizens-in-this-state-face-the-biggest-risk-on-court-fines [https://perma.cc/B895-297S] (stating that the only two states with municipal courts with funding caps are Kentucky and Missouri).

52. Carpenter et al., *supra* note 51; Cueto, *supra* note 51.

53. U.S. DEP'T OF JUST. C.R. DIV., *supra* note 48, at 62–66; *see also* Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NPR (Aug. 25, 2014, 5:56 PM), https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger [https://perma.cc/V2UJ-R77D].

54. *State-by-State Court Fees*, *supra* note 31 (finding that forty-one states have "pay to stay" statutes).

on LFOs also have the highest average percentage of Black and Latinx communities.[55] Lastly, on a national level, twelve percent of Black families reported unpaid legal expenses, fines, or court costs—compared to just five percent of white families and nine percent of Hispanic families.[56] Thus, LFOs contribute to racial disparities by falling more heavily on people of color.

II. FEDERAL CONSTITUTIONAL ANALYSIS ON LEGAL FINANCIAL OBLIGATIONS

The Fourteenth Amendment's Due Process Clause bars the imposition of *all* unpayable fines and fees on indigent defendants before a court considers a defendant's ability to pay. In addition, the Eighth Amendment's Excessive Fines Clause bars the imposition of punitive, unpayable *fines* on indigent defendants before a court considers a defendant's ability to pay.[57]

A. FOURTEENTH AMENDMENT DUE PROCESS

Under the Fourteenth Amendment's Due Process Clause, courts are barred from imposing unpayable fines and fees on indigent defendants. The Due Process Clause states that "nor shall any State deprive any person of life, liberty, or property, without due process of law."[58] The United States Supreme Court has examined court processes that treat indigent and non-indigent defendants differently and has concluded that this Clause protects defendants from statutes that punish them because they are poor.[59] Here,

55. U.S. COMM'N ON C.R., *supra* note 36, at 3.

56. R.J. Vogt, *Fed Shines New Light on Burden of Court Debt*, LAW360 (May 17, 2020, 8:02 PM), https://www.law360.com/articles/1274094 [https://perma.cc/2727-V7YB]; BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, FEATURING SUPPLEMENTAL DATA FROM APRIL 2020, at 9 (2020), https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf [https://perma.cc/2BMR-6JPP].

57. The Eighth Amendment's Excessive Fines Clause only applies to fines and restitution, so ATP hearings are only constitutionally required for fines in this context. *See infra* notes 107, 109 and accompanying text.

58. U.S. CONST. amend. XIV.

59. *See* Griffin v. Illinois, 351 U.S. 12, 17, 20 (1956) (requiring means for indigent defendants to have access to transcripts for appeal even if they cannot afford them); Douglas v. California, 372 U.S. 353 (1963) (requiring appellate counsel for indigent defendants on direct first appeal); Williams v. Illinois, 399 U.S. 235, 240–41 (1970) (holding that a state cannot subject indigent defendants to a period of imprisonment beyond the statutory maximum solely because of their indigency or inability to pay LFOs); Tate v. Short, 401 U.S. 395, 399 (1971) (holding that a state cannot imprison under a fines-only statute on the basis that an indigent defendant cannot pay a fine); Bearden v. Georgia, 461 U.S. 660, 671–72 (1983) (holding that state courts cannot constitutionally revoke probation for failure to pay a fine and make restitution without first determining the probationer's ability to pay).

imposing any LFO without inquiring into one's ability to pay violates that constitutional principle.

Beginning with *Griffin v. Illinois*, the Supreme Court held that due process and equal protection required that if states give defendants the right to appeal, they must ensure that all defendants have access to transcripts, even if they are unable to afford them, because the central aim of the judicial system is that all people charged with a crime must stand equally in every American court so that no criminal trial procedure allows for invidious discrimination between persons and different groups of persons.[60] Building on this, in *Douglas v. California*, the Court held that states must supply appellate counsel to indigent defendants when they give all defendants the right to first appeal.[61] Next, the Court held that states may not automatically imprison defendants who cannot pay their LFOs.[62]

In *Bearden v. Georgia*, the Court created a test for the constitutionality of court processes that threaten to disadvantage criminal defendants because of their indigence and created a prohibition on punishing a person for his or her poverty.[63] In *Bearden*, the Supreme Court explained that a traditional due process framework, known as the *Mathews* test, does not apply because due process and equal protection principles converge in the Court's analysis in these cases. According to the Court, this is because indigency "is a relative term rather than a classification, fitting 'the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.' "[64] Instead, in determining whether a particular practice violated the constitutional prohibition on "punishing a person for his poverty," courts must inquire into "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose."[65]

60. *Griffin*, 351 U.S. at 17.

61. *Douglas*, 372 U.S. at 353.

62. *Williams*, 399 U.S. at 240–41; *Tate*, 401 U.S. at 399.

63. *Bearden*, 461 U.S. at 672. *Bearden* considered the constitutionality of a fine, so some may question whether the holding of *Bearden* is applicable to fees.

64. *Id.* at 665, 666 n.8 (citation omitted); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 127 (1996) (explicitly declining to apply a traditional due process framework when requiring the availability of appellate review of parental rights). The Court articulated the *Mathews* test in *Mathews v. Eldridge*, which balances an individual's private interest, the risk of an erroneous deprivation of that interest, and the government's interest. Mathews v. Eldridge, 424 U.S. 319 (1976).

65. *Bearden*, 461 U.S. at 666–67 (alteration in original) (quoting Williams v. Illinois, 399 U.S. 235, 260 (Harlan, J., concurring)).

Lower courts have applied this *Bearden* four-factor test to a variety of practices and made different findings. The Eleventh Circuit applied *Bearden* and held that conditioning voting restoration rights on LFO payment was constitutional because the State had a rational interest in concluding that felons[66] who completed all terms of their sentences, including paying fines, fees, costs, and restitution, were more likely to responsibly exercise the franchise.[67] Conversely, a Sixth Circuit dissent applied this similar analysis to Tennessee's re-enfranchisement law and would have held it unconstitutional, whereas the majority declined to apply *Bearden* because the conditions requiring felons to pay child support and restitution before having their voting rights restored "merely relate[d] to the restoration of a civil right," meaning there was no additional punishment.[68] With this controlling precedent, a district court then found substantial reason to doubt that revoking driver's licenses of indigent people who failed to pay criminal-court debts was rationally related to furtherance of debt collection because the *Griffin* line of cases does not allow for drawing a line that imposes a greater sanction on convicted persons based solely on their indigence.[69] In contrast, an Alabama appeals court rejected applying *Bearden* to uphold a driver's license suspension statute because the license suspension was " 'not the continuation of a punishment imposed at criminal sentencing' because [the defendant's] *punishment* was the imposition of a fine after being convicted of a traffic offense."[70] Similarly, an Oregon district court applied *Bearden* and upheld a driver's license suspension statute due to inability to pay fines because it was fundamentally fair for a state to deprive a person of a property interest because of the person's inability to pay a fine associated

66. This Note refers to people convicted of felonies as "felons" strictly because that is the terminology used in the cited cases. To avoid dehumanizing language, the term "returning citizen" should be used. For further information, please see Erica Bryant, *Words Matter: Don't Call People Felons, Convicts, or Inmates*, VERA INSTITUTE OF JUSTICE (Mar. 31, 2021), https://www.vera.org/news/words-matter-dont-call-people-felons-convicts-or-inmates [https://perma.cc/PY8N-V737].

67. Jones v. Governor of Fla., 975 F.3d 1016, 1025, 1034–35 (11th Cir. 2020) (holding that conditioning re-enfranchisement on the completion of "all terms of sentence" was constitutional as applied to indigent felons who cannot afford to pay their fines, fees, costs, and restitution).

68. Johnson v. Bredesen, 624 F.3d 742, 748–49 (6th Cir. 2010) (citing Madison v. State, 163 P.3d 757, 770 (Wash. 2007) (distinguishing *Bearden* and upholding a statute conditioning re-enfranchisement on completion of all terms of felons' sentences, including payment of their financial legal obligations)). The Washington Supreme Court distinguished *Bearden* because, inter alia, *Bearden* involved "additional punishment" upon individuals for failure to pay their fines, whereas re-enfranchisement does not impose additional punishment because all felons must complete the terms of their sentences before seeking restoration of their civil rights. *Madison*, 163 P.3d at 770.

69. Thomas v. Haslam, 329 F. Supp. 3d 475, 480 (M.D. Tenn. 2018) (entitling a determination related to indigence because collecting debt from an indigent debtor was not a rational basis for revoking a driver's license).

70. Motley v. Taylor, 451 F. Supp. 3d 1251, 1282 (M.D. Ala. 2020).

with that interest.[71] Moreover, the Ninth Circuit applied *Bearden* to hold that judges must consider a defendant's financial circumstances before applying a guidelines enhancement based on a failure to pay outstanding fines and fees because consideration of the defendant's financial circumstances was necessary to ensure that the increased sentence served legitimate penological purposes rather than simply being "due to poverty."[72] In addition, the Ninth Circuit applied *Bearden* to require immigration officials, when making bond determinations, to consider the noncitizen's financial ability to obtain bond and alternative conditions of release.[73]

When courts apply the *Bearden* analysis to requiring ATP determinations before LFOs are imposed, they vary in their holdings. Some California appellate courts reject *People v. Dueñas* on the grounds that there is an interest in punishing criminal conduct, that allowing indigency to be a defense would cause defendants with financial means to suffer discrimination, and that there would be no rehabilitative purpose if a court were precluded from imposing LFOs to educate a defendant on obligations owed to society.[74] However, because all of these opinions "dismiss the burdens of unpayable debt as constitutionally insignificant, none of them actually carr[y] out the weighing process required by *Bearden*."[75] Additionally, the California Supreme Court will be deciding whether ATP hearings are required in *People v. Kopp*.[76]

On the other hand, the Washington Supreme Court went into a detailed analysis about the "problems associated with LFOs imposed against indigent defendants," which included reentry, interest rate, poor collection rate, and racial disparity issues.[77] The court held that trial courts must conduct

71. Mendoza v. Garrett, 358 F. Supp. 3d 1145, 1171 (D. Or. 2018) (finding that the *Griffin*/*Bearden* line of cases does not apply to a property interest).

72. United States v. Parks, 89 F.3d 570, 572 (9th Cir. 1996).

73. Hernandez v. Sessions, 872 F.3d 976, 992–93 (9th Cir. 2017) ("[W]hen a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating what the person must pay to satisfy a particular state interest." (quoting the district court)).

74. People v. Hicks, 253 Cal. Rptr. 3d 116, 121–23 (Ct. App. 2019) (concluding that due process does not speak to this issue and that *Dueñas* was wrong to conclude otherwise); People v. Aviles, 252 Cal. Rptr. 3d 727, 737–40 (Ct. App. 2019) (finding *Dueñas* to be wrongly decided and that the only proper limit on fines and fees is under the Eighth Amendment).

75. People v. Cowan, 260 Cal. Rptr. 3d 505, 534 (Ct. App. 2020) (Streeter, J., concurring). This weighing process is conducted later within this Note. *See infra* notes 85–100 and accompanying text.

76. People v. Kopp, 250 Cal. Rptr. 3d 852 (Ct. App.) (holding that defendants are entitled to an ATP hearing under *Dueñas* but that they bear the burden of demonstrating their inability to pay), *review granted*, 451 P.3d 776 (Cal. 2019).

77. State v. Blazina, 344 P.3d 680, 683–85 (Wash. 2015).

individualized inquiries for all discretionary LFOs.[78] Similarly, the Wisconsin Supreme Court held that sentencing courts must conduct ability-to-pay inquiries before imposing fines and costs if a defendant raises the challenge.[79] Equally, the Montana Supreme Court requires sentencing judges to take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose on the defendant for all discretionary LFOs.[80] Likewise, Alabama appeals courts applied *Bearden* and held that trial courts must conduct an individualized inquiry into a defendant's ability to pay for all LFOs.[81] Additionally, the Illinois Supreme Court held that trial courts must conduct a hearing into whether a defendant has the ability to pay reimbursement for the services of appointed counsel.[82] Also, the Massachusetts Supreme Court held that judges must determine the amount of restitution a defendant is able to pay because to do otherwise would "simply doom[] the defendant to noncompliance" and would "violate[] the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty."[83] In line with these cases, some California appeals courts follow *People v. Dueñas*, which found that due process "requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments" because these fees and assessments caused "devastating consequences suffered only by indigent persons [that] in effect transform [this] funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay."[84]

78. *Id.* at 681, 685 (remanding two cases because trial courts erred when imposing discretionary LFOs, such as filing fees, victim penalty assessments, DNA sample fees, restitution, and public defender fees, without first making individualized inquiries into defendants' ability to pay).

79. State v. Iglesias, 517 N.W.2d 175, 178 (Wis. 1994); Will v. State, 267 N.W.2d 357, 360 (Wis. 1978) (holding that trial courts have a duty to make an ATP determination on a *fine* if a defendant raises the challenge). The trial court in *Iglesias* considered a defendant's limited financial resources and properly found that she had the ability to pay the fines and fees. *Iglesias*, 517 N.W.2d at 179.

80. State v. Mingus, 84 P.3d 658, 661–62 (Mont. 2004) (requiring ATP hearings for discretionary LFOs, but not mandatory LFOs, because the legislature statutorily mandates these LFOs).

81. Faircloth v. State, 654 So. 2d 62, 62–63 (Ala. Crim. App. 1994) (rejecting a probation revocation order until a *Bearden* assessment could be made); Snipes v. State, 521 So. 2d 89, 91 (Ala. Crim. App. 1986) ("In revocation proceedings for failure to pay *fines*, *restitution*, *court costs*, *or supervision fees*, the trial court should inquire into the reasons for the failure to pay and make specific determinations and findings in accordance with *Bearden v. Georgia*." (emphasis added)). Following this decision, Alabama adopted Alabama Rule of Criminal Procedure 26.11, which requires an indigency analysis and lays out several guidelines for trial court judges assessing fines. ALA. R. CRIM. P. 26.11.

82. People v. Love, 687 N.E.2d 32, 36–37 (Ill. 1997).

83. Commonwealth v. Henry, 55 N.E.3d 943, 950 (Mass. 2016) (citations omitted); *see also* Commonwealth v. Nawn, 474 N.E.2d 545 (Mass. 1985).

84. People v. Dueñas, 242 Cal. Rptr. 3d 268, 273, 276 (Ct. App. 2019); People v. Kopp, 250 Cal. Rptr. 3d 852 (Ct. App.) (agreeing with *Dueñas* that due process requires courts to conduct an ATP hearing

These latter courts are correct in applying the *Bearden* test to LFOs and holding that a defendant's ability to pay must be considered. The first two factors in *Bearden* weigh heavily in favor of finding due process violations when courts impose any LFO without inquiring into a defendant's ability to pay because unpayable LFOs implicate both economic and liberty interests with government debt—resulting in cascading consequences from the loss of driver's licenses, voting rights, housing, and public benefits, to name a few consequences.[85] One court discussed these collateral consequences heavily and noted that indigent offenders "owe higher LFO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount that they owe"; that LFOs increase the chances of recidivism because they inhibit reentry with legal or background checks showing active records that can "have serious negative consequences on employment, on housing, . . . on finances," and on "credit ratings, making it more difficult to find secure housing"; and that "[s]ignificant disparities . . . exist in the administration of LFOs" with "drug-related offenses, offenses resulting in trial, Latin[x] defendants, and male defendants all receiv[ing] disproportionately high LFO penalties."[86] Other courts have discussed the "debt trap" that court-imposed fees and fines can lay for indigent people,[87] how court-imposed debt creates a "significant barrier for individuals seeking to rebuild their lives after a criminal conviction,"[88] and how the nation needs "to address the disproportionate impact [LFOs] have on low-income populations and minority communities" because "court-imposed debt, even in small amounts, may threaten an indigent person's means of subsistence" as it blocks "access to early probation termination," hinders "eligibility for expungement, . . . diminish[es] prospects for employment and housing,"

before imposing criminal justice administration fees if a defendant requests such a hearing), *review granted*, 451 P.3d 776 (Cal. 2019); People v. Son, 262 Cal. Rptr. 3d 824 (Ct. App. 2020) (holding that court operations and facilities assessments could not be imposed without giving the defendant an opportunity to request an ATP hearing because of due process); People v. Belloso, 255 Cal. Rptr. 3d 640 (Ct. App. 2019) (disagreeing with *Aviles*'s conclusion that a constitutional challenge to the imposition of LFOs on an indigent defendant should be analyzed under an excessive fines analysis instead of a due process framework); People v. Santos, 251 Cal. Rptr. 3d 483 (Ct. App. 2019) (following *Dueñas* and declining to find forfeiture).

85. *See supra* Part I. As notes 40–46 and the accompanying text further explain, "these fees are assessed as part of a large statutory scheme to raise revenue to fund court operations," so they "should be treated no differently than their civil counterparts" and should be "imposed only on those with the means to pay them." *Dueñas*, 242 Cal. Rptr. 3d at 277.

86. State v. Blazina, 344 P.3d 680, 683–85 (Wash. 2015) (citations omitted) (pointing to a national concern over the problems associated with court-imposed fees and fines, including the "doubtful recoupment of money by the government, and inequities in administration").

87. Rivera v. Orange Cnty. Prob. Dep't, 832 F.3d 1103, 1112 & n.7 (9th Cir. 2016).

88. People v. Neal, 240 Cal. Rptr. 3d 629, 635 (Ct. App. 2018).

disqualifies people from "government benefits and professional licenses, put[s] public housing out of reach, and create[s] incentives to obtain money by illegal means."[89]

These likely consequences must be weighed against the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating that purpose.[90] The legislative purpose for imposing LFOs leans more towards helping fund court operations than punishing defendants,[91] but most unpaid LFOs are uncollectible,[92] this system is not fiscally sound,[93] and "[i]t is irrational to impose a funding burden on litigants who are unable to pay, for collection from them . . . is futile."[94] Thus, there is no rational connection between assessing LFOs on indigent defendants and the purpose of raising funds for the courts. Even if the legislative purpose were to punish or deter defendants, which is what some California courts argue, an indigent defendant does not decide not to pay; he or she does not pay because he or she cannot pay. This is not a true decision. Thus, this has no bearing on his or her responsiveness to punishment or deterrence.[95] A federal court applied *Bearden* and held that collecting debt from an indigent defendant failed this rational connection "because no person can be threatened or coerced into paying money that he

89. People v. Cowan, 260 Cal. Rptr. 3d 505, 532–33 (Ct. App. 2020) (Streeter, J., concurring) (footnotes omitted).

90. *See supra* note 65 and accompanying text.

91. Tate v. Short, 401 U.S. 395, 399 (1971) (stating that imprisonment for failure to pay a fine on indigent people "is not imposed to further any penal objective of the State" and that it "is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent"). By their nature, fees are used to recoup court costs and fund operations. *See supra* text accompanying notes 25–27.

92. *Cowan*, 260 Cal. Rptr. 3d at 540 (Streeter, J., concurring) (finding $10.581 billion in total court debt, of which $1.32 billion had been written off as uncollectible); State v. Blazina, 344 P.3d 680, 684 (Wash. 2015) ("[T]he state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs."); *see supra* notes 40–46 and accompanying text (detailing why most LFOs imposed on indigent defendants are not recovered and are counterproductive because collection costs are substantial relative to the amounts collected).

93. *See supra* notes 40–46 and accompanying text.

94. *Cowan*, 260 Cal. Rptr. 3d at 530 (Streeter, J., concurring); *see supra* notes 40–46 and accompanying text.

95. *See* Theresa Doyle, *New State Law Boosts LFO Reform, but Funding May Lag*, KING CNTY. BAR (June 1, 2018), https://www.kcba.org/For-Lawyers/Bar-Bulletin/PostId/443/new-state-law-boosts-lfo-reform-but-funding-may-lag [https://perma.cc/9386-MLQQ]; Anil Sindhwani, *Legal Financial Obligations: Debtor's Prison of the 21st Century*, GATE (Feb. 25, 2019, 11:16 AM), http://uchicagogate.com/articles/2019/2/25/legal-financial-obligations-debtors-prison-21st-century [https://perma.cc/LZ2Y-EWP2].

does not have and cannot get."[96] Thus, these assessments are not punitive in nature, serve no rational purpose, fail to further the legislative intent, and may be counterproductive.[97]

The last factor is whether there is an alternative means for funding courts and punishing defendants. In terms of funding, most court funding comes from sources other than unpayable fines, such as general revenue from taxes or LFOs imposed on those who can afford to pay them.[98] Since imposing LFOs does not adequately punish defendants, as stated above, alternative means of imposing punishment and deterring crime can be found through ATP hearings for LFO calculations commensurate to a defendant's ability to pay, mental health services, education and job training support, or community service.[99] Because the Fourteenth Amendment protects indigent defendants both from unequal treatment and from procedures that refuse to examine or account for their unequal treatment, courts are constitutionally required to examine a criminal defendant's ability to pay any LFO before imposing it.[100]

Some courts differentiate between discretionary and mandatory LFOs, with the latter requiring no individualized inquiry into a defendant's ability to pay because these courts believe that these fees have a rational basis in order to fund the ongoing cost to operate, such as DNA database fees but not attorney fees or defense costs.[101] The California courts apply *Bearden* only

96. Thomas v. Haslam, 329 F. Supp. 3d 475, 483–84 (M.D. Tenn. 2018) (entitling a determination related to indigence because collecting debt from an indigent debtor was not a rational basis for revoking a driver's license).

97. People v. Kopp, 250 Cal. Rptr. 3d 852, 893 (Ct. App.), *review granted*, 451 P.3d 776 (Cal. 2019).

98. GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, RAND CORP., WHO PAYS FOR JUSTICE?: PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE 13–14 (2014). For detailed information on funding, visit *Funding*, U.S. CTS., https://www.uscourts.gov/topics/funding [https://perma.cc/C9FC-PYSL].

99. *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983) (noting that the "State is not powerless to enforce judgments against those financially unable to pay a fine" because alternative mechanisms are available, such as community service (quoting Williams v. Illinois, 399 U.S. 235, 244 (1970); Tate v. Short, 401 U.S. 395, 399 (1991)); A.B. 416, 2019 Leg., 80th Sess. (Nev. 2019) (allowing community service in lieu of administrative assessments and fees); S.B. 1637, 2019 Leg. (Tex. 2019) (requiring deferred payment, payment plans, community service, or full or partial waivers for LFOs if a defendant is unable to pay).

100. See Turner v. Rogers, 564 U.S. 431, 447–49 (2011) for procedures which, taken together, create safeguards in the nonpayment context—including

> (1) notice to the defendant that his "ability to pay" is a critical issue . . . ; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status . . . ; and (4) an express finding by the court that the defendant has the ability to pay.

101. *See, e.g.*, State v. Mingus, 84 P.3d 658, 661–62 (Mont. 2004) (requiring ATP hearings for discretionary LFOs, but not mandatory LFOs, such as a driving-under-the-influence fine, because the

to fees and restitution due to a punitive and nonpunitive distinction,[102] but *Bearden* itself considered fines.[103] Alabama's system that requires ATP determinations for all *fines*, *restitution*, *court costs*, *or supervision fees* should be utilized because, for those unable to pay, assessments, fees, and fines all inflict additional punishment—making every form of LFO punitive in nature.[104] *Bearden* concerned the nonpayment of a fine and deemed its purpose to be punishment.[105] Likewise, when any financial obligation is imposed on an indigent defendant, it becomes punitive because it comes with many other consequences and hardships as all LFOs become "additional punishment for a criminal conviction for those unable to pay."[106] Thus, under a Due Process analysis, courts are constitutionally required to examine a criminal defendant's ability to pay *any* type of LFO before imposing it.

B. EIGHTH AMENDMENT EXCESSIVE FINES

In addition to Due Process violations, imposing LFOs before considering an indigent defendant's ability to pay violates the Eighth Amendment's Excessive Fines Clause. The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[107] The second clause in the Eighth Amendment prohibits the imposition of excessive fines and "limits the government's power to extract

legislature statutorily mandates these LFOs); State v. Blazina, 344 P.3d 680, 685 (Wash. 2015); State v. Schmitt, 385 P.3d 202 (Wash. Ct. App. 2016) (reversing the imposition of discretionary LFOs and remanding for the trial court to conduct an individualized inquiry into the defendant's current and future ability to pay). Washington courts do not require consideration of a defendant's ability to pay before imposing a Victim Penalty Assessment fee, a case filing fee, or a DNA collection fee because, unlike discretionary LFOs, the Washington legislature unequivocally requires the imposition of such fees at sentencing without regard to finding an ability to pay. State v. Shelton, 378 P.3d 230, 237–38 (Wash. Ct. App. 2016); State v. Mathers, 376 P.3d 1163, 1166–69 (Wash. Ct. App. 2016) (holding that WASH. REV. CODE § 10.01.160(3) does not require trial courts to consider a defendant's ability to pay before imposing a $500 victim penalty assessment and a $100 DNA fee if a DNA sample of the defendant has not previously been taken). In Washington, the imposition of all other LFOs is discretionary and imposition on indigent defendants is categorically prohibited. § 10.01.160(3); State v. Catling, 438 P.3d 1174 (Wash. 2019).

102. People v. Dueñas, 242 Cal. Rptr. 3d 268, 273, 277 (Ct. App. 2019); *Kopp*, 250 Cal. Rptr. 3d at 863 (requiring courts to conduct an ATP hearing before imposing *criminal justice administration fees* if a defendant requests such a hearing).

103. *Bearden*, 461 U.S. at 672.

104. *See* Snipes v. State, 521 So. 2d 89, 91 (Ala. Crim. App. 1986).

105. *Bearden*, 461 U.S. at 672.

106. *Dueñas*, 242 Cal. Rptr. 3d at 276; *see supra* Part I.

107. U.S. CONST. amend. VIII. The Fourteenth Amendment requires that this prohibition be applied to the states. U.S. CONST. amend. XIV.

payments, whether in cash or in kind, 'as *punishment* for some offense.' "[108] This prohibition applies to criminal penalties, LFOs that are partially punitive, restitution, and court operations as long as they are punitive in nature.[109] The Excessive Fines Clause is an incorporated protection that applies to the states under the Fourteenth Amendment's Due Process Clause.[110]

In the 1998 case of *United States v. Bajakajian*, the Supreme Court for the first time held that a forfeiture constituted a constitutionally "excessive" fine.[111] The Court, based on a historical analysis of the Eighth Amendment, concluded that the Excessive Fines Clause is motivated by the principle of proportionality, which looks at the severity of a punishment being grossly disproportionate to the seriousness of the offense.[112] To determine whether a fine is grossly disproportional to the underlying offense, four factors were considered: (1) the nature and extent of the underlying offense; (2) the relationship between the underlying offense and other illegal activities; (3) the possibility of other penalties being imposed for the offense; and (4) the extent of the harm caused by the offense.[113] In determining proportionality of the punishment, the Court did not limit itself to a comparison of the fine amount to the proven offense, but it also considered the particular facts of the case, the character of the defendant, and the harm caused by the offense.[114] Thus, the Court looked at the defendant's individual

108. Austin v. United States, 509 U.S. 602, 609–10 (1993) (quoting Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 265 (1989)).

109. Timbs v. Indiana, 139 S. Ct. 682, 686 (2019) (applying the prohibition on excessive fines to both criminal and civil penalties, like forfeitures); *Austin*, 509 U.S. at 610, 621–22 (applying the Excessive Fines Clause to only partially punitive penalties); People v. Cowan, 260 Cal. Rptr. 3d 505, 518 (Ct. App. 2020) (allowing a restitution fine and court operations assessments to be challenged under the Excessive Fines Clause because both attach only upon entry of a criminal conviction). Restitution is a form of punishment for an offense, so the Excessive Fines Clause applies to it, and a court must consider the amount of the loss sustained by the victim as a result of the offense, the defendant's financial resources, the financial needs and earning ability of the defendant and the defendant's dependents, and other factors the court deems appropriate. 18 U.S.C. § 3663(a)(1)(B)(i). Thus, restitution is a monetary sanction under the Excessive Fines Clause, and courts should inquire into a defendant's ability to pay. United States v. Bajakajian, 524 U.S. 321, 331–32, 331 & n.6 (1998).

110. *Timbs*, 139 S. Ct. at 687. Since this case was decided fairly recently, only four state court cases could be found that directly challenge whether fines or fees imposed on indigent defendants violate the Excessive Fines Clause. *See infra* note 137.

111. *Bajakajian*, 524 U.S. at 331 (holding that a forfeiture of cash resulting from a criminal conviction for failure to report the transportation of money overseas was a fine for Excessive Fines Clause purposes).

112. *Id.* at 334, 336–37.

113. *See* United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1122–23 (9th Cir. 2004) (enunciating the "*Bajakajian* factors").

114. *Bajakajian*, 524 U.S. at 337–41. Although *Bajakajian* did not address the ability to pay as part of its proportionality test, some courts consider the ability to pay as part of an Excessive Fines Clause

circumstances as part of the proportionality analysis.[115] Similarly, in the context of the Court's Excessive Bail Clause jurisprudence, it has been established that "the financial ability of the defendant" is a relevant consideration.[116] The Court then left a number of questions open relating to the domain of the Excessive Fines Clause, so lower courts have developed a wide range of their own versions of a *Bajakajian* "gross disproportionality" test—often characterizing it as an inherently fact-intensive inquiry.[117]

Various courts have expanded on what constitutes an Excessive Fines Clause violation and have applied *Bajakajian*'s "gross disproportionality" test. Excessive Fines Clause claims generally arise in the criminal forfeiture context.[118] The *Bajakajian* factors have been expanded to apply to fines

analysis. *See, e.g.*, United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007) ("Given the history behind the Excessive Fines Clause, it is appropriate to consider whether the forfeiture in question would deprive [the defendant] of his livelihood."); People *ex rel.* Lockyer v. R.J. Reynolds Tobacco Co., 124 P.3d 408, 421 (Cal. 2005) (considering ability to pay as part of an Excessive Fines Clause analysis).

115. *Bajakajian*, 524 U.S. at 336–40. Hence, if a punitive LFO is proportional to an offense but is still too high for an indigent defendant to pay, then this punitive LFO would violate the Eighth Amendment's Excessive Fines Clause's proportionality analysis.

116. Stack v. Boyle, 342 U.S. 1, 5 & n.3 (1951) (finding that the relevant "excessive[ness]" referent is whether the bail amount exceeds "an amount reasonably calculated to fulfill th[e] purpose" of bail).

117. *See, e.g.*, von Hofe v. United States, 492 F.3d 175, 186 (2d Cir. 2007) ("Determining the excessiveness of a civil *in rem* forfeiture is necessarily fact-intensive . . . ."); United States v. Bieri, 68 F.3d 232, 236 (8th Cir. 1995) ("[C]ourts must engage in a fact-intensive analysis under the Eighth Amendment Excessive Fines Clause . . . ."); *cf.* Amos v. Gunn, 94 So. 615, 641 (Fla. 1922) ("There being no definitely fixed rules or standards for determining what are and what are not excessive fines, each case, whether a statute prescribing fines or a judgment imposing a fine under a statute, must be adjudged on its merits . . . ."). Although the precise list of factors employed varies by circuit, a consensus has developed that the inquiry demands, at a minimum, a consideration of the factors considered by the *Bajakajian* court:

> (1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant's conduct.

United States v. Malewicka, 664 F.3d 1099, 1104 (7th Cir. 2011) (citations omitted).

118. *See, e.g.*, *$100,348.00 in U.S. Currency*, 354 F.3d at 1113–14 (ruling on a criminal forfeiture of money for an individual knowingly making false statements in connection with failure to report the international transport of cash); United States v. George, 779 F.3d 113, 122 (2d Cir. 2015) (ruling on a criminal forfeiture of a residence for its use in harboring an illegal alien); United States v. Chaplin's, Inc., 646 F.3d 846, 849–50 (11th Cir. 2011) (ruling on a criminal forfeiture of a jewelry store's inventory for its use in a money laundering operation); United States v. Cheeseman, 600 F.3d 270, 273 (3d Cir. 2010) (ruling on a criminal forfeiture of firearms and ammunition as a consequence of defendant's drug addiction); United States v. Wallace, 389 F.3d 483, 484 (5th Cir. 2004) (ruling on a criminal forfeiture of an aircraft for defendant's willful operation of an unregistered aircraft).

levied on corporations[119] and to civil penalties imposed by federal law.[120] A forfeiture of weapons used in the commission of a crime, pursuant to a Wisconsin statute, was held unconstitutional based on the *Bajakajian* factors because the forfeiture was grossly disproportionate to the maximum penalty for the crime.[121] Furthermore, the mandatory forfeiture of a public employee's retirement allowance was ruled an excessive fine because it was not proportional to the gravity of the underlying offense.[122] On the other hand, the Ninth Circuit extended the *Bajakajian* four-factor analysis to govern municipal fines and ruled that a Los Angeles parking ordinance that imposed a sixty-three dollar initial parking fine for parking beyond an allotted time limit was not grossly disproportionate but that a late-payment penalty fee at one-hundred percent of the initial fine needed to be remanded to discuss the city's justification.[123] Similarly, the Second Circuit held that a forfeiture of $1.27 million for mail fraud and conspiracy was not grossly disproportionate and that courts should consider whether a forfeiture would deprive a defendant of his or her future ability to earn a living when looking at the proportionality determination required by *Bajakajian* under the Excessive Fines Clause.[124] Lastly, the Fourth Circuit held that a forfeiture of $358,390.22 from prostitution conspiracy proceeds survived the Excessive Fines Clause under a *Bajakajian* analysis.[125]

119. *See, e.g.*, Colo. Dep't of Lab. & Emp., Div. of Workers' Comp. v. Dami Hosp., LLC, 442 P.3d 94, 96 (Colo. 2019) (holding that *Bajakajian* applies to fines levied on corporations because the Excessive Fines Clause is not limited to fines on individuals).

120. *See, e.g.*, Vasudeva v. United States, 214 F.3d 1155, 1161–62 (9th Cir. 2000) (applying *Bajakajian* to review the constitutionality of civil monetary penalties for trafficking in federal food stamps); Balice v. USDA, 203 F.3d 684, 698–99 (9th Cir. 2000) (applying *Bajakajian* to assess the constitutionality of civil fines levied pursuant to the Agricultural Marketing Agreement Act of 1937).

121. State v. Bergquist (*In re* Return of Prop.), 641 N.W.2d 179, 180, 183 (Wis. Ct. App. 2002) (affirming the lower court's application of *Bajakajian* and the lower court's finding that a statutory forfeiture was unconstitutional because it was partially a punishment and grossly disproportionate to the maximum penalty for the crime: namely, a $1,000 fine).

122. Pub. Emp. Ret. Admin. Comm'n v. Bettencourt, 47 N.E.3d 667, 678–83 (Mass. 2016) (applying *Bajakajian* and finding that the mandatory forfeiture of a former police officer's entire retirement benefits, in excess of $659,000, was an excessive fine because it was not proportional to the gravity of the underlying offense: namely, unauthorized access to a computer system).

123. Pimentel v. City of Los Angeles, 974 F.3d 917, 920, 921–22, 925 (9th Cir. 2020) (finding that a parking fine was not grossly disproportionate to the offense but remanding a late fee).

124. United States v. Viloski, 814 F.3d 104, 107, 115–16 (2d Cir. 2016) (finding that the forfeiture was not grossly disproportionate to the gravity of the offense and would not deprive the defendant of his livelihood because it equaled the sum the defendant had illegally acquired, laundered, and passed on to an accomplice and because the defendant failed to establish that the forfeiture would deprive him of his livelihood).

125. United States v. Jalaram, Inc., 599 F.3d 347, 349, 355–56 (4th Cir. 2010) (finding that the forfeiture was not excessive despite the government not identifying any victims because the crimes warranted serious punishment as they generated hundreds of thousands of dollars in illicit revenues, the criminal activity spanned several months, and the crimes charged were connected with other offenses).

Circuits are split on whether a defendant's inability to pay is a relevant consideration in the context of the Eighth Amendment. Some circuits believe that as long as a penalty is not grossly disproportionate to its associated offense, it does not violate the Eighth Amendment, so these circuits do not take into account the personal impact on a defendant.[126] However, one of these circuits also stated that proportionality between penalty and offense does not represent the entirety of the Excessive Fines Clause analysis in all cases.[127] Other circuits have not taken a personal financial hardship factor into account in their analyses.[128] On the other hand, the First Circuit has required courts to consider if the contemplated fine would be so severe as to destroy a defendant's livelihood.[129] Additionally, some state courts have held that courts must consider an offender's financial resources and the nature of the burden that the fine will impose under the Eighth Amendment.[130]

This latter reasoning more closely aligns with Congress, Eighth Amendment scholars, and the Supreme Court.[131] Congress recognized the importance of ATP determinations in achieving proportional sentences when it directed federal courts to consider a defendant's income, earning capacity,

126. *See, e.g.*, United States v. Smith, 656 F.3d 821, 825–29 (8th Cir. 2011) (rejecting the argument that a money judgement was excessive because a defendant was indigent); United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999) ("[E]xcessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender.").

127. In fact, the Eighth Circuit recognized that nonproportionality factors, such as the ability to pay, are likely to be of greater relevance in cases including fines. *See, e.g.*, United States v. Hines, 88 F.3d 661, 664 (8th Cir. 1996) ("In imposing a fine . . . [the] ability to pay becomes a critical factor.").

128. *See, e.g.*, *Pimentel*, 974 F.3d at 924–25 (declining to address whether a violator's ability to pay should be incorporated in an Excessive Fines Clause analysis because the Supreme Court declined to address it in *Bajakajian* and *Timbs*); United States v. Malewicka, 664 F.3d 1099, 1104 (7th Cir. 2011); United States v. Zakharia, 418 F. App'x 414, 422 (6th Cir. 2011); United States v. Sabhnani, 599 F.3d 215, 262 (2d Cir. 2010); Newell Recycling Co. v. U.S. EPA, 231 F.3d 204, 210 (5th Cir. 2000).

129. This line of cases begins with *United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007), and was developed further in *United States v. Levesque*, 546 F.3d 78, 83–85 (1st Cir. 2008) (remanding to the district court to determine whether a forfeiture would deprive a defendant of his livelihood).

130. *See, e.g.*, People v. Cowan, 260 Cal. Rptr. 3d 505, 518–19 (Ct. App. 2020) (holding that a sentencing trial court should not have imposed court operations and facilities assessments without allowing the defendant to present evidence and argument on the defendant's ability to pay because the assessments were "fines" for purposes of the excessive fines prohibitions); State v. Ber Lee Yang, 452 P.3d 897, 904 (Mont. 2019) (holding a fine statute unconstitutional under the Eighth Amendment since it did not allow a sentencing court to consider a defendant's financial resources). *Contra* Miller v. One 2001 Pontiac Aztek, 655 N.W.2d 12, 13 (Minn. Ct. App. 2002) (holding that a trial court should not have considered one's financial condition for a forfeiture).

131. United States v. United Mine Workers of Am., 330 U.S. 258, 304 (1947) ("[A] court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment[,] . . . consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."); Stack v. Boyle, 342 U.S. 1, 5 n.3 (1951) (finding that "the financial ability of the defendant" is a relevant consideration in Excessive Bail analysis).

financial resources, and financial burdens before imposing LFOs or restitution in federal criminal cases.[132] Eighth Amendment scholars and Supreme Court Justices state that the Excessive Fines Clause can be traced back to the Magna Carta and requires economic sanctions to be proportioned to the wrong and to not deprive defendants of their livelihood.[133] Scholars and some courts argue that at least some consideration of the real-world consequences of punishment is important to determining proportionality.[134] To do otherwise would "generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally."[135] When a court imposes the same punitive LFO, without inquiring into a defendant's ability to pay, on an indigent and non-indigent defendant, the indigent defendant is punished more harshly, which makes punitive LFOs unequal.[136] Thus, this practice

132. 18 U.S.C. § 3572(a); 18 U.S.C.S. app. § 5E1.2 (LexisNexis). Courts must consider a defendant's employment status, earning ability, financial resources, willfulness in failing to comply with a restitution order, and any other circumstances that may have a bearing on the defendant's ability to pay. 18 U.S.C. § 3613A(a)(2).

133. United States v. Bajakajian, 524 U.S. 321, 335 (1998) (finding that the Magna Carta required that "amercements (the medieval predecessors of fines) should be proportioned to the offense and that they *should not deprive a wrongdoer of his livelihood*" (emphasis added)); Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019); Miller v. Alabama, 567 U.S. 460, 469 (2012) (" ' "[P]unishment for crime should be graduated and proportioned" ' to both the offender and the offense." (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005)); S. Union Co. v. United States, 567 U.S. 343, 370 (2012) (Breyer, J., dissenting) (finding that the Magna Carta prevented the court from imposing a fine that would deprive the offender of their means of livelihood); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 289 (1989) (O'Connor, J., dissenting) (stating that after the Magna Carta, the precursors of civil fines were reduced in accordance with a party's ability to pay). For some scholarly discussions on the concept of proportionality in the punitive Eighth Amendment context, see Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 335 (2014) ("[T]he idea of saving defendants from persistent impoverishment was a guiding principle reaching back to the days of the Magna Carta and the English Bill of Rights, and enduring through the ratification of the Eighth Amendment."); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 854–72 (2013) (describing the Magna Carta in relation to the ability to pay and the Eighth Amendment).

134. *See, e.g.*, State v. Timbs, 134 N.E.3d 12, 36 (Ind. 2019); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 956 (2010); Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1, 6 (2009); Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 587 (2011).

135. *Timbs*, 134 N.E.3d at 36.

136. *Bajakajian*, 524 U.S. at 336. The Court adopted its Excessive Fines Clause test from its Cruel and Unusual Punishment Clause precedents, which focus on whether two defendants who are equally culpable receive the same punishment, whether the punishment adequately reflects the seriousness of the crime, and whether the punishment for a given offense is disproportionate to the penalties for similar offenses. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 292 (1983); Rummel v. Estelle, 445 U.S. 263, 271–72 (1980). By imposing LFOs without ATP hearings, courts are violating the first and second principles here by punishing indigent defendants more harshly. An ATP hearing would remedy this by ensuring an ability to pay or a graduated payment scale commensurate to the ability to pay.

violates the Eighth Amendment proportionality principles. This exact reasoning was adopted by the Montana Supreme Court, the Tennessee Supreme Court, a California Court of Appeals, and an Oregon Court of Appeals, which ruled a fine statute, court operations and facilities assessments, and two forfeitures to be in violation of the Eighth Amendment.[137] The defendant with the unpayable LFO suffers more collateral consequences, such as repeated court appearances to justify nonpayment, disenfranchisement, reduced resources, and job disruption, simply due to his or her inability to pay off the LFO immediately.[138] The punishment for two similar offenses becomes unequal, in violation of Eighth Amendment proportionality principles, which should consider a defendant's individual circumstances, so the only way that courts can ensure that people who commit the same crime receive the same punishment is by taking into account ability to pay during a hearing and adjusting LFOs accordingly. Thus, under the Eighth Amendment, federal precedents, and Congress's statutes, ATP hearings are constitutionally required before any punitive LFO may be imposed to avoid excessive fines.

III. OVERCOMING KEY CONCERNS

Although the prospect of reforming the use of LFOs is gaining attention and political traction,[139] some suggest ATP determinations are administratively infeasible, would result in significant revenue loss, or would not address systemic racial issues.[140] However, as the following discussion details, well-designed ATP hearing systems can be implemented to provide

137. State v. Ber Lee Yang, 452 P.3d 897, 904 (Mont. 2019) (finding a statute facially unconstitutional to the extent that it required a sentencing judge to impose a mandatory fine without ever permitting the judge to consider whether the fine was excessive based on the defendant's financial resources); Stuart v. State Dep't of Safety, 963 S.W.2d 28, 36 (Tenn. 1998) (holding that when determining the harshness of a penalty imposed under an "excessive fines analysis, courts should consider the monetary value of the property forfeited, particularly in light of the claimant's financial resources"); People v. Cowan, 260 Cal. Rptr. 3d 505, 518–19 (Ct. App. 2020) (holding that a sentencing trial court should not have imposed court operations and facilities assessments without allowing the defendant to present evidence and argument on ability to pay because the assessments were "fines" for purposes of the excessive fines prohibitions); State v. Goodenow, 282 P.3d 8, 17 (Or. Ct. App. 2012) (concluding that because of "the history of the Excessive Fines Clause and its purpose of protecting defendants' livelihoods and self-sufficiency," it was appropriate to consider both "the amount of [a] forfeiture *and the effect of the forfeiture on the defendant*" (emphasis added)). The *Goodenow* court stated that "[w]hether an otherwise proportional fine is excessive can depend on, for example, the financial resources available to a defendant, the other financial obligations of the defendant, and the effect of the fine on the defendant's ability to be self-sufficient." *Goodenow*, 282 P.3d at 17.

138. *See supra* Part I.

139. *See supra* notes 17–19 and accompanying text.

140. *See infra* notes 142–43, 166–68 and accompanying text.

reliable calculations, maintain or even improve fiscal outcomes, and alleviate racial disparities.

A. CAPTURING AND EMPLOYING VALID FINANCIAL DATA

Ability-to-pay opponents are concerned that obtaining financial information may be too difficult,[141] that defendants will inaccurately self-report financial data,[142] or that performing ability-to-pay calculations will overburden courts.[143] These apprehensions are inconsistent with existing court practices, studies on self-reporting, and data from pilot projects—all of which suggest that systems can be designed to effectively capture and employ valid financial data.

Courts already often use financial data self-reporting to assess whether a defendant qualifies for indigent defense representation, in presentence investigations, and to set bail.[144] These courts could use the same information to avoid complications created by federal restrictions on obtaining financial data through tax and bank records,[145] and this data would not require more intrusiveness into defendants' lives. While there may be some degree of inaccuracy in self-reporting, some research has shown that people who are surveyed on their income typically "provide consistent, although not necessarily perfect, estimates of their legal income."[146] Courts already rely on self-reporting data,[147] so concerns with inaccuracy are red herrings. Additionally, courts could use a verification system based on spot-checking since the value of verification is in the defendant's knowing that verification is possible.[148]

Additionally, concerns regarding hearings burdening courts are alleviated through pilot projects that show that such calculations can be

141. *See, e.g.*, Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1754–56 (2015).

142. *See, e.g.*, Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 61 (2017).

143. Reitz, *supra* note 141, at 1754.

144. Colgan, *supra* note 142, at 62.

145. *Id.*

146. Holly Nguyen & Thomas A. Loughran, *On the Reliability and Validity of Self-Reported Illegal Earnings: Implications for the Study of Criminal Achievement*, 55 CRIMINOLOGY 575, 577 (2017). The research analyzed self-reported earnings generated from data from the Pathways to Desistance Study and the National Supported Work Demonstration Project, which are two longitudinal data sets of active offenders separated by more than thirty years. *Id.* at 576. The findings were based on an analysis within and between both data sets to support the reliability and validity of self-reported illegal earnings. *Id.* Jurisdictions like Ohio have relied on self-reporting to create systems for assessing ability-to-pay economic sanctions. *See* Colgan, *supra* note 142, at 62.

147. *See supra* note 144 and accompanying text.

148. Colgan, *supra* note 142, at 64 & n.73.

efficiently completed. In these experiments, "simple forms and tables aided in the computation of adjusted daily income,"[149] and "[w]hen combined with tables setting out the penalty units for the offense of conviction,"[150] these forms made the process of setting amounts quite simple and show that calculations can be efficiently completed. Also, courts will not be burdened with extra costs since they already often use self-reporting of financial data for many determinations.[151] Thus, these arguments establish that self-reported data used in other routine court processes is likely to have high levels of accuracy and that ATP determinations can be accomplished in a straightforward manner, resulting in a reliable determination of a defendant's ability to pay.

B. MAINTAINING OR IMPROVING FISCAL OUTCOMES

In some jurisdictions, economic sanctions are a means of punishment and a source of revenue generation, so they are viewed as a necessity. Coupled with misconceptions about capturing accurate financial data and administrative inefficiencies, proponents of using LFOs for punishment and revenue generation are concerned with the fiscal effects of ATP determinations.[152] However, there are strong indications that jurisdictions are losing revenue from the expenditures necessary to collect LFOs from indigent individuals,[153] and that ATP hearings can keep stable, and perhaps even improve, revenue intake.

The comparative costs and expenditures to enforce LFOs could be significantly offset by other savings, such as costs saved from a decreased need for oversight, declines in costly punitive measures for failures to pay, and a potential reduction in costs as a result of reduced recidivism rates. A significant amount of court resources is expended on judicial administrative oversight[154] because court dockets are clogged by hearings requiring people

149. *Id.* at 64 (citations omitted). Pilot projects involving day-fines experiments, which used self-reporting, were conducted in four Oregon counties, Staten Island, and Milwaukee and showed substantial degrees of accuracy through the use of forms and tables. *See* Charles Worzella, *The Milwaukee Municipal Court Day-Fine Project*, *in* DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS 67 (Douglas C. McDonald ed., 1992); JODY FORMAN & DAVID FACTOR, INTEGRATING STRUCTURED FINES IN FOUR OREGON COUNTIES 16 (1995); Judith Greene, *The Staten Island Day-Fine Experiment*, *in* DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS, *supra*, at 13, 23–24.

150. Colgan, *supra* note 142, at 64 (citing Greene, *supra* note 149, at 23–24).

151. *See supra* note 144 and accompanying text.

152. *See* Reitz, *supra* note 141, at 1754; Colgan, *supra* note 142, at 60.

153. *See supra* notes 40–46 and accompanying text. *See generally* DILLER ET AL., *supra* note 40, at 19–22.

154. *See supra* notes 40–45 and accompanying text.

with outstanding debt to appear periodically.[155] For example, in North Carolina, a county spent more money jailing 246 nonpayment offenders than it ever recouped from them.[156] In addition to the potential for reducing these collection expenditures, ATP hearings may result in fewer expenditures on punitive measures for failure to pay. An expenditure study in New Orleans, Louisiana showed that its use of incarceration to address the inability to pay bail, fines, and fees created a $1.9 million annual deficit.[157] Additionally, civil rights litigation challenging courts that fail to adhere to ATP hearing requirements may result in significant damage awards.[158] Along with reducing punitive expenditures, ATP hearings may reduce recidivism rates, which will reduce overall social and criminal justice system costs. Studies suggest that economic sanctions promote recidivism by pushing people towards criminal activity as a means of obtaining funds to satisfy their debts.[159] Furthermore, LFOs—along with penalties for failure to pay, restrictions on driver's licenses and public benefits, and limited access to employment and housing—drain defendants and their families of necessary resources, which produces and exacerbates financial instability.[160] Thus, by ensuring that LFOs are within a defendant's ability to pay, criminal justice systems will be decreasing their comparative costs and expenditures spent

155. *See, e.g.*, CHRISTIAN HENRICHSON, STEPHEN ROBERTS, CHRIS MAI, AYESHA DELANY-BRUMSEY, MATHILDE LAISNE, CHELSEA DAVIS & ROSE WILSON, VERA INST. OF JUST., THE COSTS AND CONSEQUENCES OF BAIL, FINES AND FEES IN NEW ORLEANS 29–34 (2017).

156. CHRIS ALBIN-LACKEY, HUM. RTS. WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 53 (2014).

157. LAISNE ET AL., *supra* note 43, at 22, 24; *see also, e.g.*, Scott Dolan, *Taxpayers Lose as Maine Counties Jail Indigents Over Unpaid Fines*, PORTLAND PRESS HERALD (May 31, 2015), https://www.pressherald.com/2015/05/31/taxpayers-lose-as-maine-counties-jail-indigents-over-unpaid-fines [https://perma.cc/KHV6-X4P2] ("The total cost to taxpayers [in Cumberland County, Maine] to jail the [thirteen] individuals for a combined total of 232 days was $25,990—to recoup $10,489 in fines or restitution.").

158. *See* Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1221–27 (2017) (examining the efforts of Ferguson, Missouri's municipal government as a revenue stream and arguing that civil damages can shift the cost-benefit of crime policy decisions); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1151–56 (2016) (describing positions taken by various commentators regarding the effect of civil suits seeking damages in deterring improper governmental conduct).

159. *See* FOSTER COOK, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 11 (2014) (reporting that seventeen percent of participants admitted to criminal activity for the purpose of paying economic sanctions); Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1785 (2010) ("[S]everal respondents indicated that [monetary sanctions] encourage them to return to crime. . . . [I]t is conceivable that legal debt creates an incentive to seek illegal means to support [oneself] and, ironically, to make . . . payments, a pattern that would further increase the risk of criminal justice involvement.").

160. BANNON ET AL., *supra* note 5, at 24–25, 27–29.

on incarcerating individuals, monitoring individuals on probation, tracking down nonpayment, and recidivism costs.

Not only can ATP hearings lessen expenditures to collect LFOs from indigent individuals, but they can also result in stable, or even increased, revenue intake as LFOs become more manageable for people of limited means.[161] Individuals may believe that they cannot pay economic sanctions because then they might not be able to either afford basic necessities or reduce the principal debt due to accruing interest and collection costs.[162] They might then abandon attempts to pay according to the self-efficacy theory: a person's belief as to whether he or she can achieve a desired result has a direct impact on that person's level of effort toward achieving that result.[163] An ATP hearing would result in a manageable LFO amount, which would promote a belief that the debt is surmountable, leading to higher levels of self-efficacy and greater efforts to complete payments. This theory is supported by pilot projects that found that taking into account an individual's ability to pay resulted in improved payments.[164] These projects suggest that "revenue benefits may be obtained even without improved collections services."[165] Thus, ATP determinations can maintain and even improve revenue generation.

C. REDUCING RACIAL DISPARITIES

Some scholars are concerned that ATP determinations may be insufficient to lessen existing racial injustice and may even exacerbate it. One scholar argues that ATP hearings often happen behind closed doors or

161. *See, e.g.*, TASK FORCE ON FAIR JUST. FOR ALL, JUSTICE FOR ALL: REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON FAIR JUSTICE FOR ALL: COURT-ORDERED FINES, PENALTIES, FEES, AND PRETRIAL RELEASE POLICIES 11, 13 (2016) [hereinafter JUSTICE FOR ALL].

162. Colgan, *supra* note 142, at 65–66.

163. *See id.*; *cf.* JUSTICE FOR ALL, *supra* note 161 (stating that the imposition of sanctions when a person has no meaningful ability "to pay may promote frustration, despair, and disrespect for the justice system" and therefore lead to reductions in payment); R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1806 (2015).

164. Colgan, *supra* note 142, at 65–69 (finding that graduation according to one's ability to pay can maintain and even improve revenue generation). The day-fines pilot projects beginning in 1991 in Maricopa County, Arizona; Bridgeport, Connecticut; Polk County, Iowa; and Milwaukee, Wisconsin found that ATP determinations can result in increased payments. *See* Susan Turner & Judith Greene, *The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County*, 21 JUST. SYS. J. 1, 3–4 (1999); SUSAN TURNER & JOAN PETERSILIA, RAND, DAY FINES IN FOUR U.S. JURISDICTIONS 13, 59–60 (1996); Worzella, *supra* note 149, at 72–74.

165. Colgan, *supra* note 142, at 69.

in unmonitored courtrooms where there is no oversight or regulation.[166] As detailed below, requiring notice or the presence of counsel at these hearings would alleviate these concerns because defendants would be informed about the process with prior notice or have counsel to provide supervision over the proceeding.[167] This scholar then claims that ATP determinations require invasive inquiries into a defendant's financial resources and expenses.[168] As argued above, these ATP hearings would not require additional inquiries into defendants' backgrounds because courts already rely on self-reporting financial data for various assessments.[169] Lastly, this scholar contends that ATP hearings impose "new harms that are racially distributed based on who enters the process in the first place."[170] Although ATP determinations would not fix all racial disparities within the criminal justice system, they do lessen wealth extraction from Black communities and halt disenfranchisement based on inability to pay criminal justice debt.[171] Until the absolute abolishment of reliance on court fees to fund judicial systems and systemic change within the criminal justice system occur, ATP determinations with notice and existing court practices are currently the most effective tool to dispel racial disparities.

D. DESIGNING ABILITY-TO-PAY DETERMINATIONS

To obtain the potential benefits detailed in Part I and lessen the poverty penalty, ATP determinations must accurately capture a defendant's financial condition and include proper judicial notice or attorney representation. A defendant's financial condition can be determined through existing self-reporting court systems. When a defendant has a source of income, such as employment, public benefits, business income, dividends, retirement income, and so forth, that is unlikely to be interrupted, there is no need to speculate as to the defendant's future income.[172] Similarly, if there is strong evidence identifying a major shift in post-sentencing employment or benefits, courts should take into account such changes.[173] Both of these

166. Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 178 (2019).

167. *See infra* notes 182–87 and accompanying text.

168. Zhen, *supra* note 166, at 180, 201–02.

169. *See supra* note 144 and accompanying text.

170. Zhen, *supra* note 166, at 181; *see* Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), https://priceonomics.com/the-fining-of-black-america [https://perma.cc/FF5X-426Z] (finding a nationwide pattern of Black wealth depletion through arbitrary local fines, fees, and forfeitures by imposing excessive fines on communities with the most Black residents).

171. *See supra* note 38 and accompanying text.

172. Colgan, *supra* note 142, at 81–82.

173. *Id.* at 82.

determinations of base income will be straightforward. However, courts need to refrain from making predictions without a meaningful evidentiary basis due to remote speculation.[174]

To address situations in which a defendant is unemployed at the time of sentencing but may be employed in the future, jurisdictions could establish systems that assess the likelihood of future employment. For example, one Oregon appellate court examined whether a defendant had substantial work history and specific employment prospects.[175] Other Oregon courts will also consider the effects that incarceration can have on interrupting employment and reducing the chances of employability upon release.[176] Predicting future employment also creates the risk that economic sanctions will be unmanageable if employment does not materialize. However, lack of employment does not render a person immune from LFOs because that person may have other sources of income.[177] Even those without income may still pay through non-incarceration alternatives, such as community service or supportive services involving training or treatment.[178]

174. *See, e.g.*, Ruback, *supra* note 163, at 1805–08; United States v. Porter, 41 F.3d 68, 72 (2d Cir. 1994) (Winter, C.J., concurring) (rejecting the imposition of "amounts that cannot be repaid without Hollywood miracles"); United States v. Rogat, 924 F.2d 983, 985 (10th Cir. 1991) ("The possibility of repayment . . . cannot be based solely on chance.").

175. *See, e.g.*, State v. Dylla, 365 P.3d 662, 663 (Or. Ct. App. 2015) (upholding an ATP determination due to the defendant's eighteen-year employment as a truck driver and pending truck driver job offer). Oregon requires the government to prove that defendants can or may be able to pay attorney fees. OR. REV. STAT. ANN. § 151.505(3) (West 2021); *id.* § 161.665(4); *see also* State v. Coverstone, 320 P.3d 670, 671 (Or. Ct. App. 2014).

176. *See, e.g.*, State v. Boss, 374 P.3d 1013, 1014 (Or. Ct. App. 2016) (noting that there was no evidence presented that the defendant "would receive income during his lengthy incarceration," or that he would obtain sufficient employment to pay the fees after his release).

177. *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 244 (1970) (warning against a system in which a defendant could escape punishment because of his or her limited means); *Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income*, U.S. CTS. (Dec. 2010), https://www.id.uscourts.gov/Content_Fetcher/?ID=987 [https://perma.cc/4SXX-CQNC] (listing sources of income for establishing debtor means for bankruptcy proceedings).

178. A.B. 416, 2019 Leg., 80th Sess. (Nev. 2019) (allowing community service in lieu of administrative assessments and fees); S.B. 1637, 2019 Leg., Reg. Sess. (Tex. 2019) (requiring deferred payment, payment plans, community service, or full or partial waivers for LFOs if a defendant is unable to pay); Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 73 (1990) (explaining that in Germany, community service was used as an alternative to the day-fine for defendants who are unemployed); BANNON ET AL., *supra* note 5, at 15, 17; AM. C.L. UNION, *supra* note 44, at 79. However, imposing community service alternatives may present issues as well. *See* LUCERO HERRERA, TIA KOONSE, MELANIE SONSTENG-PERSON & NOAH ZATZ, WORK, PAY, OR GO TO JAIL: COURT-ORDERED COMMUNITY SERVICE IN LOS ANGELES 3 (2019) (arguing that community service often replicates or exacerbates the problems of legal debt through unpaid, unprotected labor); Eoin Guilfoyle, *The Potential Negative Effects of Using Community Service Orders as an Alternative to Imprisonment for Fine Defaulters*, CRIM. JUST. IN IR. (Apr. 15, 2016), https://criminaljusticeinireland.wordpress.com/2016/04/15/the-potential-negative-effects-of-using-community-service-orders-as-an-alternative-to-imprisonment-

After establishing base income, ATP hearings should account for a defendant's ability to meet basic necessities, such as housing, food, hygiene products, transportation, medical care, and obligations. A model with flat deductions dependent upon whether a defendant fell above or below the federal poverty line would account for people at the low-income levels being hit the hardest by LFOs.[179] This sort of model would be consistent with "the manner of establishing available income in other contexts, such as in setting federal financial aid, in which the government excludes income and assets for families at the lowest income levels."[180] Additionally, the hearing could take into account a defendant's other financial obligations, such as child support payments, student loans, or medical expenses. Designing a system to allow for departure from standard formulas to allow for this evidence can help balance competing governmental aims.[181] In order for ATP determinations to be useful with manageable amounts of LFOs levied against a defendant, these determinations must be made for all fines, fees, restitution, and surcharges.

ATP hearings should include prior notice. Most defendants are unaware that they must request ATP determinations,[182] so requiring a judge to provide notice that a defendant may ask for an ATP hearing when a defendant is unrepresented or having an appointed public defender represent the defendant's interests will protect the defendant, legitimize the proceedings, and allow for effective determinations.[183] The "chance that the obligation [to pay] will fall on the truly indigent is lessened where there is at least some factual determination before the obligation is imposed."[184] If defendants are

for-fine-defaulters [https://perma.cc/Q9FU-9MVT] (discussing the harms of Community Service Orders as an alternative to imprisonment for the nonpayment of a fine).

179. Colgan, *supra* note 142, at 86.

180. *Id.* (citing Danielle Douglas-Gabriel, *How Your Family Finances Factor into Financial Aid Calculations*, WASH. POST (Jan. 14, 2015), https://www.washingtonpost.com/news/get-there/wp/2015/01/14/how-your-family-finances-factor-into-financial-aid-calculations [https://perma.cc/X5WH-AB8J]).

181. *Cf.* Hamilton v. Lanning, 560 U.S. 505, 519 (2010) ("It is only in unusual cases that a court may go further and take into account other known or virtually certain information about [a] debtor's future income or expenses.").

182. State v. Albert, 899 P.2d 103, 113 (Alaska 1995) (authorizing entry of judgment for appointed counsel fees without a hearing or inquiry into the defendant's ability to pay, unless the defendant objected); State v. Hawkins, 152 P.3d 85, 89 (Kan. Ct. App. 2007), *aff'd*, 285 Kan. 842 (2008) (finding that the trial court had no obligation to sua sponte address the defendant's ability to pay); Watrous v. State, 696 So. 2d 839, 839–40 (Fla. Dist. Ct. App. 1997) (holding that the trial court need not find an ability to pay but must give the defendant the opportunity to challenge the LFO amount); *see* Anderson, *supra* note 15, at 367.

183. Anderson, *supra* note 15, at 342.

184. A number of courts have required notice and hearing, based on statute or prior court rule, prior to the imposition of LFOs. *See, e.g.*, People v. Poindexter, 258 Cal. Rptr. 680, 683–84 (Ct. App. 1989) (reversing an order when a defendant had no notice that the court would reconsider the issue of ability to

unrepresented and uninformed, judges are the only ones capable of raising and initiating ATP hearings, so one's right to due process requires the judge to provide notice.[185] When a defendant already has a public defender, the public defender's responsibility should include requesting an ATP hearing and providing evidence during this hearing and sentencing.[186] The issues of (1) whether the State must prove ability to pay or a defendant must prove inability to pay and (2) whether a defendant must affirmatively raise an ATP hearing or the court must consider it in all cases are live issues in many jurisdictions.[187] Lack of counsel can exacerbate problems that arise when courts fail to conduct ATP determinations and consider fee alternatives for indigent defendants.[188] Only after such an ability-to-pay inquiry is made may

pay); Williams v. State, 700 So. 2d 750, 751 (Fla. Dist. Ct. App. 1997) (reversing a sentencing order when a defendant had no notice that the lien could be contested and when the payment imposed was not orally announced at sentencing); People v. Bramlett, 455 N.E.2d 1092, 1094 (Ill. App. Ct. 1983) (requiring a finding with respect to a defendant's ability to pay before imposing reimbursement fees for the services of the public defender).

185. *See* Bearden v. Georgia, 461 U.S. 660, 672–73 (1983); BENCH CARD: BILOXI MUNICIPAL COURT PROCEDURES FOR LEGAL FINANCIAL OBLIGATIONS & COMMUNITY SERVICE 1 (2016); H.F. 3357, 90th Leg. (Minn. 2018) (requiring notice on traffic tickets that inform recipients of the court's ability to waive or reduce fines and fees if the recipient can demonstrate indigency or undue hardship); *see also* NAT'L TASK FORCE ON FINES, FEES, & BAIL PRACS., LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES 1 (2019), https://www.ncsc.org/__data/assets/pdf_file/0026/17396/benchcard-reformatted-3-13-19.pdf [https://perma.cc/M8K4-JNU4] (explaining the importance of affording "Adequate Notice of the Hearing to Determine Ability to Pay," and recognizing that such notice "shall include" notice of: "the hearing date and time"; "the total amount due"; "that the court will evaluate the person's ability to pay at the hearing"; "that the person should bring any documentation or information the court should consider in determining ability to pay"; "that incarceration may result only if alternative measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused"; "the right to counsel"; and "that a person unable to pay can request payment alternatives, including, but not limited to, community service and/or reduction in the amount owed").

186. This process for public defenders would likely not consume a lot of resources or time because courts already use the self-reporting of financial data as a primary source to assess whether a defendant qualifies for indigent defense representation and could therefore use this same information. *See supra* note 144 and accompanying text.

187. *See, e.g.*, People v. Kopp, 250 Cal. Rptr. 3d 852, 893 (Ct. App.) (finding that the defendant has the burden to demonstrate an inability to pay), *review granted*, 451 P.3d 776 (Cal. 2019); Williams v. People, 454 P.3d 219, 221 (Colo. 2019) (finding that the prosecution bears the burden of proving the defendant's ability to pay when a defendant introduces some evidence of his or her inability to pay); State v. Lundy, 308 P.3d 755, 760 (Wash. Ct. App. 2013) (finding that the State bears the burden of establishing that a defendant has the present or likely future ability to pay discretionary LFOs); Commonwealth v. Porter, 971 N.E.2d 291, 297–98 (Mass. 2012) (finding that the defendant bears the burden of persuasion regarding indigency, in part because "[a] criminal defendant is the party in possession of all material facts regarding her own wealth and is asserting a negative").

188. U.S. COMM'N ON C.R., *supra* note 36, at 73 ("Counsel can assist in presenting evidence regarding a defendant's ability to pay fines and fees, negotiating lower fines and fees or alternate payment plans, and making sure the defendant understands the implications of any payment commitments made.").

the court impose any LFOs.[189] Thus, judicial notice to ask for an ATP determination or having appointed legal counsel ask for the hearing should be required.

CONCLUSION

The criminal justice system, through legislation and judges in courts, employs myriad forms of unmanageable economic sanctions—fines, surcharges, fees, bail, and restitution—on people who have no meaningful ability to pay and then imposes further punishment for the failure to do so. The proper solution to imposing unpayable LFOs on indigent defendants is to require ATP determinations. These ATP determinations should occur only after a defendant is given judicial notice or else the defendant's counsel should be required to ask for a hearing. Additionally, defendants should have their legal counsel at these hearings to ensure transparency, accountability, and proper assessments.[190]

These determinations could lessen the poverty penalty, relieve racial disparities, restrict debtors' prisons, alleviate conflicts of interest, lessen recidivism rates, increase finances for many jurisdictions, benefit families with criminal justice system–involved individuals, and improve the cycle of poverty for indigent people. Ensuring that all fines and fees are reasonable, proportionate, and transparent is the only way to live up to the guarantee of due process and appropriate fines enshrined in our Constitution. In order to achieve legal debt-free justice, this country must end systemic wealth extraction from low-income communities of color. ATP hearings are one step in alleviating these issues in the juvenile and criminal justice systems that unjustly target and disproportionately harm low-income individuals.[191]

189. Jaclyn Kurin, *Indebted to Injustice: The Meaning of "Willfulness" in a* Georgia v. Bearden *Ability to Pay Hearing*, 27 GEO. MASON U. C.R. L.J. 265, 306 (2017).

190. *See supra* notes 182–87 and accompanying text.

191. Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. REV. 401, 418 (2020).