THE INTERSECTION OF RACE AND POVERTY: CHALLENGING DEBTORS' PRISONS

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The Intersection of Race and Poverty: Challenging Debtors' Prisons

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Materials:

Ending Modern-Day Debtors Prisons (ACLU webpage)
Brown v. Lexington County (ACLU case page)
Blog, Twanda Marshinda Brown: *I Was Taken From My Family and Jailed for 57 Days Because I am Poor*
Bearden v. Georgia, 461 U.S. 660 (1983)
Biloxi Advisement of Rights
Biloxi Bench Card
Lawful Collection of Legal Financial Obligations: A Bench Card for Judges (National Task Force on Fines,
Fees and Bail Practices)
ACLU: A Guide for Public Defenders
Confronting Criminal Justice Debt: A Guide to Litigation (Chap. 3 & 4) (National Consumer Law Center)

I: Modern-Day Debtors' Prisons and the Marginalization of Communities of Color (10 mins)

1) Overview of user-funded justice and the rise of monetary sanctions (5 mins)
2) History of litigation challenging modern-day debtors' prisons (5 mins)

II: The Impact of Fines and Fees on Our Clients (15 min)

1) The burden of monetary sanctions on the poor (5 mins)
2) The story of Twanda Marshinda Brown (*Brown v. Lexington County, South Carolina*) (5 mins)
3) The story of Kevin Thompson (*Thompson v. Dekalb County, Georgia*) (5 mins)

III: Changing the Game (5 mins)

1) The difference an attorney can make in the lives of poor people (2 mins)
    a. Challenging the initial imposition *and* collection of fines and fees
2) Biloxi, Mississippi: A Model for Reform (*Kennedy v. Biloxi, Mississippi*) (3 mins)

IV: The Constitution Applies When Courts Seek to Collect Fines and Fees (15 mins)

1) A Person Cannot be Imprisoned for Being Poor
    a. Equal Protection and Due Process Require a Hearing Before Jailing a Person for nonpayment of Fines or Fees
        i. *Bearden v. Georgia*, 461 U.S. 660 (1983)
2) Required Procedures: Ability-to-Pay Determination and Consideration of Alternative Sanctions,
    a. *Bearden v. Georgia*, 461 U.S. 660 (1983)
3) Recognized Alternative Sanctions: Reduction, Waiver, Installment Payments, Community Service
    a. *Bearden v. Georgia*, 461 U.S. 660 (1983)

4) Right to Counsel
    a. 6th Amendment
        i. *Argersinger v. Hamlin*, 407 U.S. 25 (1972
        ii. *Scott v. Illinois*, 440 U.S. 367 (1979)
        iii. *Alabama v. Shelton*, 535 U.S. 654 (2002)
    b. 14th Amendment
        i. *Turner v. Rogers*, 564 U.S. 431 (2011)
        ii. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)
        iii. *Bearden v. Georgia*, 461 U.S. 660 (1983)

V: What Public Defenders Can Do (15 mins)

1) Guide to Challenging Imposition of Fines and Fees
    a. Mandatory v. Discretionary Fines and Fees
2) Guide to Challenging Enforcement of Fines and Fees
    a. Defending Against Incarceration and For Reasonable Alternatives

ENDING MODERN-DAY DEBTORS' PRISONS

Nearly two centuries ago, the United States formally abolished the incarceration of people who failed to pay off debts. Yet, recent years have witnessed the rise of modern-day debtors' prisons—the arrest and jailing of poor people for failure to pay legal debts they can never hope to afford, through criminal justice procedures that violate their most basic rights.

State and local courts have increasingly attempted to supplement their funding by charging fees to people convicted of crimes, including fees for public defenders, prosecutors, court administration, jail operation, and probation supervision. And in the face of mounting budget deficits at the state and local level, courts across the country have used aggressive tactics to collect these unpaid fines and fees, including for traffic offenses and other low-level offenses. These courts have ordered the arrest and jailing of people who fall behind on their payments, without affording any hearings to determine an individual's ability to pay or offering alternatives to payment such as community service.

In response, since 2009, the ACLU and ACLU affiliates across the country have been exposing and challenging modern-day debtors' prisons, and urging governments and courts to pursue more rational and equitable approaches to criminal justice debt.

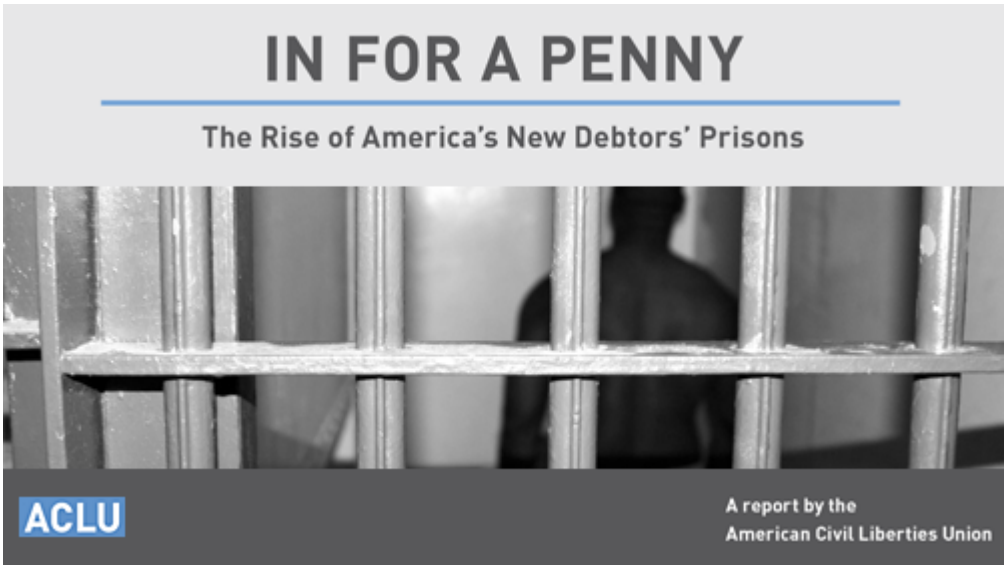
Debtors' prisons impose devastating human costs. They lead to coercive debt collection, forcing poor people to forgo the basic necessities of life in order to avoid arrest and jailing. Debtors' prisons waste taxpayer money and resources by jailing people who may never be able to pay their debts. This imposes direct costs on the government and further destabilizes the lives of poor people struggling to pay their debts and leave the criminal justice system behind. And most troubling, debtors' prisons create a racially-skewed, two-tiered system of justice in which the poor receive harsher, longer punishments for committing the same crimes as the rich, simply because they are poor.

Ultimately, debtors' prisons are not only unfair and insensible, they are also illegal. Imprisoning someone because she cannot afford to pay court-imposed fines or fees violates the Fourteenth Amendment promises of due process and equal protection under the law.

The ACLU and ACLU affiliates are uncovering how debtors' prisons across the country undermine the criminal justice system and threaten civil rights and civil liberties. We are working in state legislatures and courts, and with judicial officials to end these practices once and for all.

Updates:

ACLU Statement for U.S. Commission on Civil Rights Hearing on "Municipal Policing and Courts: A Search for Justice or a Quest for Revenue"



In for a Penny

This ACLU report presents the results of a year-long investigation into modern-day debtors' prisons in Louisiana, Michigan, Ohio, Washington, and Georgia. It shows that poor defendants are being jailed at increasingly alarming rates for failing to pay legal debts, creating a racially-skewed, two-tiered system of justice that violates the basic constitutional rights of poor people. The report documents the realities of today's debtors' prisons, and provides state and local governments and courts with recommendations for pursuing sensible and fair approaches to collecting criminal justice debt.

READ THE REPORT

On the Ground - Local Campaigns

ACLU affiliates across the country have launched campaigns exposing courts that illegally and improperly jail people too poor to pay criminal justice debt, and seeking reform through public education, advocacy, and litigation.

1. Arkansas
2. California
3. Colorado
4. Georgia
5. Louisiana
6. Maine
7. Michigan
8. Mississippi
9. Nebraska
10. New Hampshire

11. Ohio

12. South Carolina

13. Tennessee

14. Texas

15. Washington

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Brown v. Lexington County, et al [1]

Updated:

Saturday, July 22, 2017 - 9:30am

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Filed

Related Issue Areas

Mass Incarceration›Unnecessary Incarceration›Debtors' Prisons

Summary

In the latest front in the nationwide fight against debtors' prisons, on June 1, 2017, the American Civil Liberties Union filed a federal lawsuit challenging the illegal arrest and incarceration of poor people in Lexington County, South Carolina, without a hearing or representation by counsel. Victims can avoid jail only if they pay the entire amount of outstanding court fines and fees up front and in full. Indigent people who are unable to pay are incarcerated for weeks to months without ever seeing a judge, having a court hearing, or receiving help from a lawyer. The result is one of the most draconian debtors' prisons uncovered by the ACLU since 2010.

Description

In Lexington County, hundreds, if not more than a thousand, impoverished people each year are locked up simply because they cannot afford to pay fines in traffic and misdemeanor cases in the County's magistrate courts. Though poverty has increased in Lexington County since 2012—with poverty rates for Black and Latino residents at more than double the rate for white residents–the County continues to rely on revenue from fines and fees in magistrate court cases. The system now issues more than a thousand warrants each year to order the arrest and immediate incarceration of people who owe court fines and fees unless they pay the full amount of their debts before being booked in jail.

The result is a two-tiered system of justice. People who can afford to pay buy their freedom, while poor people are locked away in the Lexington County Detention Center, causing their families to suffer, their jobs to disappear, and their chances of escaping poverty to become even more remote. These debtors' prison practices trap poor people, particularly people of color, in a complicated and expensive criminal justice maze with too many ways in and no realistic ways out.

Plaintiffs Twanda Marshinda Brown and Cayeshia Johnson are victims of this unlawful system.

Brown had made five regular payments toward traffic fines and fees to the Irmo Magistrate Court when she fell behind. Sheriff's deputies came to her home on a Saturday morning and arrested her in front of her children on a warrant charging her with nonpayment of court fines and fees. Brown was incarcerated for 57 days because she could not afford to pay the entire $1,907.63 that she owed. At no point was Brown provided a court hearing on her ability to pay, informed of her right to request counsel, or appointed counsel to help defend against incarceration. In jail, Ms. Brown was separated her from her children, including her 13-year-old son, and lost her job.

Johnson was arrested at a traffic stop and jailed for 55 days because she couldn't pay $1,287.50 in fines and fees stemming from a minor car accident roughly six months earlier. Despite her efforts to get a court date that she could attend and a payment plan, the court found her guilty and sentenced her without her even being present in court. She didn't know there was a warrant for her arrest until the officer who arrested her told her so. Ms. Johnson had three part-time jobs to support her four young children, and she lost all three jobs while behind bars.

The U.S. Supreme Court ruled more than 30 years ago that locking people up merely because they cannot afford to pay court fines is contrary to American values of fairness and equality embedded in the 14th Amendment to the U.S. Constitution. The court made clear that judges cannot jail someone for failure to pay without first considering their ability to pay, efforts to acquire money, and alternatives to incarceration.

The complaint, *Brown v. Lexington County*, was filed in the U.S. District Court for the District of South Carolina. It cites violations of the U.S. Constitution's Fourth, Sixth, and 14th Amendments. The ACLU of South Carolina and Terrell Marshall Law Group PLLC are co-counsel.

Update: On July 21, 2017, an amended complaint was filed to include additional plaintiffs in the lawsuit. Ann Corder was incarcerated for 54 days because she could not afford to pay $1,320 in fines and fees to a Lexington County magistrate court for traffic tickets. Although she went to court three times on these tickets, she was never seen by a judge. Ultimately, she was required her to attend a fourth hearing, which she missed because she could not get transportation to court from her rural home. Ms. Corder was fined $1,320 in her absence. When she went to court to fight an eviction action stemming from her poverty, she was handcuffed and arrested by a deputy of the Sheriff's Department within minutes.

Raymond Wright, Jr. is a disabled man who was fined more than $600 for a traffic ticket. He painstakingly made several payments even though his only income is disability insurance. Ultimately, he could not afford to pay anymore. The court threatened him with incarceration if he did not pay the entire balance of more than $400 within ten days. Mr. Wright missed the deadline and lives in fear that he will be arrested and incarcerated by Lexington County because he is poor.

Links
[1] https://www.aclu.org/cases/brown-v-lexington-county-et-al

Published on *American Civil Liberties Union* (https://www.aclu.org)

I Was Taken From My Family and Jailed For 57 Days Because I Am Poor [1]

Author(s):

Twanda Marshinda Brown

“I don’t care if you have one, two, three, four, five, six, or seven kids.”

This is what the judge told me when I tried to explain that I was a single mom with seven kids. I could not afford to pay $100 a month toward traffic tickets. The judge threatened me with jail. I was scared.

This all started when I got two traffic tickets in March last year in Lexington County, South Carolina. I did something wrong. I drove without a tag light and on a suspended license. I wanted to go to court and make it right. But when I got there, the judge treated me like I was nothing. She sentenced me to pay more than $2400 for both tickets — more than the law allowed, my attorneys told me. I did not have the money to pay that day, so the judge decided that I had to pay $100 each month.

I knew I could not afford that. So, I explained that I could pay $50 each month. The judge wasn’t hearing it. She said, “I want my money on the twelfth.” She made clear that if I missed one payment, she would have a warrant out for my arrest.

I did everything I could to pay my traffic fines. I made five payments in a row. But then I started missing payments when I could not pay the court and support my family at the same time.

In the fall of 2016, one of my sons had to get jaw surgery. While I took care of him in the hospital for a week, I could not work. Also, my employer at the time was paying me with checks that kept bouncing, which meant I wasn’t getting paid when I should have been.

After looking for weeks, I finally found a better job. I planned to use my first pay check to get back on track to paying my fine. I was just waiting for that first check.

Then, on a Saturday morning in February, officers came to my home at around 7 a.m. My 13-year-old son came into my bedroom and told me, “The sheriff is out there.” I went to the front door and saw sheriff’s department deputies through the peephole.

I didn’t want to open the door. My kids were there. But I let the deputies in. An officer informed me that there was a warrant for my arrest. I got dressed and sent my 13-year-old to take the trash out. I didn’t want him to see me in handcuffs and taken to jail.

At the jail, officers gave me a copy of the warrant used to arrest me. It said that I needed to pay $1907.63 — the entire amount I still owed in traffic fines and fees — or serve 90 days in jail.

There was no way that I could pay. I did not want my children to go without food, electricity, and rent. And I had not yet gotten my first paycheck at my new job.

For 57 days, I was locked away in jail, away from my family. I cried every day. I prayed that my kids and grandkids would be okay. I could not be with my family when my cousin died. I could not be with them on my son's 17th birthday or on my granddaughter's first birthday. I lost my new job and the chance to get a promotion and a raise. I spent my 40th birthday in jail.

But even worse was the fear I had every day that my 13-year-old son would be taken away from me by the Department of Social Services. It made me feel sick to think that I could lose him while I was in jail because I could not afford to pay traffic fines.

Luckily my older children took on responsibility to make sure that the youngest [2] was in good care. I am so grateful I did not lose him.

Since I was released on that 57th day in jail, I have been with my family. They are the light of my life. But I lost so much while I was in jail. I have been struggling to find a job, and I have even more bills because I couldn't work in jail. It's been hard.

I did everything I could to pay my fines, and I was still locked up because I was poor. I don't think being poor should be a reason to be sent to jail, to be taken from your family. So I decided to bring a lawsuit [3] against Lexington County and the people responsible so that no one else will be forced to spend weeks away from their family because they cannot afford to pay traffic tickets.

Links
[1] https://www.aclu.org/blog/speak-freely/i-was-taken-my-family-and-jailed-57-days-because-i-am-poor
[2] https://www.aclu.org/letter/brown-v-lexington-county-et-al-birthday-letter-twanda-marshinda-brown-her-son
[3] https://www.aclu.org/cases/brown-v-lexington-county-et-al

103 S.Ct. 2064
Supreme Court of the United States

Danny R. BEARDEN, Petitioner
v.
GEORGIA.

No. 81-6633.
|
Argued Jan. 11, 1983.
|
Decided May 24, 1983.

Following revocation of probation by state trial court, probationer appealed. The Georgia Court of Appeals, 288 S.E.2d 662, 161 Ga.App. 640, affirmed. The Supreme Court, Justice O'Connor, held that sentencing court could not properly revoke defendant's probation for failure to pay a fine and make restitution absent evidence and findings that he was somehow responsible for the failure and that alternative forms of punishment would be inadequate to meet the State's interest in punishment and deterrence.

Reversed and remanded.

Justice White concurred in the judgment and filed an opinion in which Chief Justice Burger, Justice Powell, and Justice Rehnquist joined.

West Headnotes (12)

[1] Fines
Imprisonment on Nonpayment

State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay a fine.

32 Cases that cite this headnote

[2] Fines
Imprisonment on Nonpayment

State cannot impose a fine as a sentence and then automatically convert it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.

117 Cases that cite this headnote

[3] Fines
Imprisonment on Nonpayment
Sentencing and Punishment
Disposition of Offender

If probationer has wilfully refused to pay fine or restitution when he has the means to pay, state is perfectly justified in using imprisonment as a sanction to enforce collection.

47 Cases that cite this headnote

[4] Sentencing and Punishment
Violation of Probation Condition

If probationer has made all reasonable efforts to pay fine or restitution and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.

132 Cases that cite this headnote

[5] Sentencing and Punishment
Other Offender-Related Considerations

Defendant's poverty does not immunize him from punishment.

7 Cases that cite this headnote

[6] Sentencing and Punishment
Factors Related to Offender

When determining initially whether state's penological interests require imposition of a term of imprisonment, sentencing court can consider the entire background of the defendant, including his employment history and financial resources.

23 Cases that cite this headnote

[7] **Sentencing and Punishment**
Violation of Probation Condition

State's interest in insuring that restitution be paid to the victims of crime does not warrant automatic revocation of probation when probationer fails to make required restitution.

3 Cases that cite this headnote

[8] **Sentencing and Punishment**
Violation of Probation Condition

State's interest in rehabilitating probationers and protecting society does not justify automatic revocation of probation when probationer fails to make court-ordered restitution.

33 Cases that cite this headnote

[9] **Sentencing and Punishment**
Violation of Probation Condition

State's interest in punishing lawbreakers and deterring others from criminal behavior does not require it to revoke probation automatically upon failure of the probationer to pay a fine or to make court-ordered restitution.

101 Cases that cite this headnote

[10] **Sentencing and Punishment**
Violation of Probation Condition

Only if sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the state's interest in punishment and deterrence may the state imprison a probationer who has made sufficient bona fide efforts to pay a fine or restitution but who has been unable to do so.

556 Cases that cite this headnote

[11] **Sentencing and Punishment**
Violation of Probation Condition

In revoking probation for failure to pay a fine or restitution, sentencing court must inquire into the reasons for the failure to pay; if probationer wilfully refused to pay or make sufficient bona fide efforts legally to acquire the resources to pay, court may revoke probation and sentence the defendant to imprisonment; if probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, court must consider alternative measures of punishment other than imprisonment and only if the alternative measures are not adequate to meet the state's interests in punishment and deterrence may the court imprison the probationer.

584 Cases that cite this headnote

[12] **Sentencing and Punishment**
Violation of Probation Condition

Trial court's determination that probationer had disobeyed court order to pay fine and make restitution and that he was required to be imprisoned for that reason amounted to imprisonment solely because of the probationer's lack of funds to pay the fine and make restitution and was improper where court did not consider reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or of making alternative orders.

433 Cases that cite this headnote

***660 **2065** *Syllabus* [*]

Petitioner pleaded guilty in a Georgia trial court to burglary and theft by receiving ****2066** stolen property, but the court, pursuant to the Georgia First Offender's Act, did not enter a judgment of guilt and sentenced petitioner to probation on the condition that he pay a $500 fine and $250 in restitution, with $100 payable that day, $100 the next day, and the $550 balance within four months. Petitioner borrowed money and paid the first $200, but about a month later he was laid off from his

job, and, despite repeated efforts, was unable to find other work. Shortly before the $550 balance became due, he notified the probation office that his payment was going to be late. Thereafter, the State filed a petition to revoke petitioner's probation because he had not paid the balance, and the trial court, after a hearing, revoked probation, entered a conviction, and sentenced petitioner to prison. The record of the hearing disclosed that petitioner had been unable to find employment and had no assets or income. The Georgia Court of Appeals rejected petitioner's claim that imprisoning him for inability to pay the fine and make restitution violated the Equal Protection Clause of the Fourteenth Amendment. The Georgia Supreme Court denied review.

Held: A sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he was somehow responsible for the failure or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence, and hence here the trial court erred in automatically revoking petitioner's probation and turning the fine into a prison sentence without making such a determination. Pp. 2068-2074.

(a) If a State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. *Williams v. Illinois,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586; *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130. If the probationer has willfully refused to pay the fine or restitution when he has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay, the State is justified in using imprisonment as a sanction to enforce collection. But if the probationer has made all reasonable bona fide efforts to pay the fine and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing ***661** the probationer are available to meet the State's interest in punishment and deterrence. Pp. 2068-2071.

(b) The State may not use as the sole justification for imprisonment the poverty or inability of the probationer to pay the fine and to make restitution if he has demonstrated sufficient bona fide efforts to do so. Pp. 2071-2072.

(c) Only if alternative measures of punishment are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay the fine. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. P. 2072.

161 Ga.App. 640, 288 S.E.2d 662, reversed and remanded.

Attorneys and Law Firms

James H. Lohr, by appointment of the Court, 459 U.S. 819, argued the cause *pro hac vice* and filed briefs for petitioner.

George M. Weaver, Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Michael J. Bowers,* Attorney General, *Robert S. Stubbs II,* Executive Assistant Attorney General, and *Marion O. Gordon* and *John C. Walden,* Senior Assistant Attorneys General.

Opinion

Justice O'CONNOR delivered the opinion of the Court.

The question in this case is whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation ****2067** for failure to pay a fine and restitution. Its resolution involves a delicate balance between the acceptability, and indeed wisdom, of considering all relevant factors when determining an appropriate sentence for an individual and the impermissibility of imprisoning a defendant solely because of his lack of financial resources. We conclude that the ***662** trial court erred in automatically revoking probation because petitioner could not pay his fine, without determining that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist. We therefore reverse the judgment of the Georgia Court of Appeals, 161 Ga.App. 640, 288 S.E.2d 662, upholding the revocation of probation, and remand for a new sentencing determination.

I

In September 1980, petitioner was indicted for the felonies of burglary and theft by receiving stolen property. He pleaded guilty, and was sentenced on October 8, 1980. Pursuant to the Georgia First Offender's Act, Ga.Code Ann. §§ 27-2727 *et seq.* (current version at §§ 42-8-60 *et seq.* (1982 Supp.)), the trial court did not enter a judgment of guilt, but deferred further proceedings and sentenced petitioner to three years on probation for the burglary charge and a concurrent one year on probation for the theft charge. As a condition of probation, the trial court ordered petitioner to pay a $500 fine and $250 in restitution. [1] Petitioner was to pay $100 that day, $100 the next day, and the $550 balance within four months.

Petitioner borrowed money from his parents and paid the first $200. About a month later, however, petitioner was laid off from his job. Petitioner, who has only a ninth grade education and cannot read, tried repeatedly to find other ***663** work but was unable to do so. The record indicates that petitioner had no income or assets during this period.

Shortly before the balance of the fine and restitution came due in February 1981, petitioner notified the probation office he was going to be late with his payment because he could not find a job. In May 1981, the State filed a petition in the trial court to revoke petitioner's probation because he had not paid the balance. [2] After an evidentiary hearing, the trial court revoked probation for failure to pay the balance of the fine and restitution, [3] entered a conviction and sentenced petitioner to serve the remaining portion of the probationary period in prison. [4] The Georgia ****2068** Court of Appeals, relying on earlier Georgia Supreme Court cases, [5] rejected petitioner's claim that imprisoning him for inability to pay the fine violated the Equal Protection Clause of the Fourteenth Amendment. The Georgia Supreme Court denied review. Since other courts have held that revoking the probation of indigents for failure to pay fines does violate the Equal Protection ***664** Clause, [6] we granted certiorari to resolve this important issue in the administration of criminal justice. 458 U.S. 1105, 102 S.Ct. 3482, 73 L.Ed.2d 1365 (1981).

II

[1] This Court has long been sensitive to the treatment of indigents in our criminal justice system. Over a quarter-century ago, Justice Black declared that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed. 891 (1956) (plurality opinion). *Griffin*'s principle of "equal justice," which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts. See, *e.g., Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (indigent entitled to counsel on first direct appeal); *Roberts v. LaVallee,* 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) (indigent entitled to free transcript of preliminary hearing for use at trial); *Mayer v. Chicago,* 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) (indigent cannot be denied an adequate record to appeal a conviction under a fine-only statute). Most relevant to the issue here is the holding in *Williams v. Illinois,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), that a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine. *Williams* was followed and extended in *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), which held that a State cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full. But the Court has also recognized limits on the principle of protecting indigents in the criminal justice system. For example, in *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), we held that indigents ***665** had no constitutional right to appointed counsel for a discretionary appeal. In *United States v. MacCollum,* 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976) (plurality opinion), we rejected an equal protection challenge to a federal statute which permits a district court to provide an indigent with a free trial transcript only if the court certifies that the challenge to his conviction is not frivolous and the transcript is necessary to prepare his petition.

Due process and equal protection principles converge in the Court's analysis in these cases. See *Griffin v. Illinois, supra,* 351 U.S., at 17, 76 S.Ct., at 589-90. Most decisions in this area have rested on an equal protection framework,

although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. See, *e.g.,* ****2069** *Griffin v. Illinois,* 351 U.S., at 29-39, 76 S.Ct., at 595-600 (Harlan, J., dissenting); *Williams v. Illinois,* 399 U.S. 235, 259-266, 90 S.Ct. 2018, 2031-34, 26 L.Ed.2d 586 (1970) (Harlan, J., concurring). As we recognized in *Ross v. Moffitt,* 417 U.S., at 608-609, 94 S.Ct., at 2442-43, we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.

The question presented here is whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate. The parties, following the framework of *Williams* and *Tate,* have argued the question primarily in terms of equal protection, and debate vigorously whether strict scrutiny or rational basis is the appropriate standard of review. There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the Equal Protection ***666** Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine.[7] Whether analyzed in terms of equal protection or due process,[8] the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual ***667** 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 ...." *Williams v. Illinois, supra,* 399 U.S., at 260, 90 S.Ct., at 2031 (Harlan, J., concurring).

In analyzing this issue, of course, we do not write on a clean slate, for both *Williams* and *Tate* analyzed similar situations. ****2070** The reach and limits of their holdings are vital to a proper resolution of the issue here. In *Williams,* a defendant was sentenced to the maximum prison term and fine authorized under the statute. Because of his indigency he could not pay the fine. Pursuant to another statute equating a $5 fine with a day in jail, the defendant was kept in jail for 101 days beyond the maximum prison sentence to "work out" the fine. The Court struck down the practice, holding that "[o]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." 399 U.S., at 241-242, 90 S.Ct., at 2022. In *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), we faced a similar situation, except that the statutory penalty there permitted only a fine. Quoting from a concurring opinion in *Morris v. Schoonfield,* 399 U.S. 508, 509, 90 S.Ct. 2232, 2233, 26 L.Ed.2d 773 (1970), we reasoned that "the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine." 401 U.S., at 398, 91 S.Ct., at 671.

[2] The rule of *Williams* and *Tate,* then, is that the State cannot "impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Tate, supra,* at 398, 91 S.Ct., at 671. In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because ***668** he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine. As the Court made clear in *Williams,* "nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs." 399 U.S., at 242, n. 19, 90 S.Ct., at 2023, n. 19. Likewise in *Tate,* the Court "emphasize[d] that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U.S., at 400, 91 S.Ct., at 672.

[3] **[4]** This distinction, based on the reasons for non-payment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. See ALI, Model Penal Code § 302.2(1) (Proposed Official Draft 1962). Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own,[9] it is fundamentally unfair to revoke ****2071** probation automatically ***669** without considering whether adequate alternative methods of punishing the defendant are available. This lack of fault provides a "substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate." *Gagnon v. Scarpelli, supra,* 411 U.S., at 790, 93 S.Ct., at 1764.[10] Cf. *Zablocki v. Redhail,* 434 U.S. 374, 400, 98 S.Ct. 673, 688, 54 L.Ed.2d 618 (1978) (POWELL, J., concurring) (distinguishing, under both due process and equal protection analyses, persons who shirk their moral and legal obligation to pay child support from those wholly unable to pay).

[5] **[6]** The State, of course, has a fundamental interest in appropriately punishing persons-rich and poor-who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus, when determining initially ***670** whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources. See *Williams v. New York,* 337 U.S. 247, 250, and n. 15 (1949). As we said in *Williams v. Illinois,* "[a]fter having taken into consideration the wide range of factors underlying the exercise of his sentencing function, nothing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law." 399 U.S., at 243, 90 S.Ct., at 2023.

The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment. See *Williams v. Illinois,* 399 U.S., at 264, 90 S.Ct., at 2033 (HARLAN, J., concurring); *Woods v. Georgia,* 450 U.S. 261, 286-287, 101 S.Ct. 1097, 1110-11, 67 L.Ed.2d 220 (WHITE, J., dissenting). A probationer's failure to make reasonable efforts to repay his debt to society may indicate that this original determination needs reevaluation, and imprisonment may now be required to satisfy the State's interests. But a probationer who has made sufficient bona fide efforts to pay his fine and restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct ****2072** to social norms. The State nevertheless asserts three reasons why imprisonment is required to further its penal goals.

[7] First, the State argues that revoking probation furthers its interest in ensuring that restitution be paid to the victims of crime. A rule that imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution. Such a goal is fully served, however, by revoking probation only for persons who have not made sufficient bona fide efforts to pay. Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, ***671** such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.

[8] Second, the State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated. We have already indicated that a sentencing court can consider a defendant's employment history and financial resources in setting an initial punishment. Such considerations are a necessary part of evaluating the entire background of the defendant in order to tailor an appropriate sentence for the defendant and crime. But it must be remembered that the State is seeking here to use as the *sole* justification for imprisonment the poverty of a probationer who, by assumption, has demonstrated sufficient bona fide efforts to find a job and pay the fine and whom the State initially

though it unnecessary to imprison. Given the significant interest of the individual in remaining on probation, see *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. [11] This would be little more than punishing a person for his poverty.

[9] **[10]** Third, and most plausibly, the State argues that its interests in punishing the lawbreaker and deterring others from criminal behavior require it to revoke probation for failure to pay a fine or restitution. The State clearly has an interest in punishment and deterrence, but this interest can often be ***672** served fully by alternative means. As we said in *Williams,* 399 U.S., at 244, 90 S.Ct., at 2023-24, and reiterated in *Tate,* 401 U.S., at 399, 91 S.Ct., at 671, "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine." For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine. Justice Harlan appropriately observed in his concurring opinion in *Williams* that "the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment." *Ibid.,* 399 U.S., at 265, 90 S.Ct., at 2034. Indeed, given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine, see *Williams, supra,* at 244, n. 21, 90 S.Ct., at 2024, n. 21, a sentencing court can often establish a reduced fine or alternate public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence, given the defendant's diminished financial resources. ****2073** Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.

[11] We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply ***673** because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. [12]

III

We return to the facts of this case. At the parole revocation hearing, the petitioner and his wife testified about their lack of income and assets and of his repeated efforts to obtain work. While the sentencing court commented on the availability of odd jobs such as lawn-mowing, it made no finding that the petitioner had not made sufficient bona fide efforts to find work, and the record as it presently stands would not justify such a finding. This lack of findings is understandable, of course, for under the rulings of the Georgia Supreme Court [13] such an inquiry would have been irrelevant to the constitutionality of revoking probation. The State argues that the sentencing court determined that the petitioner was no longer a good probation risk. In the absence of a ***674** determination that the petitioner did not make sufficient bona fide efforts to pay or to obtain employment in order to pay, we cannot read the opinion of the sentencing court as reflecting such a finding. Instead, the court curtly rejected counsel's suggestion that the time for making the payments be extended, saying that "the fallacy in that argument" is that the petitioner has long known he had to pay the $550 and yet did not comply with the court's prior order to pay. App. 45. The court declared that "I don't know any way to enforce the prior orders of the Court but one ****2074** way," which was to sentence him to imprisonment. *Ibid.*

[12] The focus of the court's concern, then, was that the petitioner had disobeyed a prior court order to pay the fine, and for that reason must be imprisoned. But this is no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate.* By sentencing petitioner

to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.

We do not suggest by our analysis of the present record that the State may not place the petitioner in prison. If, upon remand, the Georgia courts determine that petitioner did not make sufficient bona fide efforts to pay his fine, or determine that alternate punishment is not adequate to meet the State's interests in punishment and deterrence, imprisonment would be a permissible sentence. Unless such determinations are made, however, fundamental fairness requires that the petitioner remain on probation.

IV

The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

***675** Justice WHITE, with whom The Chief Justice, Justice POWELL, and Justice REHNQUIST join, concurring in the judgment.

We deal here with the recurring situation where a person is convicted under a statute that authorizes fines or imprisonment or both, as well as probation. The defendant is then fined and placed on probation, one of the conditions of which is that he pay the fine and make restitution. In such a situation, the Court takes as a given that the state has decided that imprisonment is inappropriate because it is unnecessary to achieve its penal objectives. But that is true only if the defendant pays the fine and makes restitution and thereby suffers the financial penalty that such payment entails. Had the sentencing judge been quite sure that the defendant could not pay the fine, I cannot believe that the court would not have imposed some jail time or that either the Due Process or Equal Protection Clause of the Constitution would prevent such imposition.

Poverty does not insulate those who break the law from punishment. When probation is revoked for failure to pay a fine, I find nothing in the Constitution to prevent the trial court from revoking probation and imposing a term of imprisonment if revocation does not automatically result in the imposition of a long jail term and if the sentencing court makes a good-faith effort to impose a jail sentence that in terms of the state's sentencing objectives will be roughly equivalent to the fine and restitution that the defendant failed to pay. See *Wood v. Georgia,* 450 U.S. 261, 284-287, 101 S.Ct. 1097, 1109-1111, 67 L.Ed.2d 220 (WHITE, J., dissenting).

The Court holds, however, that if a probationer cannot pay the fine for reasons not of his own fault, the sentencing court must at least consider alternative measures of punishment other than imprisonment, and may imprison the probationer only if the alternative measures are deemed inadequate to meet the State's interests in punishment and deterrence. ***676** *Ante,* at 2073. There is no support in our cases or, in my view, the Constitution, for this novel requirement.

The Court suggests, *ante* at 2073 n. 12, that if the sentencing court rejects non-prison alternatives as "inadequate", it is "impractical" to impose a prison term roughly equivalent to the fine in terms of achieving punishment goals. Hence, I take it, that had the trial court in this case rejected non-prison alternatives, the sentence it imposed would be constitutionally impregnable. Indeed, there would be no ****2075** bounds on the length of the imprisonment that could be imposed, other than those imposed by the Eighth Amendment. But *Williams v. Illinois,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) and *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), stand for the proposition that such "automatic" conversion of a fine into a jail term is forbidden by the Equal Protection Clause, and by so holding, the Court in those cases was surely of the view that there is a way of converting a fine into a jail term that is not "automatic". In building a superstructure of procedural steps that sentencing courts must follow, the Court seems to forget its own concern about imprisoning an indigent person for failure to pay a fine.

In this case, in view of the long prison term imposed, the state court obviously did not find that the sentence was "a rational and necessary trade-off to punish the individual who possessed no accumulated assets", *Williams v. Illinois, supra,* 399 U.S., at 265, 90 S.Ct., at 2034 (Harlan, J., concurring). Accordingly, I concur in the judgment.

All Citations

461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The trial court ordered a payment of $200 restitution for the theft by receiving charge; and ordered payment of $50 in restitution and $500 fine for the burglary charge.
The other conditions of probation prohibited petitioner from leaving the jurisdiction of the court without permission, from drinking alcoholic beverages, using or possessing narcotics, or visiting places where alcoholic beverages or narcotics are sold, from keeping company with persons of bad reputation, from violating any penal law; and required him to avoid places of disreputable character, to work faithfully at suitable employment insofar as possible, and to report to the probation officer as directed and to permit the probation officer to visit him.

2 The State's petition alleged two grounds for revoking probation: petitioner's failure to pay the fine and restitution, and an alleged burglary he committed on May 10, 1981. The State abandoned the latter ground at the hearing to revoke probation, and counsel has informed us that petitioner was later acquitted of the charge. Brief for Petitioner 4, n. 1.

3 The trial court also found that petitioner violated the conditions of probation by failing to report to his probation officer as directed. Since the trial court was unauthorized under state law to revoke probation on a ground not stated in the petition, *Radcliff v. State,* 134 Ga.App. 244, 214 S.E.2d 179 (1975), the court of appeals upheld the revocation solely on the basis of petitioner's failure to pay the fine and restitution.

4 The trial court first sentenced petitioner to five years in prison, with a concurrent three-year sentence for the theft conviction. Since the record of the initial sentencing hearing failed to reveal that petitioner had been warned that a violation of probation could result in a longer prison term than the original probationary period, as required by *Stephens v. State,* 245 Ga. 835, 268 S.E.2d 330 (1980), the court reduced the prison term to the remainder of the probationary period.

5 *Hunter v. Dean,* 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281, 99 S.Ct. 712, 58 L.Ed.2d 520 (1978); *Calhoun v. Couch,* 232 Ga. 467, 207 S.E.2d 455 (1974).

6 See, *e.g., Frazier v. Jordan,* 457 F.2d 726 (CA5 1972); *In re Antazo,* 3 Cal.3d 100, 89 Cal.Rptr. 255, 473 P.2d 999 (1970); *State v. Tackett,* 52 Haw. 601, 483 P.2d 191 (1971); *State v. De Bonis,* 58 N.J. 182, 276 A.2d 137 (1971); *State ex rel. Pedersen v. Blessinger,* 56 Wis.2d 286, 201 N.W.2d 778 (1972).

7 We have previously applied considerations of procedural and substantive fairness to probation and parole revocation proceedings. In *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), where we established certain procedural requirements for parole revocation hearings, we recognized that society has an "interest in treating the parolee with basic fairness." *Id.,* at 484, 92 S.Ct., at 2602. We addressed the issue of fundamental fairness more directly in *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1972), where we held that in certain cases "fundamental fairness-the touchstone of due process-will require that the State provide at its expense counsel for indigent probationers or parolees." *Id.,* 411 U.S., at 790, 93 S.Ct., at 1763. Fundamental fairness, we determined, presumptively requires counsel when the probationer claims that "there are substantial reasons which justified or mitigated the violation and make revocation inappropriate." *Ibid.* In *Douglas v. Buder,* 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973), we found a substantive violation of due process when a state court had revoked probation with no evidence that the probationer had violated probation. Today we address whether a court can revoke probation for failure to pay a fine and restitution when there is no evidence that the petitioner was at fault in his failure to pay or that alternate means of punishment were inadequate.

8 A due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context 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," *North Carolina v. Pearce,* 395 U.S. 711, 723, 89 S.Ct. 2072, 2079, 23 L.Ed.2d 656 (1969). The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.

9 We do not suggest that, in other contexts, the probationer's lack of fault in violating a term of probation would necessarily prevent a court from revoking probation. For instance, it may indeed be reckless for a court to permit a person convicted

of driving while intoxicated to remain on probation once it becomes evident that efforts at controlling his chronic drunken driving have failed. Cf. *Powell v. Texas,* 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968); *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Ultimately, it must be remembered that the sentence was not imposed for a circumstance beyond the probationer's control "but because he had committed a crime." *Williams, supra,* 399 U.S., at 242, 90 S.Ct., at 2022. In contrast to a condition like chronic drunken driving, however, the condition at issue here-indigency-is itself no threat to the safety or welfare of society.

10 Numerous decisions by state and federal courts have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine. For example, in *United States v. Boswell,* 605 F.2d 171 (CA5 1979), the court distinguished between revoking probation where the defendant did not have the resources to pay restitution and had no way to acquire them-a revocation the court found improper-from revoking probation where the defendant had the resources to pay or had negligently or deliberately allowed them to be dissipated in a manner that resulted in his inability to pay-an entirely legitimate action by the trial court. Accord, *United States v. Wilson,* 469 F.2d 368 (CA2 1972); *United States v. Taylor,* 321 F.2d 339 (CA4 1963); *In re Antazo,* 3 Cal.3d 100, 115-117, 89 Cal.Rptr. 255, 473 P.2d 999, 1007-1009 (1970); *State v. Huggett,* 55 Haw. 632, 525 P.2d 1119 (1974); *Huggett v. State,* 83 Wis.2d 790, 266 N.W.2d 403, 408 (1978). Commentators have similarly distinguished between the permissibility of revoking probation for contumacious failure to pay a fine, and the impermissibility of revoking probation when the probationer made good-faith efforts to pay. See, *e.g.,* ABA Standards for Criminal Justice 18-7.4 and Commentary (2d ed. 1980) ("incarceration should be employed only after the court has examined the reasons for nonpayment"); ALI, Model Penal Code § 302.2 (distinguishing "contumacious" failure to pay fine from "good faith effort" to obtain funds); National Advisory Commission on Criminal Justice Standards and Goals, Corrections § 5.5 (1973); National Conference of Commissioners on Uniform State Laws, Model Sentencing and Corrections Act §§ 3-403, 3-404 (1978). See also Me.Rev.Stat.Ann., Tit. 17-A, § 1304; Ill.Rev.Stat., ch. 38, ¶ 1005-6-4(d).

11 The State emphasizes several empirical studies suggesting a correlation between poverty and crime. *E.g.,* Green, *Race, Social Status, and Criminal Arrest,* 35 Amer.Soc.Rev. 476 (1978); M. Wolfgang, R. Figlio, & T. Sellin, Delinquency in a Birth Cohort (1972).

12 As our holding makes clear, we agree with Justice WHITE that poverty does not insulate a criminal defendant from punishment or necessarily prevent revocation of his probation for inability to pay a fine. We reject as impractical, however, the approach suggested by Justice WHITE. He would require a "good-faith effort" by the sentencing court to impose a term of imprisonment that is "roughly equivalent" to the fine and restitution that the defendant failed to pay. *Post,* at 2074. Even putting to one side the question of judicial "good faith," we perceive no meaningful standard by which a sentencing or reviewing court could assess whether a given prison sentence has an equivalent sting to the original fine. Under our holding the sentencing court must focus on criteria typically considered daily by sentencing courts throughout the land in probation revocation hearings: whether the defendant has demonstrated sufficient efforts to comply with the terms of probation and whether non-imprisonment alternatives are adequate to satisfy the State's interests in punishment and deterrence. Nor is our requirement that the sentencing court consider alternative forms of punishment a "novel" requirement. In both *Williams* and *Tate,* the Court emphasized the availability of alternate forms of punishment in holding that indigents could not be subjected automatically to imprisonment.

13 See cases cited at n. 5, *supra.*

APPENDIX 1
PROPOSED REVISION TO "BILOXI MUNICIPAL COURT PROCEDURES FOR LEGAL AND FINANCIAL OBLIGATIONS AND COMMUNITY SERVICE FORM TWO)

FORM TWO

BILOXI MUNICIPAL COURT
ADVISEMENT OF RIGHTS AND OBLIGATIONS ON PAYMENTS & COMMUNITY SERVICE

If you receive a notice that you **owe money to the Court** or **did not complete community service**, you have the following legal rights:

1) You have the right to a court hearing before the court can jail you.

You can explain that you already paid.
You can explain that you owe less than the amount the Court says you owe.
You can tell the Court how much money you have.
You can tell the Court how much you pay for rent, food, or other important things.
You can ask the Court to let you pay the money later.
You can ask the Court to let you work to help the community instead of paying money.
You can ask the Court to make you pay less, or nothing at all.

You can explain that you already completed community service.
You can explain that you could not complete community service because you lack transportation, need to care for your children, or need to work for money.

2) You have the right to have a lawyer help you at the hearing.

A lawyer can help you avoid jail.
A lawyer can help you explain to the Judge that you do not have the money to pay.
A lawyer can help you explain that you could not complete community service.

3) You have the right to ask the Judge to appoint a lawyer to help you at the hearing.

The Judge will decide whether to appoint a lawyer for you.
You can ask the Judge to make you pay nothing for the lawyer appointed to help you.
If you want a lawyer, you should ask the Judge to appoint a lawyer to help you when you arrive in Court for the first time.

4) At the court hearing:

The Judge will decide whether you can pay.
The Judge will decide whether you tried to earn the money to pay.
The Judge will decide whether you could not earn money because you do not have transportation, need to care for your children, or are disabled.

If you cannot pay, the Judge will decide whether you can pay less or nothing at all, whether you can pay later, and whether you can work to help the community instead of paying.

The Judge may decide that you did not pay even though you had the money. Only then, may the Judge sentence you to jail.

The Judge will decide whether you could not complete community service because you do not have transportation, need to care for your children, or are disabled.

The Judge may decide that you did not work for the community even though you were able. Only then, may the Judge sentence you to jail.

BENCH CARD
Biloxi Municipal Court Procedures for Legal Financial Obligations & Community Service

The U.S. Constitution and Mississippi law require safeguards when collecting fines, state assessments, fees, court costs, and restitution (collectively, "legal financial obligations" or "LFOs").[1] All Biloxi Municipal Court ("BMC") Judges shall abide by the procedures described below.

RIGHT TO COUNSEL

FIRST APPEARANCE:

When a person is brought before the Biloxi Municipal Court, and charged with a misdemeanor, the Court shall provide the defendant an opportunity to sign an **Affidavit of Indigence** stating that he or she is indigent and unable to employ counsel.[2]

It is a best practice for the Court to assign a public defender or court staff to help the defendant complete the Affidavit of Indigence.

The court shall use the **Affidavit of Indigence**, and any other relevant factors, to evaluate whether the defendant is entitled to counsel.

The court may appoint counsel to represent an indigent defendant charged with a misdemeanor punishable by confinement.[3]

When the court determines that representation is required at the plea, trial, sentencing, or post-sentencing stage of the proceedings, it must appoint counsel to represent an indigent defendant, unless there is a knowing, voluntary, and intelligent waiver of the right to counsel.[4]

SENTENCING:

A defendant is entitled to the assistance of counsel ***before*** being sentenced to incarceration or probation for the collection of a fine, fee, court cost, state assessment, or restitution, unless there is a knowing, voluntary and intelligent waiver of the right to counsel.[5]

If the Court contemplates imposing incarceration or probation on an unrepresented defendant, or wishes to preserve its right to impose a jail sentence or probation in the future, the Court must conduct an indigence determination by using the **Affidavit of Indigence**, and considering any other relevant factors, to evaluate whether the defendant is entitled to court-appointed counsel at no cost.

COMPLIANCE HEARING:

The court must inform every person charged with failure to pay an LFO of:

(1) all defendants' right to representation by legal counsel in any proceeding concerning nonpayment;
(2) indigent defendants' right to court-appointed representation at no cost when facing possible incarceration for failure to pay LFOs.

The Court must appoint counsel to represent indigent people who face the possibility of incarceration due to nonpayment of an LFO, including in Compliance Hearings and Probation Revocation Hearings, unless there is a knowing, voluntary, and intelligent waiver of that right.

WAIVER OF RIGHT TO COUNSEL:

The Court **may not** accept a written or oral waiver of any right to court-appointed counsel without FIRST informing the defendant of the nature of the charges, of the defendant's right to be counseled regarding her/his plea, and the range of possible punishments, and ensuring that any waiver is knowing, intelligent, and voluntary.

If a defendant/probationer seeks to waive his or her right to counsel, the court must conduct a colloquy on the right to inform the defendant:

(1) **that the indigent defendant has a right to a court- appointed attorney or public defender <u>at no cost</u>**;

(2) **that any fee normally charged for representation by a court-appointed attorney <u>shall be waived</u>** for indigent defendants; and

(3) the nature of the charges against the defendant, of defendants' right to be counseled regarding his or her plea, and the range of possible punishments.

BENCH CARD
Biloxi Municipal Court Procedures for Legal Financial Obligations & Community Service

IMPOSITION AND COLLECTION OF LFOs

SENTENCING:

The Court shall assess ability to pay when setting the amount of any fine, fee, court cost, or restitution.[6] The Court should consider:

(1) the defendant's financial resources and income;
(2) the defendant's financial obligations and dependents;
(3) the defendant's efforts and ability to find and engage in paid work, including any limitations due to disability or residence in a mental health facility;
(4) outstanding LFO obligations in other cases or to other courts;
(5) the length of the defendant's probation sentence, if any;
(6) the goals of deterrence, retribution, and rehabilitation;
(7) the Affidavit of Indigence; and
(8) any other factor or evidence that the Court deems appropriate.

The Court shall also consider the ability to perform community service when setting any community service requirements.

Fines, Fees, Court Costs, and Restitution:

If the defendant is unable to pay, the Court should consider:

(1) Reduction of the amount of fines, fees, court costs, and restitution imposed;
(2) Waiver or Suspension of the fines, fees, court costs and restitution imposed;
(3) Community Service credit toward the discharge of fines, fees, court costs, or restitution owed to Biloxi. Biloxi Municipal Court Judges shall not impose a fee for those who participate in community service. Biloxi Municipal Court Judges will attempt to provide sufficient variety of opportunities for community service to accommodate individuals who have physical or mental limitations, who lack private transportation, who are responsible for caring for children or family members, or who are gainfully employed;
(4) Extension of the amount of time for payment of the fines, restitution, fees, and court costs imposed;
(5) Completion of approved educational programs, job skills training, counseling and mental health services, and drug treatment programs as an alternative to, or in addition to, community service; and
(6) Other disposition deemed just and appropriate, in the discretion of the Court, pursuant to applicable law.

Mandatory State Assessments:

If the defendant is unable to pay, the Court should consider:

(1) extending the defendant's time to pay;
(2) requiring the defendant to perform community service to satisfy the state assessment fees;
(3) requiring the completion of approved educational programs, job skills training, counseling and mental health services, and drug treatment programs as an alternative to, or in addition to, community service; and
(4) imposing any other disposition deemed just and appropriate, in the discretion of the Court, pursuant to applicable law.

The Court may not reduce or suspend any mandatory state assessments, including those imposed under Miss. Code Ann. § 99-19-73.

Jail: The Court's decision to sentence a defendant to jail shall NOT solely be based on any finding that the defendant is unable to pay a fine, state assessment, court costs, fee, or restitution.

After setting the amount of any LFOs, and Community Service, and Program Requirements the Court shall:

(1) Determine whether the defendant can pay LFOs in full, or needs additional time;
(2) Set the terms of a Payment Plan by which LFO payments shall be made to the BMC Clerk, if the defendant cannot pay in full on sentencing day;
(3) Set forth the sentence in a written order indicating the final date for payment of LFOs and performance of community service, any Payment Plan terms and the total amount of (1) fines, (2) restitution, (2) fees and costs, and (3) state assessments;
(4) Provide the defendant the **Advisement of Rights Regarding Payments and Community Service** and the **Notice of Change of Address** form.

REPORT OF NONPAYMENT:

Warrants: The court shall not issue any warrant directing arrest for alleged LFO nonpayment absent a Compliance Hearing as described below.

The Court shall hold a Compliance Hearing for defendants who are sentenced to LFOs, community service and/or training, treatment, counseling and mental health programs and who are alleged to have failed to meet the requirements of the Court's sentence.

The Court shall provide at least 21-days notice of a Compliance Hearing through use of the **Biloxi Municipal Court Order Setting Compliance Hearing**. The Court shall also provide the **Advisement of Rights Regarding Payments and Community Service**, and the **Notice of Change of Address** form when providing notice of a Compliance Hearing.

BENCH CARD
Biloxi Municipal Court Procedures for Legal Financial Obligations & Community Service

IMPOSITION AND COLLECTION OF LFOs (continued)

COMPLIANCE HEARING:

Compliance Hearings will be audio recorded. In the event audio recording equipment is temporarily not working, the Court shall ensure that the case record includes: 1) the evidence submitted by the defendant, and 2) written documentation of the Court's findings, supporting evidence, and colloquy concerning ability to pay, efforts to secure resources, alternatives to incarceration, and the right to counsel.

Hearing Procedures and Standards

The Court must advise defendants of:

(1) all defendants' right to an ability-to-pay hearing prior to jailing for nonpayment of fines, fees, state assessments, court costs, or restitution;
(2) all defendants' right to be represented by legal counsel for defense against possible incarceration for failure to pay LFOs;
(3) indigent defendants' right to court-appointed counsel at no cost to defend against possible incarceration in proceedings concerning nonpayment of LFOs;
(4) that ability to pay, efforts to secure resources, and alternatives to incarceration are critical issues in a Compliance Hearing;
(5) the type of information relevant to determining ability to pay; and
(6) the potential penalties if a person is found to have willfully failed to pay an LFO.

The Court must provide defendants an opportunity to present evidence that the amount allegedly owed is not accurate or not in fact owed if the defendant believes the amount is not correct.

As part of determining whether the failure to pay was willful and whether incarceration can be imposed, the Court shall:

1. **Inquire into, and make a determination on, ability to pay LFOs**, by considering the totality of the circumstances, including the defendant's income, assets, debts, other LFO obligations, and any other information the Court deems appropriate. The Court shall use the **Affidavit of Indigence** to conduct this inquiry.

   The Court shall find that a defendant is unable to pay LFOs when, in consideration of the totality of the circumstances, it finds that the payment of LFOs would impose substantial hardship on the defendant or the defendant's dependents, including children and elderly parents. The Court shall make a rebuttable presumption that a person is unable to pay LFOs when:

   a. the defendant's annual income is at or below 125% of the federal poverty level for his or her household size according to the current Federal Poverty Level ("FPL") chart;
   b. the defendant is homeless;
   c. the defendant is incarcerated; and/or
   d. the defendant resides in a mental health facility.

2. **Inquire into, and make a determination on, the reasonableness of a defendant's efforts to acquire resources to pay LFOs.**

   The Court shall take into account efforts to earn money, secure employment and borrow money, as well as any limitations on the defendant's ability to engage in such efforts due to homelessness, health and mental health issues, temporary and permanent disabilities, limited access to public transportation, limitations on driving privileges, and other relevant factors.

3. If the Court determines that a defendant is unable to pay, **the Court will consider and make a determination on the adequacy of alternatives to incarceration for nonpayment of fines or restitution**, including:

   a. Reduction of the amount of fines, fees, court costs, and restitution imposed;
   b. Waiver or Suspension of the fines, restitution, fees, and court costs imposed;
   c. Community Service credit toward the discharge of fines, fees, state assessments, court costs, or restitution owed to Biloxi. Biloxi Municipal Court Judges shall not impose a fee for those who participate in community service. Biloxi Municipal Court Judges will attempt to provide sufficient variety of opportunities for community service to accommodate individuals who have physical or mental limitations, who lack private transportation, who are responsible for caring for children or family members, or who are gainfully employed;
   d. Extension of the amount of time for payment of the fines, restitution, fees, state assessments, and court costs imposed;
   e. Completion of approved educational programs, job skills training, counseling and mental health services, and drug treatment programs as an alternative to, or in addition to, community service; and
   f. Imposing other disposition deemed just and appropriate, in the discretion of the Court, pursuant to applicable law.

Judges shall be guided by the Supreme Court's recognition that the government's "interest in punishment and deterrence can often be served fully by alternative means" to incarceration.[7]

The Court will document its actions and findings and evidence in the record supporting its findings.

BENCH CARD
Biloxi Municipal Court Procedures for Legal Financial Obligations & Community Service

IMPOSITION AND COLLECTION OF LFOs (continued)

IMPOSING JAIL FOR FAILURE TO PAY

The Court may impose incarceration following a Compliance Hearing if it makes one of the following findings, supported by evidence:

(1) a defendant has willfully refused to pay the fine, fee, court cost, state assessment, or restitution when she/he has the means to pay;
(2) a defendant has failed to make sufficient bona fide efforts to seek employment, borrow money, or otherwise secure resources in order to pay the fine; or
(3) the defendant is unable to pay, despite making sufficient efforts to acquire the resources to pay, and alternative methods for achieving punishment or deterrence are not adequate.[8]

THIRD PARTY COLLECTIONS

The Court may send a case to collections by a third-party contractor if a defendant has failed to make LFO payments in accordance with a Payment Plan and the Court has determined, after holding a Compliance Hearing in accordance with the procedures described herein, that:

(1) the defendant has the ability to pay, but has refused to pay the LFO(s) owed; or

(2) the defendant is unable to pay the LFO, but has failed to make sufficient bona fide efforts to seek employment, borrow money, or otherwise secure the resources in order to pay a fine, fee, court cost, state assessment, or restitution.

In any civil execution, attachment, and/or wage garnishment proceeding to collect unpaid LFOs, the defendant is entitled to the exemptions and exclusions found in Miss. Code Ann. § 85-3-1.

Collecting Fines, Fees, State Assessments, Court Costs, and Restitution

Permitted Methods of Collection	Impermissible Methods of Collection
• Voluntary Payment • Payment Plan Administered by Court • Community Service (except restitution owed to a party other than Biloxi) • Execution of Civil Judgment • Collection by Third Party Contractors following Compliance Hearing and Court determination as described above.	• Imposing Jail at Sentencing • Issuance of Failure-to-Pay Warrants Upon Report of Nonpayment • Forfeiture of Confiscated Money • Imposing "pay or stay" sentence

[1] *Bearden v. Georgia*, 461 U.S. 670, 672 (1983) ("If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court *must* consider alternative measures to punishment other than imprisonment.") (*Emphasis added*); Miss. Code Ann. §§ 21-23-7; 25-32-9; 63-1-53; 99-15-26; 99-37-11.
[2] Miss. Code Ann. § 25-32-9.
[3] Miss. Code Ann. §§ 21-23-7; 25-32-9
[4] Miss. Code Ann. § 25-32-9.
[5] *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).
[6] *Bearden v. Georgia*, 461 U.S. 660, 669–70 (1983) ("[W]hen determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.").
[7] *Bearden v. Georgia*, 461 U.S. 670, 671–72 (1983).
[8] *Id.* at 668–69.

A Guide for Public Defenders:
Defending Indigent Clients From
the Imposition and Collection of Fines and Fees

Use this guide in conjunction with the
LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES of the National Task Force on Fines, Fees, and Bail Practices.
http://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx.

PREPARATION

- Research applicable law to determine the monetary penalties that may be assessed against client.
- Have that law with you when you go to court to represent your client.
- Determine which monetary penalties are mandatory and which ones are discretionary.

CLIENT COUNSELING

- Explain the minimum and maximum potential monetary sanctions to your client.
- Take care to explain the different types of penalties – fines, costs, fees, surcharges, assessments and restitution.
- Have a candid discussion with your client about the individual's ability to pay.
- Note that during an initial conversation, your client may be overly optimistic about what they can actually afford.
- It is critical that you advise your client about monetary penalties and assess ability to pay before your client's pleads guilty or appears in court for a sentencing proceeding.

SENTENCING

- Explain your client's inability to pay and advocate for reduction, waiver, and other alternatives for discretionary monetary penalties your client cannot afford to pay.
- Advocate for permissible alternatives to mandatory penalties your client cannot afford to pay. Depending on applicable law, you may advocate for a reasonable payment plan or reasonable community service in lieu of payment of mandatory fees, surcharges, costs and assessments.

THE RIGHT TO AN ABILITY-TO-PAY HEARING

It is *unconstitutional* to jail someone for nonpayment of fines and fees without first determining that the individual was able to pay and that nonpayment was "willful". *See Bearden v. Georgia*, 461 U.S. 600, 667-69 (1983).

Courts should NOT issue arrest warrants against defendants reported for nonpayment.

They should issue an order, summons, or notice for appearance in court to explain any failure to pay.

If the court affords proper notice of the hearing date and time, and the person does not appear as directed, only then may the court may issue a warrant directing arrest for failure to appear.

Any detention should be brief and solely for the purpose of bringing the individual before the court

THE ABILITY-TO-PAY HEARING

The court is required to consider the defendant's ability to pay, the reasons for nonpayment, and alternatives to incarceration. It is also required to make FINDINGS to support any determination that a person failed to pay and should be incarcerated as a result.

You can and should advocate for your client during this part of the proceeding.
Help the court understand your client's financial situation and obligations.
The court may ask the client questions, and the client should be prepared to answer them.

ADVOCATE FOR THE COURT TO CONSIDER <u>AT LEAST</u> EACH FACTOR ENDORSED BY THE NATIONAL TASK FORCE ON FINES, FEES, AND BAIL PRACTICES:

- Income: Does the person earn 125% of the Federal Poverty Line or lower?
- Receipt of needs-based, means-tested public assistance, including but not limited to TANF, SSI, SSDI, or veteran's disability benefits (such benefits are NOT subject to attachment, garnishment, execution, levy or other legal process)
- Financial resources, assets, obligations, and dependents
- Whether a person is homeless, incarcerated, or resides in a mental health facility
- Need to cover basic living expenses
- Demonstrated efforts to acquire resources
- Other fines and fees owed to the court or other courts
- Whether payment of fines and fees would result in "manifest hardship" to the person or their dependents;
- Permanent or temporary limitations to secure paid work
- Additional fines and fees owed to other courts or in other cases
- Other special circumstances

ALTERNATIVES TO JAIL AND PAYMENT

A court is **<u>required</u>** to consider statutory alternatives to imprisonment for indigent people who are financially unable to pay a court-ordered financial obligation.

Alternatives include:

- Reduction of amount due to an amount that can be paid in full that day
- Extension of time to pay
- Payment plan
- Revocation of the amount due
- Community service or completion of relevant court-approved program (i.e., education, job training, drug treatment, etc.), **<u>as long as</u>** the number of hours are reduced to an amount the person can complete in light of employment responsibilities, childcare needs, disability, lack of access to transportation, and any other limits

See Bearden, 461 U.S. 660 (1983).

YOU SHOULD ADVOCATE <u>FOR</u>

- the court to assess ability to pay at sentencing **<u>before</u>** imposing any fines and fees;
- the court to provide a statement of fines and fees owed, deadlines, payment plan terms, and procedures for informing the court of mailing address changes.

YOU SHOULD ADVOCATE <u>AGAINST</u>

- the imposition of probation solely to collect fines and fees that a defendant cannot afford to pay in full on sentencing day;
- the imposition of any fees for probation supervision or payment alternatives on people who cannot pay on sentencing day.

YOU SHOULD Inform your client to tell you if she has difficulty meeting a payment obligation, and to request a compliance hearing with the court.

CONFRONTING CRIMINAL JUSTICE DEBT

A GUIDE FOR LITIGATION

September 2016

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ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

ABOUT THIS PROJECT

This report is part of *Confronting Criminal Justice Debt: A Comprehensive Project for Reform*, a collaborative project by Criminal Justice Policy Program (CJPP) at Harvard Law School and the National Consumer Law Center (NCLC).

This project includes three parts designed to assist attorneys and advocates working on reform of criminal justice debt:

- *Confronting Criminal Justice Debt: The Urgent Need for Comprehensive Reform* (CJPP and NCLC),
- *Confronting Criminal Justice Debt: A Guide for Litigation* (NCLC), and
- *Confronting Criminal Justice Debt: A Guide for Policy Reform* (CJPP).

For more information, please visit:

Criminal Justice Policy Program at Harvard Law School at: **http://cjpp.law.harvard.edu**
National Consumer Law Center at: **http://www.nclc.org/issues/criminal-justice.html**

CONFRONTING CRIMINAL JUSTICE DEBT

A GUIDE FOR LITIGATION

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for their poverty, either by (1) imprisoning them simply because they cannot afford to pay or (2) irrationally denying them civil protections that they would otherwise have against private debt collection efforts. In addressing constitutional and statutory questions raised by court fines and fees, these basic principles are too often forgotten. In this document, they run throughout the legal analysis.

3. DEFENDING AGAINST IMPOSITION OF CRIMINAL JUSTICE DEBT: REPRESENTATION DURING A CRIMINAL OR CIVIL PROCEEDING THAT MIGHT RESULT IN CRIMINAL JUSTICE DEBT

3.1. Introduction

The best and most effective way to avoid the adverse consequences of criminal justice debt is to prevent its imposition in the first place. Accordingly, this chapter addresses legal issues and strategies related to defending against the imposition of criminal justice debt.

While criminal justice debt can be imposed in a number of ways depending upon the court and type of debt, it often is imposed at sentencing in criminal cases. Often, counsel's paramount concern is limiting or preventing incarceration. This too, is likely the defendant's main concern—and with good reason: protection of liberty is undoubtedly the fundamental goal in criminal defense. But as the Supreme Court has recently emphasized, incarceration is not the only issue at stake when a person faces criminal prosecution.[81] Rather, other substantial and indeed life altering consequences can flow from the criminal process, affecting an individual's social standing and wellbeing for years to come. Thus, protecting a client's *liberty*—in the truest and broadest sense of that word—often requires that counsel bear in mind the fines, fees, and surcharges that could be imposed on criminal defendants at sentencing and at other stages in the proceedings.

Far from being minor or ancillary consequences of an individual's encounter with the criminal justice system, criminal justice debts can create devastating consequences, in many cases long after the defendant has been released from jail or prison. As discussed in the introduction and Section 4.1, nonpayment of criminal justice debts may result in incarceration in many jurisdictions. Payment of criminal justice debt obligations may

[81] *Cf.* Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) (holding that effective assistance of counsel under the Sixth Amendment requires a defense attorney to be mindful of—and advise her client about—the impact that at least certain "collateral consequences" of a criminal conviction, such as deportation, can have on the defendant).

also be treated as a condition of a sentence or of probation, and may thus result in extended periods of supervision and monitoring until the debts are repaid or incarceration for failure to pay.[82] Outstanding criminal justice debts can also lead to a person's repeated arrest on debt-related warrants and detention in jail while awaiting a hearing to explain the reasons for failing to pay—both of which, in addition to being psychologically traumatic, can frustrate employment and other efforts to recover from financial setback. And individuals with outstanding criminal justice debt may be required to appear at regular review hearings, which not only entail expenditures related to transportation and childcare, but could also interfere with work and family obligations—once again perversely impacting wages and financial security for the individual or other members of the family. The government's attempts to enforce criminal justice debts may also result in wage garnishment and other collection actions, aggressive or problematic interactions with debt collection agencies, suspension of drivers' licenses, and credit reporting consequences.

Beyond these various consequences, it also bears emphasis that the debt itself can get larger and more financially burdensome over time, due to mandatory interest, penalties for late or nonpayment, or other collection costs that accrue from the date of judgment or missed payment.[83] In some jurisdictions, interest may accrue during any prison or jail term that a defendant serves—a time when a person who is indigent will have little or nothing to contribute toward repayment.[84] As a result, individuals may come out of jail or prison with significantly higher debts than they had at sentencing.[85] And while

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[82] *See, e.g.*, American Civil Liberties Union of Washington & Columbia Legal Services, Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor 4 (Feb. 2014) *available at* https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor's%20Prison%20Final%20%283%29.pdf (describing ACLU and CLS attorney observations that courts in Washington State "order incarceration for non-payment" even in cases where criminal justice debtors were "homeless, unemployed, or had mental health issues that prevented them from gaining employment"); Human Rights Watch, Profiting from Probation 25–27 (2014) (describing "pay only probation" where defendants are sentenced to probation solely because they cannot afford to pay an underlying fine and are charged monthly probation fees that may make it more difficult to pay court debt and extend the probation sentence).

[83] *See* Alaska Stat. § 12.55.051(d); Ariz. Rev. Stat. Ann. § 13-805; Or. Rev. Stat. § 137.183; Va. Code Ann. § 19.2-353.5; Wash. Rev. Code § 10.82.090.

[84] *Cf.* Peter Wagner, *The Prisoner Index: Taking the Pulse of the Crime Control Industry*, Prison Policy Initiative (Apr. 2003), *available at* http://www.prisonpolicy.org/prisonindex/prisonlabor.html (minimum wages for state prisoners, in dollars per day for non-industry work, average $0.93; maximum wages paid to prisoners by the state averages $4.73 per day).

[85] *See*, e.g., Roopal Patel and Meghna Philip, Brennan Center for Justice, Criminal Justice Debt: A Toolkit for Action 17 (2012), *available at* https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf (describing woman whose criminal justice debt increased from $36,000 to over $100,000 by the time of her release from prison due to interest accrued while she was incarcerated and unable to pay).

it is possible to try to defend against the collection of criminal justice debts "on the back end," at the time when payment comes due (as discussed in Section 4), the ability to obtain relief from criminal justice debts may often be limited. Accordingly, as is true with debts and liabilities more generally, avoiding imposition at the outset is the first—and best—defense.

Unfortunately, until recently, criminal justice debt issues often received little attention in the sentencing process. But this has started to change. As criminal justice debt practices, their consequences, and their negative impact on poor defendants have become more salient across the country, there has been growing recognition among criminal defense attorneys that zealous advocacy requires defending not only against the criminal charges and possible incarceration, but also against the imposition of fines and fees. This is particularly true for public defenders, whose clients often have little or no means to pay these debts.

As a matter of both legal advocacy and sentencing strategy, the challenges facing counsel when attempting to forestall or minimize criminal justice debt at the imposition stage often remain difficult. Unlike the enforcement stage, where the Supreme Court has set some universal parameters through cases like *Bearden*,[86] there is less constitutional guidance at the imposition stage, and thus less uniformity between legal frameworks. That being said, local case law and statutes often address criminal justice debt issues at the imposition phase—albeit with a good degree of variability among jurisdictions. Thus, an important first step for defense counsel is to become aware of their local statutes and court decisions on imposition of criminal justice debts.

This section is not meant to provide an exhaustive or comprehensive survey of the law across jurisdictions, or of the various scenarios that may arise concerning criminal justice debt imposition. Rather, its goal is to provide a general overview of some of the main issues and concepts that defense counsel may face at sentencing or other proceedings where criminal justice debts may be imposed, in order to highlight some steps defense counsel may want to take to limit—or, ideally, altogether prevent—their clients from receiving criminal justice debts in the first place.

The Section begins (in Section 3.2) by describing the difference between two key types of criminal justice debts: mandatory debts and non-mandatory debts. It then provides (in Section 3.3) an overview of various legal frameworks underlying one key tool for avoiding or limiting criminal justice debt at the imposition stage: the ability-to-pay inquiry. Section 3.4 then offers guidance on how to navigate some of the legal and strategic complexities of ability-to-pay advocacy. Next, Sections 3.5 and 3.6 discuss alternative tools—and pitfalls—for avoiding or limiting debt imposition through strategic

[86] Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). *See* § 2.2, *supra*.

plea bargaining and through the substitution of community service for direct financial obligations. Finally, Section 3.7 offers advice regarding communicating with clients about criminal justice debt imposition issues, and Section 3.8 includes a quick-reference checklist and illustration to help guide attorneys in defending against imposition of criminal justice debt.

3.2. Identifying Relevant Types of Criminal Justice Debt

3.2.1. Overview

Before determining how the law applies to certain debts, defense counsel should become familiar with the different types of debts that can be imposed within their jurisdiction or on a particular defendant. Different types of obligations are imposed for different reasons, and governing statutes or cases may only apply to a certain category of debt. For example, the State of Washington requires courts to conduct an ability-to-pay inquiry prior to imposing *costs*.[87] A court recently held, however, that this procedural protection does not apply to the imposition of *fines*.[88]

The general categories and subcategories of criminal justice debt are listed in the introduction to this report (see Section 1.1). Not all criminal justice debts, however, fit neatly into one of these categories, nor are the terms themselves uniformly applicable terms of art across jurisdictions. Rather, each jurisdiction may use different terminology to describe the various criminal justice debt obligations that are locally applicable, using terms such as "fees," "assessments," or "penalties" in potentially different ways than those terms might be employed elsewhere. As a result, it can sometimes be difficult to distinguish between the different types of obligations at play in a given jurisdiction, although occasionally a statute will specifically define the obligations to which it applies. To advocate effectively regarding criminal justice debt imposition, counsel must first understand the various *categories* of debt that exist in the local jurisdiction, in order to ascertain how those categories map onto the governing legal rules and frameworks. Note that imposition of restitution, which generally requires a defendant to compensate a private party victimized by his crime, raises a distinct set of issues and is not addressed in this guide.

A more general distinction exists between *mandatory* and *non-mandatory* debts, and a lawyer's approach to representation can differ significantly between the two. The next two sections discuss these two categories.

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[87] State v. Blazina, 344 P.3d 680 (Wash. 2015).

[88] *See* State v. Clark, 362 P.3d 309 (Wash. Ct. App. 2015) (holding that fine was not a cost subject to statutory requirement that a court inquire into defendant's ability to pay before imposition).

3.2.2. Mandatory Debts

In some jurisdictions, certain criminal justice debts must be imposed automatically, as a matter of law. Statutes establishing such mandatory debts divest the trial court of any consideration of the defendant's ability to pay.[89]

Mandatory debts may not seem like huge sums of money in isolation. But they can pile up quickly, especially if multiple mandatory debts are required to be imposed for each count of conviction in a given case. Similarly, defendants who are simultaneously being prosecuted for multiple charges at once can see a dramatic rise in their exposure to mandatory financial obligations. For example, in Washington State, for every felony judgment and sentence, the court must impose a mandatory $500 victim penalty assessment, regardless of indigence.[90] Even a single payment of $500 is a substantial sum for a poor defendant. But it is not uncommon to see an individual with three, four, or five felony convictions arising from even just a single incident or course of conduct. At $500 per conviction, a person can thus easily find himself in the hole for $1500 or $2500 in debt, just in mandatory obligations.

If a criminal justice debt truly is mandatory, there will be few if any options for avoiding imposition once the triggering conditions (such as conviction) are met. This makes it all the more important for counsel to ensure that supposedly "mandatory" debts are, in fact, mandatory. This may seem an obvious point. But in practice, many criminal justice fines and fees are treated as mandatory as a matter of custom and routine practice by local actors in the criminal justice system—and thus imposed in every case as a matter of course—even though the debts may not actually be mandatory as a *matter of law* in all circumstances. Thus, a key task for a defense attorney is to conduct thorough research into the technical legal status of a given potential debt, as closer statutory examination may reveal that some debts commonly believed to be mandatory are actually waivable or reducible, or may not be imposed in certain circumstances.

A recent initiative in Washington State illustrates the value of closely examining debt imposition statutes treated as mandatory. In Washington, a number of criminal justice debts were routinely treated as mandatory by local criminal justice actors—including judges and defense attorneys—even though the statutes establishing such debts

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[89] *See* 725 Ill. Comp. Stat. 240/10 (mandatory violent crime victims assistance fund non-waivable at sentencing); Ky. Rev. Stat. Ann. § 189A.050 (West) (service fee related to specific convictions); Wash. Rev. Code § 7.68.035 (mandatory victim penalty assessment for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor); Wash. Rev. Code § 43.43.7541 (mandatory DNA collection fee); W. Va. Code, § 50-3-2; State v. Lundy, 308 P.3d 755, 758–759 (Wash. Ct. App. 2013) (courts not authorized to consider defendant's ability pay with regard to mandatory criminal justice debts).

[90] Wash. Rev. Code § 7.68.035.

contained provisions expressly precluding imposition of the debts under certain conditions.[91] To clear up this confusion, the Washington State Minority and Justice Commission conducted a comprehensive survey that classified statutory debts appropriately. It then distributed a reference guide to every judge in the state and encouraged trainings for jurists and practitioners alike on the issue, helping to clarify which debts truly are mandatory—and which are not.[92] As similar waiver provisions exist in other states' laws, assessing whether a fee is truly mandatory is important.[93]

If, after careful review, counsel concludes that a given debt is indeed mandatory under the governing statute, the only remaining recourse may be a constitutional challenge, under either the federal or state constitution. In particular, counsel should consider whether the statute suffers from the types of infirmities the Supreme Court highlighted in *James v. Strange* in holding that a Kansas indigent defense recoupment statute violated the Constitution, as discussed in Section 2.3. Further, the question of whether and in what circumstances the Constitution may require a court to determine that a defendant has ability to pay prior to imposing criminal justice debt is discussed in Section 3.3.[94]

3.2.3. Non-Mandatory Debt

Fortunately, not all criminal justice debt is mandatory. Many criminal justice debt statutes authorize or require courts to waive or choose not to impose the debt, for a variety of reasons. For example, statutes may make imposition of certain fines or fees fully discretionary, may make the amount to impose discretionary, or may include specific exemptions barring the court from imposing debt on certain classes of defendants or

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[91] For example, Washington has a statute that requires the court to consider a defendant's ability to pay if the defendant has a mental health condition, thus allowing the court to waive debts that would otherwise be mandatory. *See* Wash. Rev. Code § 9.94A.777 (provides that "before imposing any criminal justice debt upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment . . . a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.").

[92] *See* Washington State Supreme Court Minority and Justice Commission, Reference Guide on Legal Financial Obligations (LFOs) Ordered by Courts of Limited Jurisdiction in Washington State (2015 Update), *available at* https://www.courts.wa.gov/content/manuals/CLJ%20LFOs.pdf. The commission's reports and information about its education and outreach efforts are *available at* https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=publications&layout=2&showPubTab&tab=pubRes.

[93] *See, e.g.,* Cal. Health & Safety Code § 11372.7 (West) ($150 drug program fee mandatory unless court finds offender lacks the ability to pay); Cal. Penal Code § 290.3 (West) (mandatory fine for certain sex offense convictions unless defendant lacks the ability to pay); Haw. Rev. Stat. § 706-603(1) (DNA analysis fee mandatory unless defendant presents evidence of inability to pay); Ind. Code § 33-37-5-9 (court shall assess drug abuse fee, but shall consider the person's ability to pay in determining the amount of the fee).

[94] Additionally, § 2, *supra*, provides a more general discussion of constitutional principles pertinent to criminal justice debts, especially as relates to indigent defendants.

under certain scenarios.[95] In the course of reviewing local statutory codes and case law, counsel should pay close attention to provisions such as these that may offer protection from imposition of criminal justice debts.

Perhaps the most important restriction that may apply to imposition of criminal justice debt is a requirement to first determine that the defendant has the ability to pay the debt. Such ability-to-pay inquiries are critical to the protection of indigent defendants, many of whom cannot pay and may thus be legally insulated from imposition of debt. If courts fail to conduct such inquiries, or to conduct them adequately, debts that are legally non-mandatory as applied to indigent defendants can, for all intents and purposes, become mandatory in practice. It is to this ability-to-pay analysis that the next two sections turn.

3.3. Requirements to Conduct Ability-to-Pay Determinations at Imposition

3.3.1. Overview

This section provides an overview of legal requirements to conduct ability-to-pay inquiries at the imposition stage. It begins by examining whether the United States Constitution might require such an inquiry prior to the imposition of costs, especially indigent defense recoupment fees (see Section 3.3.2), and discusses differences in constitutional treatment of fines (see Section 3.3.3). It next examines (in Section 3.3.4) statutes that impose ability-to-pay inquiry requirements, and explains why the opportunity for cancellation or modification of debt at the enforcement stage should not be viewed as a substitute for challenging imposition of debts based on inability to pay at the imposition stage (see Section 3.3.5). Section 3.4 discusses legal and strategic complications that can arise in the course of representing clients in such inquiries.

3.3.2. Fuller v. Oregon and the Potential Constitutional Requirement to Conduct an Ability-to-Pay Determination Before Imposing Costs

The question of whether the Constitution requires courts to consider a defendant's ability to pay prior to imposing costs is presently unsettled. Most of the case law addressing this question focuses on indigent defense recoupment costs, which raise particularly salient right to counsel concerns, in addition to more general due process and equal protection concerns. However, as discussed below, the reasoning from the indigent

[95] *See, e.g.,* Cal. Health & Safety Code § 11372.7 (West) ($150 drug program fee mandatory unless court finds offender lacks the ability to pay); Cal. Penal Code § 290.3 (West) (mandatory fine for certain sex offense convictions unless defendant lacks the ability to pay); Haw. Rev. Stat. § 706-603(1) (DNA analysis fee mandatory unless defendant presents evidence of inability to pay); Ind. Code § 33-37-5-9 (court shall assess drug abuse fee, but shall consider the person's ability to pay in determining the amount of the fee).

defense fee cases should also apply to the many other types of criminal justice costs that implicate the Sixth Amendment.

A starting point for analysis of this issue is the Supreme Court's opinion in *Fuller v. Oregon*, which, as noted earlier (see Section 2.3), dealt with the constitutionality of an indigent-defense recoupment statute. *Fuller* upheld an Oregon indigent defense recoupment statute, distinguishing an earlier case *James v. Strange* (also discussed in Section 2.3), which had struck down Kansas's indigent-defense recoupment statute. A key difference between *Fuller* and *Strange* was that the Oregon statute upheld in *Fuller* included a number safeguards to protect indigent defendants against financial hardship, whereas the Kansas statute struck down in *Strange* denied criminal justice debtors even those protections from hardship that were otherwise afforded to civil debtors.[96] Among the safeguards included in the statute upheld in *Fuller* were requirements that "a court may not order a convicted person to pay these expenses unless he is or will be able to pay them," that debtors may not be held in contempt for nonpayment if lacking in means to pay, that debtors receive all the protections applicable to civil judgment debtors, and that debtors may petition for remission (i.e., cancellation or modification) of the debt based on financial hardship at any time.[97] In view of these statutory protections, the Court emphasized that the Oregon recoupment statute was

> *carefully designed to ensure that only those who actually become capable of repaying the state will ever be obliged to do so. Those who remain indigent or for whom repayment would work manifest hardship are forever exempt from any obligation to repay.*[98]

In *Fuller*'s wake, a split has emerged among lower courts as to how to apply the Supreme Court's holding to the question of whether courts are required to conduct an ability-to-pay inquiry before *imposing* criminal justice debt obligations—and particularly indigent defense fee obligations. Some courts have observed that the Supreme Court did not mandate, as a matter of constitutional law, *all* of the safeguards that were in place in the Oregon recoupment statute—including the imposition-stage payment ability assessment—but rather simply held that a statute with such safeguards would pass constitutional muster.[99] In jurisdictions taking this approach, recoupment statutes may only

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[96] *See* § 2.3, *supra*.

[97] 417 U.S. at 45–47, 53–54.

[98] 417 U.S. at 47.

[99] *See, e.g.,* United States v. Pagan, 785 F.2d 378, 381-82 (2d Cir. 1986) (holding that the imposition of assessments on the indigent, per se, does not offend the Constitution); State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991) (trial court not required to determine a convicted defendant's ability to pay statutorily mandated costs prior to assessing costs unless the applicable statute specifically requires such a determination); People v. Jackson, 769 N.W.2d 630, 639, 643 (Mich. 2009) (constitution does not require ability to pay analysis until fee is enforced); State v. Kottenbroch, 319 N.W.2d 465, 472 (N.D.1982) (prior determination of ability to pay not required by *Fuller* so long as judgment debtor

be considered unconstitutional to the extent the mechanisms for *enforcing* the debt are unconstitutional, such as if they fail to require a determination of ability to pay prior to imprisonment for nonpayment as required by *Bearden,*[100] or violate the principles against discriminatory collection terms discussed in *Strange* (see 2.3, *supra*).[101]

Other jurisdictions, however, see in *Fuller* more robust constitutional protections, at least as relates to indigent defense recoupment. In these jurisdictions, courts have held that some—or even each—of the statutory safeguards outlined in *Fuller* are in fact constitutionally necessary.[102] And in at least one state, courts have expressly found that a statute's failure to account for the defendant's ability to pay *at the time of imposition* violates the Sixth Amendment.[103]

While the majority of cases challenging debt at the imposition stage under *Fuller* have specifically addressed *indigent defense* recoupment orders—which raise particularly salient right to counsel concerns—there are cases that have generally applied some of *Fuller's* reasoning to other types of criminal justice debt.[104] Moreover, imposition of other types

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had opportunity to present inability to pay before probation was revoked for failure to pay); State v. Blank, 930 P.2d 1213, 1219–1220 (Wash. 1997) (appellate cost recoupment statute not constitutionally deficient because it lacked pre-imposition ability to pay inquiry).

[100] *See* § 2.2, *supra*.

[101] *See, e.g.,* State v. Albert, 899 P.2d 103, 109 (Alaska 1995) (concluding that *James v. Strange*, 407 U.S. 128 (1972), and *Fuller* do not require a prior determination of ability to pay in a recoupment system that treats recoupment judgment debtors like other civil debtors); State v. Blank, 930 P.2d 1213, 1219–1220 (Wash. 1997) (constitutional principles implicated at point of collection and when sanctions are sought for nonpayment); State v. Curry, 829 P.2d 166, 169 (Wash. 1992) (holding that it was not unconstitutional for the court to impose a mandatory fee because "there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants"); People v. Jackson, 769 N.W.2d 630, 643 (Mich. 2009) (same); State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991) (ability-to-pay inquiry must occur when state seeks to enforce collection). *See generally* § 2, *supra* (discussion of the principles of *Fuller* and *Bearden*).

[102] *See* Olson v. James, 603 F.2d 150 (10th Cir. 1979) (Kansas recoupment statute which lacks, among other safeguards, proceedings to determine the financial condition of the defendant, violated Fourteenth Amendment); People v. Cook, 407 N.E.2d 56 (Ill. 1980) (a summary decision which orders reimbursement without affording a hearing with the opportunity to present evidence and be heard acts to violate an indigent defendant's right to procedural due process); Fitch v. Belshaw, 581 F. Supp. 273, 275–276 (D. Or.1984) (striking down Oregon statute which allowed recoupment judgments to be entered without adequate procedures to ensure that defendants would be able to pay without hardship). *See also* State v. Tennin, 674 N.W.2d 403, 410 (Minn. 2004) (Sixth Amendment protections absent in Minnesota cost recoupment statute because no waiver provision either at imposition or implementation).

[103] *See* State v. Morgan, 789 A.2d 928 (Vt. 2001) ("[W]e hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered . . . .").

[104] *See* Jones v. State, 360 So. 2d 1158 (Fla. Dist. Ct. App. 1978) (applying *Fuller* to "payments by a probationer toward the costs of his supervision"); Brown v. County Comm'rs of Carroll County, 658

of criminal justice costs frequently implicate similar Sixth and Fourteenth Amendment concerns regarding burdening the right to counsel discussed in *Fuller*, as well as other Sixth Amendment rights. In particular, costs relating to prosecution, defense, case management and adjudication (including filing fees, costs for DNA tests, juror fees, witness fees, and court personnel fees) that are imposed or increased based on a defendant's exercise of his rights to counsel, to trial, or to call witnesses in his defense, have the effect of burdening those rights, especially for indigent defendants.[105] These types of costs should be subject to many of the same principles and arguments regarding ability-to-pay determinations developed in the indigent defense fee case law. Additionally, Fourteenth Amendment due process and equal protection arguments, discussed in Section 2, may apply to criminal justice debts beyond indigent defense fees.[106]

3.3.3. Requirements to Conduct Ability to Pay Determinations Prior to Imposition of Fines

The preceding section discussed arguments that ability-to-pay determinations should be required (as a matter of constitutional law) to orders requiring defendants to pay for *costs* associated with the criminal justice system. Fines, however, present a different legal analysis, as they are generally intended to be punitive, and thus may be guided by a different set of principles. Notably, in *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court explained that

> *[t]he Court has not held that fines must be structured to reflect each person's ability to pay to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances, they are guided by sound judicial discretion rather than by constitutional mandate.*[107]

Similarly, in Washington, the state Court of Appeals held that Washington's ability to pay requirement in its cost recoupment statute does not apply to fines,[108] although the

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A.2d 255 (Md. 1995) (applying *Fuller* in finding that there was no constitutional infirmity in county seeking reimbursement from an inmate or pretrial detainee for medical costs incurred on his own behalf where no other source of reimbursement is available); State v. Blank, 930 P.2d 1213 (Wash. 1997) (applying *Fuller* in case where defendant challenged constitutionality of statute that allowed court to impose appellate costs, including fees for appointed counsel, on defendant without first finding he had the ability to pay such costs).

[105] *See Confronting Criminal Justice Debt: A Guide for Policy Reform* at 19-20 (2016) (discussing how criminal justice costs burden defendant's Sixth Amendment rights).

[106] *See* Section 2.3, *infra* (noting that portions of *Fuller* and *Strange* addressing discrimination under the Equal Protection Clause should apply beyond the context of indigent defense recoupment).

[107] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 22, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). *See also* Williams v. Illinois, 399 U.S. 235, 243, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) (stating, in context of initial imposition of a fine, that nothing precludes a judge from imposing on an indigent, the maximum penalty prescribed by law); State v. Murrell, 499 S.E.2d 870, 876 (W. Va. 1997).

[108] State v. Clark, 362 P.3d 309, 312 (Wash. Ct. App. 2015).

court did "[n]onetheless . . . strongly urge trial judges to consider the defendant's ability to pay before imposing fines" given the many barriers that criminal justice debts impose on an offender's successful reentry back into the community.[109]

In the absence of a federal constitutional requirement to determine a defendant's ability to pay prior to imposition of fines, defense counsel should determine whether state law nonetheless requires or permits such assessment. Indeed, several states have enacted statutes that require some ability-to-pay analysis at the time of imposition.[110] When an ability to pay determination is required prior to imposition of fines, the discussion in this guide regarding ability-to-pay hearings is generally applicable to fines as well as to costs. Additionally, even if a statute is silent as to ability to pay at imposition, it may be interpreted to allow for defenses to imposition based on inability to pay, and asserting reasons for inability to pay may convince a court to waive or reduce fines.[111]

Finally, counsel should bear in mind that fines are uniquely subject to the Eighth Amendment, which expressly states that "excessive fines" "shall not . . . be imposed."[112] As discussed at Section 7.3.1.5, *infra*, recent scholarship argues that the Eighth Amendment should be invoked and employed in support of challenges to fines that are excessive as applied to an indigent defendant, even though most cases interpreting the clause thus far have narrowly limited its application to fines that are grossly disproportionate to the offense, without regard to the individual defendant's financial circumstances.[113]

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[109] *Id*.

[110] Cal. Penal Code § 1202.5 (West); Haw. Rev. Stat. § 706-641; 5 Ill. Comp. Stat. 283/20; 730 Ill. Comp. Stat. 5/5-9-1; Ind. Code § 35-38-1-18; Kan. Stat. Ann. § 21-6612(c); Ky. Rev. Stat. Ann. § 534.030 (West); Me. Rev. Stat. tit. 17-A, § 1302; Mont. Code Ann. § 46-18-231; N.J. Stat. Ann. § 2C:44-2 (West); Ohio Rev. Code Ann. § 2947.14 (West); 42 Pa. Cons. Stat. § 9726; R.I. Gen. Laws § 12-21-20. *See also* Ashton v. State, 737 P.2d 1365 (Alaska Ct. App. 1987) (trial court under mandatory duty to consider defendant's earning capacity in connection with any imposition of a fine); Clark v. State, 963 So. 2d 911 (Fla. Dist. Ct. App. 2007) (finding fine imposed by trial court invalid because court failed to consider defendant's ability to pay as required by statute); People v. Morrison, 444 N.E.2d 1144 (Ill. App. Ct. 1983) (finding of ability to pay implicit in imposition of fine where trial court is aware of facts in the record that would support such a finding); State v. Ramel, 743 N.W.2d 502 (Wis. Ct. App. 2007) (necessary for sentencing court to determine whether a defendant has the ability to pay a fine if the court intends to impose one).

[111] *Cf.* State v. Packer, 916 P.2d 322 (Or. Ct. App. 1996) (although statute made no mention of defendant's ability to pay, assessment of ability required before imposition of compensatory fine).

[112] U.S. Const. amend. VIII.

[113] *See* § 7.3.1.5, *infra*.

3.3.4. Statutory Requirements to Consider Ability to Pay at Imposition

While *Fuller v. Oregon* may or may not directly require imposition-stage ability-to-pay inquiries as a matter of constitutional law, the case has still had a significant impact on this issue. By affirming the Oregon statute that required such an inquiry, the Court implicitly encouraged states to model the Oregon statutory framework, which *does* require ability-to-pay inquiries at the imposition stage as a matter of state law. And indeed a number of states have taken up this invitation, creating statutory provisions that similarly require courts to consider a defendant's ability to pay prior to imposing criminal justice debt. Some statutes contain each of the safeguards included in the Oregon statute challenged in *Fuller*; in fact, many mirror the language in the Oregon statute directly. Moreover, while some statutes apply the requirement only to recoupment of indigent defense costs,[114] others apply more expansively to other types of criminal justice debts as well.[115] Thus, counsel should always make sure to check the statutory provisions in their jurisdiction for each type of criminal justice debt that may be applied to determine whether an ability-to-pay defense might be available—and if so, should consider arguing that a client's inability to pay ought to relieve him of the debt obligation (see Section 3.4, *infra*).

Below are excerpts from two statutes that resemble the Oregon recoupment statute—one pertaining to indigent defense fees, the other to costs in general—which illustrate the statutory basis for many of the options for securing relief from criminal justice debt discussed in this guide.

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[114] *See* Ala. Code § 15-12-25; Del. Code Ann. tit. 10, § 8601; Kan. Stat. Ann. § 22-4513; Mont. Code Ann. § 46-8-113; N.D. Cent. Code § 12.1-32-08; Vt. Stat. Ann. tit. 13, § 5238.

[115] *See* 730 Ill. Comp. Stat. 5/5-9-1 (fines); Haw. Rev. Stat. § 706-641 (fines); Mich. Comp. Laws § 771.3 (probation costs); Or. Rev. Stat. § 161.665 (general costs); Utah Code Ann. § 77-32a-3 (West) (general costs); Wash. Rev. Code § 10.01.160 (general costs).

TABLE 1

Examples of Cost Recoupment Statutes

STATE STATUTE	ALA. CODE 1975 § 15-12-25 (ALABAMA)	WASH. REV. CODE 10.01.160 (WASHINGTON STATE)
Types of criminal justice debts that may be imposed. *(See Section 1.1 for definitions of common types of debts; see Section 3.3.2 for a discussion of Sixth Amendment concerns that may animate restrictions on imposition of criminal justice debts that burden rights to counsel or to trial)*	(a)(1) A court may require a convicted defendant **to pay the fees of court appointed counsel.** Fees of court appointed counsel for the purposes of this section, shall mean any attorney's fees and expenses paid an appointed counsel, contract counsel, or public defender.	(1) The court may require a defendant to pay **costs**. Costs may be imposed only upon a convicted defendant... (2) Costs shall be **limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program** . . . or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees...may be included in costs the court may require a defendant to pay.
Requirement that costs only be imposed on defendants the court has determined have current or future ability to pay. (*See* Section 3.3.4, for a discussion of statutory ability-to-pay requirements at imposition; *see Sections* 3.4-3.7 for discussion of strategic and practical considerations when ability to pay inquiries are applicable at imposition.)	(2) The court shall not order a defendant to pay the fees of court appointed counsel **unless the defendant is or will be able to pay them.** In determining the amount and method of payment of these fees, **the court shall take into account the financial resources of the defendant and the nature of the burden that payment of the fees will impose.**	(3) The court **shall not order a defendant to pay costs unless the defendant is or will be able to pay them.** In determining the amount and method of payment of costs, **the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.**

STATE STATUTE	ALA. CODE 1975 § 15-12-25 (ALABAMA)	WASH. REV. CODE 10.01.160 (WASHINGTON STATE)
Requirements relating to remission of criminal justice debts after imposition based on "manifest hardship." (*See* Section 3.3.5 for discussion of why such remission provisions are not an adequate substitute for pre-imposition ability to pay determinations; see Section 4.3 for discussion of seeking remission when representing clients on whom a debt has already been imposed.)	(2) A defendant who has been ordered to pay the fees of court appointed counsel and who is not in contumacious default in the payment thereof **may at any time petition the court which sentenced him or her for remission of the payment of these fees or of any unpaid portion thereof.** If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant, the court may remit all or part of the amount due in fees or modify the method of payment.	(4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof **may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof.** If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

While the Washington statute more broadly includes additional costs, note the similarities between the two. Much like the Oregon statute in *Fuller*, they both 1) give the court authority to impose costs on a convicted defendant; 2) define the cost and its parameters; 3) only allow for imposition on those defendants who currently or in the future will have the ability to pay; 4) require the court to look at the financial circumstances of the defendant and the nature of the burden that the costs will impose; and 5) require the court to consider remitting the costs if the defendant requests this relief on the basis that payment of costs will create a manifest hardship for the defendant—a topic that is discussed in more detail in Section 4.3, *infra*.

3.3.5. Remission is Not an Adequate Substitute for a Pre-Imposition Ability to Pay Inquiry

Many states have criminal justice debt statues that model the Oregon statute upheld in *Fuller v. Oregon* by requiring an ability-to-pay inquiry at the time of imposition while *also* providing a defendant an opportunity to seek remission (i.e., cancellation or modification) of a criminal justice debt based on an inability to pay at the time payment is due. Indeed, some jurisdictions have held that a meaningful remission process is a required feature of a constitutionally permissible cost recoupment statute.[116] Seeking remission

[116] *See* Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979) (among general guides to be gleaned from *Strange* and *Fuller* are that a convicted person on whom an obligation to repay has been imposed ought at any time be able to petition the sentencing court for remission of the payment of costs); Fitch v. Belshaw, 581 F. Supp. 273 (D.C. Or. 1984); State v. Blank, 930 P.2d 1213, 1221 (Wash. 1997) (statute which imposes obligation to pay the costs of court-appointed counsel which lacks any

for clients who already owe criminal justice debt is discussed in Section 4.3. For present purposes, however, it is important to stress that counsel should *never* forgo a chance to challenge the imposition of a criminal justice debt on the theory that a client who lacks the ability to pay will be protected by remission down the road. Indeed, some cases make clear that a trial court cannot avoid its duty to inquire into a defendant's ability to pay at the time of sentencing simply because the statute allows for remission at a later date.[117] And there are a number of important practical reasons why remission does not afford the same protection as an inquiry at the imposition stage:

1. An individual who has no present or likely future ability to pay should never have to seek remission: Remission is generally intended for those defendants whom the court finds to be indigent at the time of sentencing, but *with the likely future ability* to pay the costs. If, by contrast, the defendant *will likely lack* the ability to pay *in the future,* then there is no need for remission—the cost simply should not be imposed. Moreover, a remission hearing is itself a burden and an imposition on the client, who must not only live with the cloud of a potential debt hanging over his or her head until the remission hearing is resolved but must also incur the costs of getting to the remission hearing, which requires traveling to the courthouse and may require missing work or arranging for childcare.
2. No right to counsel at remission: At sentencing, the defendant will usually enjoy a statutory or constitutional right to counsel, which means he will benefit from a lawyer's argument as to why he lacks the current and future ability to pay the debt. At remission, however, there often is no right to counsel, meaning the debtor will likely have to represent himself. *Pro se* litigants, however, routinely fare worse than litigants with even meager professional representation. Furthermore, *pro se* defendants may not receive notice that remission of costs is an option. Thus, remission may, in practice, only be available to individuals who are able to obtain help of legal aid or pro bono counsel in addressing their criminal justice debt post-imposition, or to those rare non-lawyers who happen to know the details of the jurisdiction's cost-recoupment statute (and who are further able to petition the court for remission and to argue that he meets a vague and undefined standard).
3. A different standard at remission: At sentencing the court must inquire into whether the defendant is or will be able to pay costs. It cannot order costs if the defendant

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procedure to request a court for remission of payment violates due process).

[117] State v. Simmons, 249 P.3d 15 (Kan. Ct. App. 2011) (while statute allowing assessment of fees of defense counsel permits defendant to later request modification of public defender recoupment fees because of manifest hardship, that process could not replace the trial court's studied determination of an appropriate amount in the first place), *reversed in part on other grounds by* 283 P.3d 212 (Kan. 2012); State v. Morgan, 789 A.2d 928 (Vt. 2001) (appellant not required to seek remission before appealing ability to pay challenge).

typically lacks the current and future ability to pay. Moreover, the burden to prove ability to pay may lie with the state. At a remission hearing, by contrast, the court does not have to inquire into ability to pay. Rather, the *defendant* has the burden of proving that the costs create a *manifest hardship*. This standard is generally undefined, giving the defendant no direction on what he must prove to the court.[118] Furthermore, in many jurisdictions, the court is not required to remit costs even if it finds that costs do in fact create a manifest hardship for the defendant. Rather, remission is left to the court's general discretion.

In short, remission is an important failsafe for clients who encounter challenges to repayment following the imposition of debt. And in jurisdictions without an ability-to-pay inquiry at the imposition stage, remission may afford one of the few potential avenues to relief. But remission is nonetheless a poor and inadequate substitute for an argument that a debt ought not be imposed in the first place. Counsel who have the opportunity to argue against the imposition of criminal justice debts at the outset should always take that first opportunity to do so.

3.4. Representing Clients in Ability-to-Pay Hearings

3.4.1. General

In jurisdictions that require ability-to-pay determinations at the imposition stage, the specific rules and processes governing the ability to pay hearing can vary. For example, different evidentiary presumptions may apply, and different forms of financial evidence may be deemed admissible or inadmissible. Attorneys representing clients in such proceedings should therefore be sure to familiarize themselves with the relevant statutes, case law, and court rules for their jurisdiction.

In addition to these jurisdiction-specific issues, this section highlights three key issues that advocates should consider when representing clients in ability-to-pay hearings: (1) the timeframe relevant to the consideration; (2) the evidentiary standard that will be applied; and (3) the strategic challenges inherent in balancing inability to pay arguments against arguments for a reduced sentence of incarceration. Each of these issues is taken up in the following sections.

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[118] *See, e.g.*, N.C. Gen. Stat. § 15A-1363 (allowing for remission of fines or costs if it appears to satisfaction of the court that circumstances which warranted imposition of the fine no longer exist; that it would otherwise be unjust to require payment; or that proper administration of justice requires resolution of the case). *But see* R.I. Gen. Laws § 12-20-10 (allowing for remission of costs based on defendant's indigence, with several factors establishing prima facie evidence of indigency, including receipt of certain public benefits, and outstanding payments totaling $100 or more on child support, restitution, or counseling costs).

3.4.2. The Timeframe Issue: Assessing Whether a Defendant "Is or Will Be Able to Pay"

In many jurisdictions, the ability-to-pay inquiry at the time of imposition is framed as a question of whether the defendant is *or will be* able to pay the costs at issue, either explicitly by the relevant statute or by case law in the jurisdiction. If so, the proceeding will be more complicated than simply persuading the court that the defendant lacks the ability to pay the debt on the day he or she is being sentenced. Instead, the court must consider both the defendant's current ability to pay and his future ability to pay as well.

Assessing—and thus litigating—an individual's future ability to pay can be challenging for multiple reasons. For one, criminal courts are unaccustomed to assessing a defendant's future ability to pay, as this inquiry rarely arises in other contexts. Indeed, the two most analogous scenarios for criminal court judges—determining whether a defendant qualifies for appointment of counsel and determining whether a defendant is able to satisfy criminal justice debt at the collection stage—are both assessed by examining a person's ability to pay at the time of the inquiry. Furthermore, there is little substantive guidance in the statutory or governing case law defining "future ability to pay" as a legal concept. In fact, some courts that have declined to adopt an ability-to-pay inquiry requirement at the imposition stage have rejected the idea that future ability to pay can be assessed at all.[119]

In the absence of concrete guidance as to how to conduct the future ability-to-pay inquiry, courts often look endlessly to the future and rely on speculation and conjecture to assume that the defendant will inevitably be able to pay the debt obligation *at some point*, which will generally incline the judge to conclude that imposing the fine is appropriate. If confronted with this problem, defense counsel may want to reference *Fuller* to help limit the temporal scope of the court's analysis. In stating that a court must consider whether the defendant is or will be able to pay the recoupment costs at issue in that case, the Court offered some guidance as to what constitutes an appropriate analysis of future ability to pay when it stated that the Oregon legislation was "tailored to impose an obligation only against those with a *foreseeable* ability to meet it, and enforce that obligation only against those who *actually are* able to meet it without hardship."[120] Defense counsel may be able to use this language to argue that a sentenc-

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[119] *See* State v. Blank, 930 P.2d 1213, 1221 (Wash. 1997) (stating, in context of holding that ability to pay analysis is not required before appellate costs are ordered, that "common sense dictates that a determination of ability to pay and an inquiry into a defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of ten years or longer"); People v. Wiley, 748 N.W.2d 569, 573 (Mich. 2008) (Mem.).

[120] *Fuller*, 417 U.S. at 54. *See also* People v. Schronski, 15 N.E.3d 506 (Ill. App. Ct. 2014) (a court may only order reimbursement of the public defender fee if it finds that the defendant has a reasonably foreseeable ability to pay).

ing court ought to consider not what is remotely possible but rather what is reasonably probable within a foreseeable—i.e., near—future with regards to a defendant's actual financial circumstances. Additionally, counsel should assess whether the law in their jurisdiction provides additional guidance to help guide or cabin any "future ability to pay" inquiries, such as by requiring written findings as to the reasons a defendant has a foreseeable ability to pay or by requiring consideration of how specific factors, like mental or physical disabilities, may impact future earning potential.

3.4.3. Evidence of Ability to Pay

In addition to the difficulties that may arise in determining the point(s) in time to which the court must look when determining ability to pay, there may also be difficulty in figuring out what *evidence* a defendant—or, in some jurisdictions, the prosecutor—needs to present to the court in order to show present and future ability or inability to pay. Indeed, the phrase "ability to pay" is ambiguous,[121] and statutes may not offer any further definition.[122] Absent clear and objective criteria widely varying results may (and often do) occur, not only between courts—for example across counties in a state—but also between judges in the same courthouse. Thus, as is true with sentencing advocacy more generally, counsel should consult colleagues in the relevant jurisdiction to determine what types of arguments or advocacy techniques tend to resonate in the specific forum at issue, and with individual sentencing judges.

Some jurisdictions, however, do provide at least some statutory authority or appellate case law to guide the ability-to-pay inquiry, setting out factors that a court should—or even must—consider.[123] Counsel seeking assistance in fleshing out the ability-to-pay analysis may wish to draw on the following examples from Washington State, Illinois, and Kansas:

State v. Blazina (Washington State).[124] The Washington State Supreme Court recently addressed the ability-to-pay inquiry in *State v. Blazina*. The recoupment statute at issue

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[121] *Cf. State Bans on Debtors' Prisons and Criminal Justice Debt,* 129 Harv. L. Rev. 1024, 1026 n.23 (2015) (explaining how vagueness in the *Bearden* holding has limited its protections).

[122] For instance, many recoupment statutes, such as the Oregon statute challenged in *Fuller*, only specify general requirements that the court take account of the financial circumstances of the defendant and the nature of the burden that the payment of costs will impose. *See, e.g.*, Ala. Code §§ 14-6-22, 15-12-25; Del. Code Ann. tit. 10, § 8601; Haw. Rev. Stat. § 706-641; Kan. Stat. Ann. § 22-4513; Mich. Comp. Laws § 771.3; Mont. Code Ann. §§ 46-8-113, 46-18-232; Nev. Rev. Stat. § 178.3975; N.D. Cent. Code § 29-07-01.1; Or. Rev. Stat. § 151.505; Utah Code Ann. § 77-32a-3 (West).

[123] *See generally Confronting Criminal Justice Debt: A Guide for Policy Reform* at 26-30 (2016) (recommending that legislators amend criminal justice debt statutes to include robust ability-to-pay safeguards, including clearly defined standards and definitions applicable to the inquiry, and highlighting some examples).

[124] State v. Blazina, 344 P.3d 680 (Wash. 2015).

in that State provides that the court must conduct a pre-imposition inquiry into the defendant's ability to pay, taking account of the financial resources of the defendant and the nature of the burden that costs will impose.[125] However, in conducting this inquiry, the court in appellants' cases made no findings on the record. Instead, it simply signed a boilerplate judgment form that stated the inquiry had been conducted and found that the defendant had the current and likely future ability to pay.[126] The state Supreme Court deemed this rote recitation insufficient, holding that the sentencing court must:

> *do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.*[127]

Notably, the Court then went on to hold that, "[w]ithin this inquiry, the court must also consider important *factors* . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay."[128] And the court further stated that trial courts should look to Washington's civil fee waiver court rule for additional guidance.[129] The official comment accompanying that rule in turn states that an individual should be determined indigent (and thus not subject to certain debts) if he or she: (1) is currently receiving a needs-based, means-tested public benefit such as welfare, food stamps, or SSI; (2) has total household income at or below 125% of the federal poverty line; (3) has total household income above 125% of the federal poverty line and has "recurring basic living expenses . . . that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made;" or (4) is subject to "other compelling circumstances" that make the person unable to pay fees.[130]

People v. Morrison (Illinois).[131] This Illinois case challenged the imposition of a $350 fine on the defendant at sentencing. The defendant appealed, arguing that the facts did not support the finding that he had the future ability to pay. The Illinois Supreme Court agreed, and listed facts the court may have been able to elicit from the defendant

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[125] Wash. Rev. Code § 10.01.160(3).

[126] State v. Blazina, 344 P.3d 680 (Wash. 2015).

[127] *Id.* at 685.

[128] *Id.* at 685 (emphasis added). Other cases have similarly identified pending incarceration as an important factor to consider when determining future ability to pay. *See, e.g.*, State v. Duncan, 374 P.3d 83 (Wash. 2016) (court holding that trial court's ability to pay analysis was inappropriate where court imposed costs of incarceration on defendant serving ninety-six-year prison sentence and would be released owing well over $1 million in debt).

[129] State v. Blazina, 344 P.3d 680, 685 (Wash. 2015).

[130] Washington Court Rules GR 34(3).

[131] 444 N.E.2d 1144 (Ill. App. Ct. 1983).

to show ability to pay, or lack thereof.[132] These facts included information regarding the defendant's living expenses; whether the defendant's spouse contributed income to the household and if so how much; the defendant's educational background and marketable skills; and any property or other sources of income available to the defendant.[133] Absent this information, the court held, there were insufficient facts available to the trial court to properly impose the fine. The state supreme court thus vacated the fine and remanded the case for the limited purpose of conducting a hearing to determine the defendant's ability to pay the fine, and the amount of the fine.[134]

State v. Robinson (Kansas).[135] In *Robinson*, the defendant was ordered to pay over $700 in indigent defense fees after conviction. On appeal, he argued that the sentencing judge violated the Kansas attorney fee recoupment statute by failing to explicitly consider Robinson's ability to pay and the financial burden that payment would impose at the time of the assessment. The court agreed, stating that the sentencing court, at the time of initial assessment, must not only consider the financial resources of the defendant and the nature of the burden that payment will impose, but also must state on the record how those factors have been weighed in the court's decision.[136] Without an adequate record on these points, meaningful appellate review of whether the court abused its discretion in setting the amount and method of payment of the fees would be impossible.[137]

Beyond these three cases, there are other cases addressing both the imposition and enforcement stages of criminal justice debt in which courts have offered guidance as to ability to pay, or held that a reasonable ability to pay analysis must be more than perfunctory.[138] For example, in the context of inquiries into whether a defendant who failed to pay criminal justice debt was able to pay, an appeals court found that an analysis based solely on imputed rather than actual wages was reversible error.[139] Also, before imposing indigent defense fees, some courts require a finding that circumstances have changed since the original determination of indigence was made at the time counsel was

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[132] 444 N.E.2d 1144, 1145 (Ill. App. Ct. 1983).

[133] *Id.*

[134] *Id.*

[135] 132 P.3d 934 (Kan. 2006).

[136] *Id.* at 940.

[137] *Id.*

[138] *See, e.g.* People v. Daniels, 28 N.E.3d 216 (Ill. App. Ct. 2015)(vacating public defender fee where trial court held a perfunctory hearing); State v. Carrasco, 950 P.2d 293, 296 (N.M. Ct. App. 1997) (holding that the court must make an actual ability-to-pay determination and cannot delegate this responsibility to the probation officer).

[139] *See, e.g.* Skipper v. State, 189 So. 3d 269, 271(Fla. Dist. Ct. App. 2016) (reversing a probation revocation for failure to pay restitution where "the State did not offer any evidence to contradict Skipper's testimony. Instead, the State simply argued that it believed that Skipper should be able to find work.").

appointed.[140]Additionally, some states establish presumptions regarding ability to pay, though they may or may not be reasonable or helpful as applied to a given defendant's situation. For example, in the context of collection (rather than imposition), in Florida a monthly payment amount is presumed to correspond to the person's ability to pay if the amount does not exceed two percent of the person's net annual income divided by twelve.[141] Unreasonable presumptions of ability to pay may be subject to challenge.[142]

In addition to payment ability factors established by case law or state statute, counsel should also note that the federal government has promulgated tools for assessing payment ability—albeit in other contexts—that can be cited as potential supporting authority in the absence of established jurisprudential rules. Two possible examples are the National Collection Standards employed by the IRS[143] and the standards for income-driven repayment options for federal student loans.[144] These existing government standards are designed to balance the repayment of a debt obligation owed to the federal government against the need to ensure that the debtor and his or her household are able to meet their basic needs. If a client would be deemed to face a financial hardship or be authorized not to have to make actual payments under these federally approved standards, that may make for a persuasive argument to a court that he or she lacks the ability to pay a court-imposed debt.

3.4.4. Strategic Considerations Concerning When to Raise Ability to Pay Arguments

In addition to the complicated legal issues discussed above regarding how to assess an individual's present or future ability to pay, there remains a separate—and essential—strategic consideration facing any defense attorney tasked with making inability-to-pay arguments in the course of a sentencing hearing: How to highlight a client's inability to pay while simultaneously emphasizing the client's capacity to become a productive, i.e., a responsible and perhaps ultimately *employable,* member of society—a showing often essential to obtaining a favorable non-monetary sentence.

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[140] *See, e.g.*, Museitef v. United States, 131 F.3d 714, 716 (8th Cir. 1997) (holding that after a defendant has demonstrated an inability to pay counsel fees, the fees can only be recouped if the person has the ability to pay "in light of the liquidity of the individual's finances, his personal and familial needs, or changes in his financial circumstances.").

[141] Fla. Stat. § 28.246 (4).

[142] *See, e.g.*, People v. Cook, 407 N.E.2d 56, 57 (Ill. 1980) (finding that presumption that posting of bail demonstrated an ability to pay could not substitute for a due process hearing to determine if a defendant was indigent).

[143] Internal Revenue Service, Collection Financial Standards (eff. Mar. 28, 2016) *available at* https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards.

[144] *See* National Consumer Law Center, Student Loan Law § 3.3.3.3 (5th ed. 2015), *updated at* www.library.nclc.org (describing income-driven federal student loan payment plans that set monthly payments as a function of a limited percentage of income in excess of household poverty guidelines, including payments of as little as $0).

Practically speaking, this can be a fine line to walk. Oftentimes, at sentencing, the defendant will need to show herself in the best light possible in order to request the court's leniency or to persuade the court that a long prison sentence is not warranted. The alternative to a long sentence is usually some form of court supervision, such as probation. Courts, however, are considerably more inclined to impose a shorter sentence when the defendant shows a likelihood of being a responsible and productive member of the community—which often includes being employable. Indeed, in many courts, seeking and maintaining employment may be a standard condition of probation. Thus, an argument that a person is unlikely to have a steady income not only at the time of sentencing but also going forward into the foreseeable future may affirmatively undercut the perhaps far more important argument to be made at sentencing: that she is ready, willing and able to reenter the community and secure a steady income.

One tactic counsel might be able to implement in order to address this inherent tension is to seek bifurcation of the sentencing hearing in order to separate the determination of the punitive sentence from the legally distinct inquiry into a defendant's ability to pay criminal justice debt. Bifurcation can help focus the court's attention on these two separate inquiries and alleviate the dilemma discussed above by separating the "contributions to society" arguments from the "inability to pay" arguments. Bifurcation can also help to establish a clear record of the arguments and evidence considered for purposes of any subsequent appeal.

If bifurcation is not an option—or even if it is—counsel should also bear in mind that the strategic dilemma posed in this section can often be navigated by nuanced and thoughtful sentencing advocacy. After all, in a criminal justice system where upwards of eighty percent of the defendants are in fact indigent, most judges will be aware that the defendants appearing before them often face considerable financial hardships. And yet, many poor defendants are not only sentenced to probation, but complete their terms of probation successfully—a point judges will also either know or remember if prompted by defense counsel.

Simply put: being poor and being a productive, contributing member of society—worthy of a lenient or probationary sentence—are hardly mutually exclusive. Indeed, far from it. Thus, even without bifurcation as an option, a sentencing hearing is often an opportunity to humanize a client's financial hardships and to highlight how the client's history of enduring and persevering *in the face of those hardships* demonstrates resiliency—a trait that sentencing advocates will often wish to emphasize. Moreover, the sentencing hearing is an opportunity to educate the court as to the hardships inherent in criminal justice debt obligations and the perverse consequences that such debts can impose on a person whom the court and the justice system are supposed to be trying to rehabilitate. In short, by discussing the financial realities facing a person with a criminal

conviction,[145] counsel may be able to avoid a lengthy sentence and imposition of debts at the same time. Even if not, incorporating such arguments into sentencing advocacy can help to broaden judges' perspectives in the long run, perhaps softening judges to clients' hardships at the enforcement or remission stage, or altering their views on debt imposition practices over time.

Finally, it is important to note that many courts in jurisdictions with ability-to-pay inquiry requirements do not—in practice—actually conduct anything more than a perfunctory "hearing" on the issue. In such cases, defense counsel should object to the imposition of the debt during the hearing in order to preserve the issue for appeal. If possible, counsel should attempt to state with as much specificity as possible the reasons why the debt ought not be imposed—for example, by citing any authority requiring an inquiry into ability to pay and providing evidence of inability, or by providing reasons that the fee or fine is inapplicable or unwarranted under the circumstances. Counsel should be mindful, however, not to jeopardize the outcome of the sentencing hearing itself—for example, by frustrating the judge with an extended (and perhaps uncustomary) argument about the need to comply with the applicable ability-to-pay statute, right before the judge sentences the client. Failure to object at all may be considered a waiver and should be avoided,[146] but even a brief *pro forma* objection may be sufficient to preserve the issue for appeal, without detracting from other sentencing hearing objectives.

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[145] There is substantial information available on the impact of a criminal conviction and the general circumstances of those who have them. This information may be useful in showing what a defendant's life will look like once the conviction is entered, or how it will worsen if the individual has previous convictions in addition to the current one. For example, the individual may be reentering society with a limited education, which along with the conviction, will create serious limitations on future employment prospects and one's ability to pay criminal justice debts. *See* Bannon, et. al., *supra* at 4 (between 15-27 percent of prisoners expect to live in homeless shelters upon release); John Schmitt & Kris Warner, Center for Economic and Policy Research, Ex-Offenders in the Labor Market 2 (2010) (felony conviction or time in prison makes individuals significantly less employable). A person with a criminal conviction is also more likely to have a substance abuse problem or a physical or mental disability that precludes gainful employment and is also more likely to be forced into a tenuous housing situation. *See* National Center on Addiction and Substance Abuse, Columbia University, Behind Bars II: Substance Abuse and America's Prison Population 25–26 (2010) (of the 2.3 million prisoners in U.S., 1.5 million meet the DSM-IV medical criteria for substance abuse or addiction; 32.9% have a mental health disorder).

[146] *See* People v. McCullough, 298 P.3d 860 (Cal. 2013) (holding that a defendant waived his right to challenge the imposition of a booking fee when he failed to object during the ability to pay determination). *But see* People v. Trujillo, 340 P.3d 371, 378 (Cal. 2015) (holding that "in an appropriate case a defendant's discovery of trial counsel's failure properly to advise the defendant, before the sentencing hearing, of the requirement of a waiver of a court hearing on ability to pay probation costs may constitute a change of circumstances supporting a postsentencing request for such a hearing.").

BIFURCATION CONSIDERATIONS

In considering whether to seek to bifurcate penalty sentencing and imposition of costs, counsel should consider:

- **Whether the client has a strong argument that he or she would be unable to pay the potential debt that may be imposed:** If a client's inability-to-pay defense is unlikely to be successful in avoiding the debt obligation, then it may not be worth risking that such arguments could undermine sentencing arguments that highlight her capacity and eagerness to obtain employment. Conversely, if a client has a strong shot at both avoiding debt imposition *and* benefitting from "productive member of the community" arguments, bifurcation may be worthwhile.
- **How much discretion the sentencing judge has in setting the length of any incarceration or supervision terms or conditions that may be imposed:** If the client's likely sentence is fairly predictable, either due to the nature of the case or the terms of any applicable plea bargain, then the risk that inability-to-pay arguments will adversely affect the sentencing decision may be mitigated. On the other hand, if the sentencing judge has a wide range of discretion, bifurcation may be worthwhile.
- **Whether the facts or arguments that would support limiting incarceration or supervision would undermine an argument for inability to pay, and vice versa:** Inability-to-pay arguments are not always in tension with effective sentencing advocacy, which means bifurcation may not be necessary in every case. It should be considered, however, when the arguments for debt waiver and the arguments for a low or a probationary sentence truly are in tension. For example, a client who has a full-time and well-paying job with a steady work history may wish to highlight this fact at sentencing to demonstrate his or her reliability—while perhaps simultaneously wishing to downplay the fact that he or she is, say, in default on child support payments (raising an inference of poor character), or is subject to a series of preexisting criminal justice debt obligations (highlighting a criminal history). Those debts, however, may constitute the very reason why the client lacks the ability to pay any additional debts. Bifurcation may be a useful tool in situations similar to this one.

3.5. Plea Bargaining and Criminal Justice Debt

In jurisdictions that provide for ability-to-pay determinations at the imposition stage, it may be common practice for prosecutors to demand waiver of such an inquiry as a condition of a plea agreement. Plea negotiations are inherently case-specific, and the proper approach to conducting them will necessarily depend on both the strengths and weaknesses of the parties' cases and on the goals and interests that the client is

hoping to maximize. Still, even taking such nuances into account, one point bears special emphasis: Ability-to-pay hearings have value—potentially quite significant value—to *both* sides in the plea negotiation, and therefore should not be waived thoughtlessly, or without obtaining a commensurate concession from opposing counsel.

On the defendant's side, the potential value of an ability-to-pay hearing is obvious: it could save the client from the imposition of a potentially sizable criminal justice debt, and spare her all of the associated difficulties that can arise from years of payment and potentially devastating enforcement actions. Of course, the value of the hearing is not static—some defendants will have a better chance at demonstrating inability-to-pay than others, or will be more sympathetic at a payment capacity hearing. Similarly, some judges will be more amenable to inability-to-pay arguments than others, which could affect how valuable the hearing will be perceived by counsel on both sides of the negotiation. At a minimum, however, it is incumbent on defense counsel to ensure that her client understands the potential value of the ability-to-pay inquiry, the likelihood of success, and the potential long-term hardship that could follow from allowing debt to be imposed without challenge. Only by understanding the value of the hearing can *the client* decide whether it is worth waiving the inquiry as part of a plea bargain.

In advising clients with respect to that assessment, it is important for defense counsel to bear in mind that prosecutors often have an interest in *avoiding* the ability-to-pay hearing altogether. For one thing, hearings require time and resources—particularly if the governing statute puts the burden on the prosecutor to affirmatively establish the defendants' ability to pay. Prosecutors, who often also face resource constraints, may not have the time or energy to assemble the necessary documentation or to prepare arguments for a hearing in every case. They may thus have a strong incentive to secure waiver of the hearing. Moreover, as a representative of the state, the prosecutor may have a more direct, budgetary interest in making sure that debts are imposed and paid—and may even face some institutional pressure in this regard. All of which is to say that the prosecutor may have a strong incentive to *guarantee* the imposition of debt by securing waiver of a payment-ability inquiry from the defendant. And that means that a defendant who is legally entitled to such a hearing has something of value that the prosecutor wants—his waiver. Defense counsel should thus be thoughtful in exploring concessions that the client might be able to bargain for in exchange for agreeing to waive the hearing—e.g., dropped charges, lower sentences, more favorable conditions of supervision. And counsel should then be sure to discuss with the client whether he or she in fact prefers receiving those concessions to having the opportunity to argue against imposition of the debt.

Finally, apart from considering whether and how to bargain over waiver of payment ability determinations, defense counsel should also more generally consider ways to

negotiate plea terms that decrease or avoid the risk of excessive fines and fees for the client. The strategies through which this could succeed are likely to vary by jurisdiction and judge, but some options may include: (1) pleading guilty to charges or offenses that carry lower mandatory fees than other charges, or to charges that do not carry mandatory fees; (2) negotiating the amount of the fines or fees that the prosecutor will recommend the judge should impose, if the prosecutor has a say in the matter at sentencing; (3) negotiating the content of the factual recitation the prosecutor will proffer regarding the defendant's financial circumstances; or perhaps even (4) negotiating that the prosecutor will either not oppose or will affirmatively endorse a finding by the court that the defendant is unable to pay fines and fees, either at all or in excess of a negotiated amount.

3.6. Community Service as an Alternative to Criminal Justice Debt

If a client is too poor to pay criminal justice debts, one potential option to mitigate this problem can be to seek alternatives to imposition of the debt. In several jurisdictions, this can be achieved via statutes that allow a court to convert criminal justice debts into community service.[147] Community service can be an acceptable alternative for some defendants who lack the ability to pay, especially if the service that may be completed is meaningful, promotes useful job skills or connections, and is reasonably convenient.[148]

Community service is not, however, a one-size-fits-all solution for every debtor, and may not be an appropriate option for a number of reasons:

- Physical and mental disabilities and substance abuse issues: Many defendants have mental or physical disabilities or substance abuse issues that make community service inappropriate, if not impossible, or that interfere with treatment schedules.[149]

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[147] *See, e.g.,* Cal. Penal Code § 1209.5 (West) (authorizing court to convert fine for infraction to community service upon showing fine would pose hardship to defendant or his or her family); Kan. Stat. Ann. § 8-1567 (authorizing community service in lieu of payment of fine for DUI convictions); Minn. Stat. § 609.101 (allowing for conversion of fine to community service if court finds on record that person is indigent or that payment could create undue hardship on person or person's immediate family); N.M. Stat. Ann. § 31-12-3 (giving court discretion to allow any person who has been sentenced to pay a fine, or fees and costs to serve a period of time in labor in lieu of them); Okla. Stat. tit. 11, § 27-122.2 (municipal court authorization to order term of community service in lieu of fine or in conjunction with imprisonment); Va. Code Ann. § 19-2-354 (allowing defendant assessed fines or costs to discharge all of part of fines or costs through community service); W. Va. Code § 62-4-16 (allowing municipal judge to substitute community service in lieu of sentence of incarceration or imposition of fine); Wis. Stat. § 973.05(3)(a) (community service in lieu of fine authorized at sentencing).

[148] For a discussion of elements and benefits of well-designed community service programs, see *Confronting Criminal Justice Debt: A Guide for Policy Reform* at 21-22 (2016).

[149] *See* National Center on Addiction and Substance Abuse, Columbia University, Behind Bars II: Substance Abuse and America's Prison Population 25–26 (2010) (of the 2.3 million inmates in the

- Lack of access to transportation: Getting to the community service location can be problematic, especially in rural or other sparsely populated areas.
- Time restrictions: Many indigent clients have work or child care obligations, or need to be looking for work or stable housing or addressing other immediate needs during much of the day. Community service options may not be available during the hours the client is available. It may also be counterproductive to require that an individual perform community service—especially tasks that cannot translate into marketable job skills or are not otherwise rehabilitative—while abandoning responsibilities that better promote accountability and successful reintegration back into the community.
- Multiple debt obligations: Many individuals who cannot afford to pay tickets or other court costs promptly end up accruing several debts (including traffic and other municipal infractions) from different counties, all of which may be owed at the same time. It might not be possible to convert the payment of each of these fines into community service, as it could take a year or more of full time service to pay off debts throughout a state.

It is also important to realize that community service is not a "risk free" alternative to criminal justice debt, as a client who is ordered to complete community service as (for example) a condition of probation, could potentially have his or her probation revoked—and thus face incarceration—for failure to complete the community service on time, just as is true when a more formal financial debt is not paid on time. Community service, moreover, is nontransferable: unlike financial debt obligations, a client cannot get help from family members or friends to "pay off" community service. An attorney should always consult his or her client regarding whether community service is a viable option and should discuss all of the possible pitfalls that could make completion of community service difficult.

Finally, even for clients for whom community service may be a viable alternative to the imposition of criminal justice debt, defense counsel should still first attempt to argue that costs are not appropriate for an indigent defendant in the first place. The best alternative to the imposition of criminal justice debt is always not having the debt imposed at all.

3.7. Communicating with Your Client

Attorneys who represent indigent clients know that their clients are poor. The details of a client's financial circumstances, however, are rarely the subject of extensive discussion between the attorney and the client—especially when criminal justice debt issues are treated as peripheral concerns, or worse, ignored altogether. For all the reasons

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nation's prisons, 1.5 million meet the DSM-IV medical criteria for substance abuse or addiction; 32.9% of inmates have a mental health disorder).

discussed in this guide, however, criminal justice debt issues should not be allowed to fall through the cracks. And in order to address them effectively—at the imposition stage and, subsequently, in the course of potential enforcement proceedings—counsel must develop a sound understanding of their clients' financial status.

As with all aspects of criminal defense representation, it is important to build a relationship of trust so that defendants feel comfortable sharing what can often be deeply personal hardships and struggles. Similarly, as is true of criminal representation more generally, it is important for counsel to make certain that the client fully understands the obligations and consequences associated with criminal justice debt, pre- and post-conviction. Just as an attorney must advise a defendant about the consequences of violating conditions of probation, parole, community corrections or supervised release, so too should an attorney be sure to explain the meaning of legal financial obligations and the consequences that ensue when they are not paid or addressed.[150] Defense counsel have a duty to understand the details of the debt obligations themselves. And they have an obligation to explain those obligations to the defendant, making clear the defendant's responsibilities regarding timely payment, the potential consequences of failure to pay, the processes for making payments during and post-incarceration, and any potential avenues for remission. A defendant's liberty and successful re-entry could depend on these concepts being fully and clearly understood.

For all of these reasons, successful representation regarding criminal justice debt issues requires open communication between client and counsel. Here are some specific steps defense counsel should take when communicating with a client about these issues:

First, counsel should incorporate discussion of criminal justice debt issues into their existing conversations about the nature and consequences of the case—at each stage of the representation. Defense counsel are accustomed to talking with their clients about the substantive criminal law that governs the case, explaining how the evidence obtained through discovery or investigation relates to the elements of the offense or potential defenses. Similarly, defense counsel routinely walk clients through the mechanics of sentencing, describing concurrent versus consecutive sentencing as well as the details of probation, parole, supervised release, and good-time credit. The same attention to detail should be paid to the financial consequences of a criminal case.

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[150] *Cf.* American Bar Ass'n, Criminal Justice Standards for the Defense Function, Collateral Consequences 4-5.4(a) (4th ed.) ("Defense counsel should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction. Counsel should investigate consequences under applicable federal, state, and local laws, and seek assistance from others with greater knowledge in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial, plea, or other dispositions.").

This of course requires, first and foremost, that counsel know the details themselves. As emphasized in earlier parts of this guide, counsel should study the statutory framework, case law, and common practices in the jurisdiction in order to determine the range of criminal justice debts that could be imposed, the consequences for failure to pay, the process for remission, and the law governing ability to pay. Once the attorney masters these details, she should then take the time to explain them to the client—clearly and patiently—just as she would for other aspects of the case.

It is important to bear in mind that for many clients, the details of criminal justice debt and its consequences will likely be unfamiliar. Moreover, some clients may lack financial literacy or sophistication. And even sophisticated clients often experience common and well known psychological traits that cause people to discount the significance of seemingly far off consequences—like future debt. For all these reasons, it is incumbent on the attorney to make sure that the client fully understands the nature of the criminal justice debt at issue and the consequences at stake.

It may be helpful along these lines to provide a one or two page summary to the client, written in plain language (and translated into the client's native language if necessary). Such a summary can both help the client understand the criminal justice debt landscape and also help eliminate any element of surprise. Counsel, public defender agencies, or legal service providers may also consider developing short summaries that incorporate illustrations or other visual cues that simplify the criminal justice debt issues into easily understandable formats, as research shows such illustrations substantially enhance comprehension.[151]

Finally, and most importantly, counsel should be sure to continue discussions of criminal justice debt issues throughout the course of representation, folding this aspect of the case into each significant discussion of the client's goals and strategic choices. This includes discussing criminal justice debt issues as they relate to plea negotiation, plea offer evaluation, sentencing preparation, and post-conviction support and litigation.

Second, counsel should determine the totality of the client's financial circumstances early in the representation. Defense attorneys must understand all aspects of their clients' financial circumstances in order to represent them successfully regarding debt obligations. This requires the attorney to gain understanding of, among other things, the client's income (formal and informal), their financial obligations and expenses (including monthly expenditures and obligations to dependents), their outstanding debts, and any circumstances (such as medical and mental health needs or physical

[151] W. Howard Levie & Richard Lentz, *Effects of Text Illustrations: A Review of Research*, 30 Educ. Commc'n & Tech. 195, 206 (1982) (analyzing 155 studies on the effect of illustrations on reading comprehension).

disabilities) that could impact earning capacity. It may be helpful to develop a chart or check list of questions that counsel or an intake staff person can go through with clients. Ask questions that invite specificity rather than asking broad, sweeping, open-ended questions. For example, instead of asking "what are your monthly expenses," try asking:

1. How much is your rent?
2. How much are your phone and utility bills per month?
3. How much do you spend on food each month?
4. How much do you spend on household supplies?
5. How much do you spend on transportation?
6. How much do you spend on daycare?
7. How much do you spend on prescriptions or other medical expenses?

Some clients overestimate such expenses while others may underestimate their income, expenses, assets, debts and other factors that affect their ability to pay criminal justice debt. It is the duty of defense counsel to gain an accurate understanding of the client's circumstances—both in order to advise the client properly and, potentially, to help the court gain a complete understanding of the client's current and future ability (or inability) to pay. Counsel should consider having the client sign a generalized release that authorizes the attorney or her investigator to obtain records detailing the client's key financial transactions or account balances, and should further consider incorporating collection of such information into the standard tasks assigned to an investigator (if available) prior to sentencing. In short, the more information obtained, the better and more comprehensive the representation will be.

It is important to stress, however, that the details a client shares about his or her financial circumstances are not only potentially sensitive but are also covered by the attorney client privilege. This is especially important to bear in mind regarding information about income or other issues that may reflect potentially suspicious activity—such as unreported taxable income or income gained from potentially illegal activity. Counsel must always give careful thought to such aspects of a client's financial profile in order to avoid inadvertently disclosing information that could expose the client to criminal liability. And even where criminal liability is not at risk, counsel should never disclose the details of the client's finances without the client's permission.

Third, defense counsel should prepare the client for any criminal justice debt hearings. As with sentencing hearings more generally, defense counsel will often be in the best position to steer the proceedings on the client's behalf, arguing the law and explaining how the circumstances surrounding the client's financial posture, criminal history and collateral consequences of a conviction might affect the client's current and future

ability to pay criminal justice debt. The presiding judge, however, often may direct questions to the defendant him or herself. Defense counsel should prepare the defendant for these questions, including by practicing common questions and responses in advance. Counsel should also advise the client to think critically about her answers and advise her to request a moment to speak with counsel privately should she feel uncomfortable or confused at any point during the hearing. Furthermore, the client should be informed that if she fails to provide complete information, the court may accept what is presented as the truth and make imposition determinations based on the information that is provided.[152] Finally, it is important to make sure the client understands that the ability to pay inquiry is not an assessment of character and that, in most cases, honestly conveying her financial hardship is likely to help the client—not to result in more jail time due to inability to pay.

Additionally, it is important to remember that clients present themselves with more than just their words. It is always in a client's interest to come to a sentencing hearing presenting themselves—through words, action, and appearance—as a responsible member of the community. With respect to ability-to-pay inquiries, however, this can become more complicated, as it may not be in a client's best interest, for example, to bring or wear especially expensive or flashy items or clothing to such a hearing. Counsel should not shy away from advising a client even at this level of detail, always being mindful, of course, to treat the client with dignity and respect.

Fourth and finally, counsel should thoroughly review the criminal justice debt portion of the judgment and sentence with the client. The discussion with a defendant after sentencing typically involves a review of the sentence imposed, conditions of supervised release, and avenues for appeal, among other things. Defendants are rarely as concerned about the sometimes long list of costs and fees printed at the end of the judgment form. However, failure to pay these criminal justice debts can cost defendants dearly, perhaps even landing them back in jail, or otherwise preventing them from securing employment and housing, harming their credit, and generally impairing their ability to rebuild their lives. As a result, defense attorneys should take the time to explain what a defendant should do to address criminal justice debt upon release from incarceration, and what collateral consequences flow from failure or inability to pay. Even the simple act of using a highlighter or a marker to emphasize payment amounts and due dates on the judgment order can be helpful. And once again, preparing a standard and visually informative handout to simplify the process can be valuable as well.

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[152] *See, e.g.,* People v. Green, 1998 WL 1991155 (Mich. Ct. App. June 12, 1998) (holding that the court may rely on information in the presentencing report, which is presumed to be accurate, when making an ability to pay determination unless the defendant objects).

Finally, if the attorney or the attorney's office is available to offer ongoing representation for the client in the event issues arise in the course of payment and collection, the attorney should stress to the client that he or she should contact the attorney at the first sign of difficulty fulfilling a debt. Oftentimes, a proactive attorney can try to work things out with a probation officer or other monitoring official to gain more time to make a payment or to otherwise lend assistance before the situation becomes dire. But such opportunities for early intervention only arise if the client alerts the attorney to potential problems in advance, before the attorney is served with notice that the client is in violation of the payment terms of her sentence.

3.8. Checklist for Representation of Clients Facing Imposition of Criminal Justice Debts

Below is a brief checklist that attorneys may use to help guide representation of clients facing imposition of criminal justice debts, along with cross references to the sections in this guide that discuss each issue.

- What types and amounts of debts might be imposed on your client? *(see 1.1, 3.2)*
  - Indigent defense fees?
  - Other fees or costs?
  - Surcharges?
  - Fines?
  - Restitution?
  - Other?

- Are the debts mandatory?
  - Debts that are commonly treated as mandatory may actually be discretionary or include conditions under which they should not be imposed. (*see 3.2.2)*
  - Imposition of non-mandatory debts may be avoided or reduced based on the existence of specified conditions—often including a defendant's inability to pay—or as a matter of the court's discretion. (*see 3.2.3)*
  - Consider potential constitutional challenges to imposition of mandatory debts. (*see 3.2.2)*

- If your client is indigent, does the law require an ability to pay analysis prior to imposition of costs or fines?
  - Review statutory language and case law for your jurisdiction to determine which types of debt, if any, require an ability to pay analysis prior to imposition. *(see 3.3.4)*
  - If the statutory or case law is indeterminate, consider potential constitutional arguments that an ability to pay determination is needed. *(see 3.3.2, 3.3.3)*

- Recognize and educate courts as to why post-sentencing remission options may not be an adequate substitute for a pre-imposition ability to pay determination. *(see 3.3.5)*

- If an ability to pay analysis is required or permitted, must future ability to pay be considered?
  - If the law clearly requires consideration of future ability to pay, focus on whether such future ability is reasonably foreseeable for this client. *(see 3.4.2)*
  - If the statute is silent as to the time period to consider for ability to pay, focus on current ability and financial condition. *(see 3.4.2, 3.4.3)*

- If an ability to pay analysis is required or permitted, what evidence will the court consider and how?
  - As "ability to pay" is often not defined, look not only to statutory authority, but also to case law in the jurisdiction and beyond, ask colleagues about their experiences with particular judges' approaches, and consider federal standards applied to other government debts. *(see 3.4.3)*
  - Potentially relevant factors include:
    - Whether the client was deemed indigent for purposes of appointment of counsel
    - Employment status and prospects
    - Income in relation to federal poverty guidelines for household size
    - Comparison of income to necessary expenses
    - Debt-to-income ratio
    - Receipt of benefits
    - Pending incarceration
    - Physical or mental disabilities
    - Substance abuse issues
    - Other debt

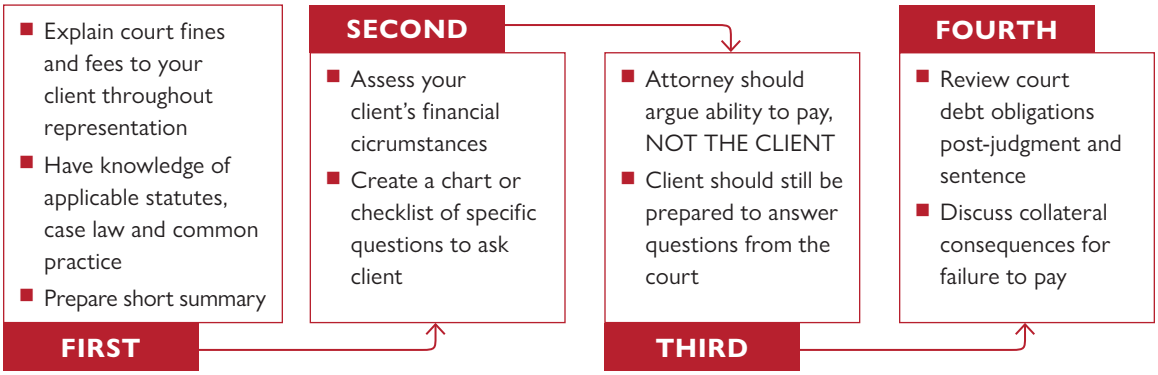
- What is your client's financial position and what capacity does your client have to pay such debts?
  - Open communication with your client about the details of their financial condition is critical to effective representation in ability to pay hearings. *(see 3.7)*
  - Communication regarding the rights, obligations, and risks associated with criminal justice costs is similarly critical. *(see 3.7)*

- Is your client interested in pursuing a plea agreement?
  - Counsel the client regarding the risks of any proposals by the prosecutor to waive the ability to pay determination as part of a plea deal. *(see 3.5)*
  - Consider ways plea bargaining may be used to reduce the likelihood of imposition of burdensome debts or other negative sentencing outcomes, and discuss such options thoroughly with the client. *(see 3.5)*

- Is community service an alternative to fines and fees?
  - If so, determine key facts like hours, accessibility, and type of service.
  - Community service may be a good option for some individuals, but there are a number of pitfalls to be aware of and discuss with clients as relates to their specific circumstances and goals. *(see 3.6)*
  - Avoiding service and financial obligations to the state altogether best protects the liberty of clients who are too poor to pay. *(see 3.6)*

TABLE 2

Key Steps Defense Counsel Should Take to Address Criminal Justice Debts at Imposition



4. DEFENDING COLLECTION OF CRIMINAL JUSTICE DEBT: REPRESENTATION OF CLIENTS FACING COLLECTION OR SANCTIONS FOR NONPAYMENT OF CRIMINAL JUSTICE DEBT, INCLUDING THOSE FACING THREATS TO THEIR LIBERTY

4.1. Introduction

In at least 44 states and the District of Columbia, individuals may be incarcerated for "willful" nonpayment of criminal justice debts.[153] Incarceration may be imposed in a number of different ways. Among the most common are civil or criminal contempt orders for violation of the order to pay; sanctions imposed for failure to appear at a debt-related hearing; revocation of probation or parole where payment was a condition of supervision; and "pay or stay" policies that offer individuals the "choice" of serving time in jail in lieu of paying a criminal justice debt.[154] Additionally, in many jurisdictions,

[153] *See* Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor 50 (2016). For a summary of all states, see *id.* at tbl. 4.2, and for a chart of the state law authority relied upon, see *id.* at tbl. A2.2.

[154] *See* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, Criminal Justice

nonpayment of criminal justice debt can result in governmental sanctions—beyond imprisonment—that can infringe on vital rights and interests essential to self-sufficiency, including suspension of driver's or professional licenses, restrictions on expungement of criminal records, and denial of the right to vote.[155] All attorneys—civil and criminal—who represent individuals who owe criminal justice debt should educate themselves on the consequences of missed criminal justice debt payments or hearings related to criminal justice debts in their jurisdiction, and should counsel clients with criminal justice debt accordingly.

In light of these potential consequences, the most urgent legal needs of criminal justice debtors will often consist of finding ways to defend against incarceration, forestalling the loss of an essential right, or quickly reducing the risk of nonpayment consequences through modification of the debt or payment plan. This section addresses several potential grounds for defending against incarceration and other collection actions related to criminal justice debts, focusing specifically on modification or remission of criminal justice debts based on financial hardship or other circumstances, constitutional protections against incarceration for inability to pay, other potential federal and state constitutional defenses, and statutes of limitations. These approaches are by no means exhaustive. However, they may often address the most immediate or serious needs of a client facing incarceration or other severe consequences arising from a difficulty in paying criminal justice debts. Advocates should also consider whether bankruptcy (discussed below in Section 5) and exemptions from garnishment, seizure, and offset (discussed in Section 6) might provide relief from collection, as well as other constitutional and statutory protections discussed below in the context of affirmative claims (see Section 7).

4.2. The Advocacy Gap

Before describing the various tools attorneys can use to help protect individuals facing criminal justice debt collection actions, one critically important point bears emphasis: Far too often, attorneys are not involved in these proceedings at all. While the Constitution generally precludes ordering imprisonment of a defendant in a criminal prosecution

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Debt: A Barrier to Reentry 20–23 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf. *See also* Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor 50, 104, 115 (2016).

[155] *See, e.g.*, Ark. Code. Ann, § 16-90-1404 (driver's license suspensions); Iowa Code §§ 901C.1, 907.9 (expungement). *See also* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry 2, 25, 29 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf; Allyson Fredericksen and Linnea Lassiter, Alliance for Justice, Disenfranchised by Debt (2016). *See generally Confronting Criminal Justice Debt: A Guide for Policy Reform* at 15-17, 22-23 (2016).

without the right to appointed counsel for those who cannot afford counsel,[156] the scope and application of the right to the various types of post-sentencing nonpayment proceedings is complex, varies by jurisdiction, and sometimes depends upon case-by-case factors.[157] Additionally, some states do not recognize a right to counsel in civil contempt proceedings under state law, even when incarceration may result.[158]

These gaps in the right to appointed counsel for indigent debtors create a significant representation need in many jurisdictions—a need that all attorneys, civil and criminal, who represent criminal justice debtors can help fill by educating themselves on criminal

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[156] *See* Scott v. Illinois, 440 U.S. 367, 373–374, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979) (holding "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense"); Gideon v. Wainwright, 372 U.S. 335, 343–345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding right to appointed counsel applies to state criminal prosecutions).

[157] *See generally* 3 Crim. Proc. § 11.2(b) (4th ed. updated Dec. 2015) (addressing when the right to appointed counsel attaches in criminal proceedings, including the circumstances under which a Sixth Amendment or due process right to counsel applies in probation and parole revocation proceedings); Colin Reingold, *Pretextual Sanctions, Contempt, and the Practical Limits of Bearden-Based Debtors' Prison Litigation*, 21 Mich. J. Race & L. 361, 369–372 (2016) (discussing right to appointed counsel in criminal contempt proceedings and application to contempt proceedings for failure to appear at a criminal justice debt status or payment hearing). *See also* Turner v. Rogers, 564 U.S. 431, 441, 448-449, 131 S. Ct. 2507, 180 L .Ed. 2d 452 (2011) (noting that there is generally a Sixth Amendment right to counsel in criminal contempt proceedings, but holding "that the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)," though explicitly leaving open the possibility of a right to appointed counsel in civil contempt proceedings in which the debt is owed to the state, especially if the state is represented by counsel); Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (distinguishing probation and parole revocation hearings from criminal trials, and concluding that "the need for counsel" at such hearings "must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system").

[158] *See, e.g.,* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry 22, nn.32–136 (2010), *available at* **http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf** (noting that some states order incarceration for nonpayment of criminal justice debt through the civil contempt process and that "[w]hile most states recognize a right to counsel in civil proceedings that could result in incarceration, high courts in Florida, Georgia, and Ohio have rejected this notion (although lower courts in Ohio are divided as to whether the high court's ruling continues to be good law)"). *See also* Turner v. Rogers, 564 U.S. 431, 441, 448-449, 131 S. Ct. 2507, 180 L .Ed. 2d 452 (2011) (noting that there is generally a Sixth Amendment right to counsel in criminal contempt proceedings, but holding "that the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)," though explicitly leaving open the possibility of a right to appointed counsel in civil contempt proceedings in which the debt is owed to the state, especially if the state is represented by counsel).

justice debt collection in their jurisdiction and by offering counsel to clients with criminal justice debt issues. Attorneys can provide critical assistance in defending against incarceration by identifying and pursuing available defenses, as well as by navigating the often complex procedural processes and identifying types and sources of relevant evidence.

Legal services and other civil attorneys may also play important roles in representing clients in collection-related proceedings—including, potentially, when incarceration is a risk. Attorneys with expertise in debt collection actions and in representing indigent clients may provide a valuable service by defending clients in collection actions or representing them in hearings related to criminal justice nonpayment. Additionally, legal services and pro bono attorneys may provide valuable representation in affirmative proceedings to modify a debt obligation or repayment plan. In such situations, debtors are unlikely to have court-appointed counsel or to be able to afford private counsel.

LEGAL SERVICES ATTORNEYS AND CRIMINAL JUSTICE DEBT

Legal Services Corporation ("LSC") regulations restrict when LSC funds may be used for representation of clients in relation to criminal matters, but do not preclude representation in many types of proceedings related to criminal justice debt. Three key restrictions bar use of LSC funds to represent clients with respect to: (1) "criminal proceedings" in which a client has been charged with an offense punishable by "death, imprisonment, or a jail sentence," 45 C.F.R. § 1613; (2) actions collaterally attacking a criminal conviction—such as habeas corpus proceedings, 45 C.F.R. § 1615; and (3) representation of prisoners and incarcerated pre-trial detainees in civil litigation, 45 C.F.R. § 1637.

These rules leave open significant opportunities for LSC-funded attorneys to represent clients in proceedings involving criminal justice debt. Notably, as stated in the preamble to 45 C.F.R. § 1613, the "criminal proceedings" rule "does *not* prohibit legal assistance with respect to any matters that are not part of a criminal prosecution such as probation revocation after a sentence has been imposed . . . [or] parole revocation." 41 Fed. Reg. 38,506 (Sept. 1976) (emphasis added) (internal citations omitted). (Attorneys must still, however, determine whether representation in specific instances would violate the limitations in § 1637 on representation of pre-trial detainees and other incarcerated persons.) The preamble also emphasizes that because infractions "punishable by no more than a fine" are "basically civil in nature," and "because the imposition of a fine may be extremely burdensome for the clients of legal services programs, the regulation permits representation of defendants in such cases." 41 Fed. Reg. 38,506 (Sept. 1976). Further, the rules do not preclude use of LSC funding to represent clients in civil proceedings related to criminal justice debt or in proceedings where the underlying conviction or culpability is not at issue, and where the client is not in jail or prison.

Given these rules, there is one area in which LSC-funded attorneys likely *cannot* provide assistance: serving as defense counsel when a client is being prosecuted for an independent charge of *criminal* contempt or other criminal violation due to nonpayment or failure to appear, if incarceration may be ordered. However, the regulations should generally permit representation in many proceedings, often including: (1) seeking remission or modification of criminal justice debt or payment plans, (2) defending against probation or parole revocation, (3) defending against collection actions for criminal justice debt, including garnishment and license suspension hearings, and (4) defending against civil contempt—although an individualized analysis will often be necessary to determine whether a given contempt matter is civil or criminal. *See* LSC Advisory Opinion EX-1999-05 (Mar. 4, 1999), *available at* http://www.lsc.gov/sites/default/files/LSC/laws/pdfs/olaeo/EX-1999-05.pdf.

The National Legal Aid & Defender Association has prepared a detailed analysis and guidance on LSC-funding restrictions as applied to various criminal justice debt proceedings; the memorandum is available to members of the Association. See Robin C. Murphy, National Legal Aid & Defender Association Guidance for LSC Programs RE: Criminal Justice Debt Collection (July 2016).

4.3. Seeking Remission or Modification of Criminal Justice Debts or Payment Plans After Imposition

When individuals are burdened by criminal justice debt, counsel can provide substantial assistance by seeking to have the debts remitted (i.e., cancelled) in whole or in part, or by seeking to have a payment plan created or modified, based on the client's financial situation or other relevant factors. Depending on the jurisdiction, counsel may be able to modify or cancel a debt in various procedural settings, including (1) in a defensive proceeding, such as a hearing to show cause for nonpayment; (2) in the course of a routine administrative hearing, such as a probation or payment status hearing; or (3) through an affirmative petition to remit the debt.[159] Complete cancellation of an obligation to pay a criminal justice debt will often relieve a debtor not only of the threat of incarceration for nonpayment, but also of other significant threats to liberty and livelihood related to collection of the debt or consequences of nonpayment. Modification of the amount of a debt or the terms of a payment plan, though not as complete a remedy, may make it possible for a client to make more manageable payments, avoid imminent penalties for nonpayment, avoid collection costs, or reduce the amount of time he or she will remain subject to payment terms.[160]

[159] See, e.g., Wash. Rev. Code § 10.01.160(4). *See also* Wash. Rev. Code § 10.01.160(4).

[160] For example, Community Legal Services has created a pamphlet on Criminal Court Fines and Fees in Philadelphia: Know Your Rights that describes how to get an affordable payment plan for local court

Advocates representing individuals with criminal justice debt should thus be sure to determine what opportunities for cancellation and modification are available in their jurisdiction, paying special attention to the procedural rules governing how such claims may be raised and what criteria the court will apply. Criminal justice debt waiver and modification opportunities may be provided by statute, court rules, or judicial discretion. Additionally, at least with respect to indigent defense fees, some jurisdictions have held that a meaningful remission process is a required feature of a constitutionally permissible cost recoupment statute;[161] counsel should consider the availability of such arguments in their jurisdiction if remission is not otherwise provided.

Although the availability and terms of remission vary by jurisdiction, many state remission statutes are similar in their language. As seen in Table 3, which collects examples of such statutes, many states authorize courts to remit all or part of court costs, costs of defense, or costs of incarceration if the debt will impose "manifest hardship" to the defendant or the defendant's family, so long as the defendant is not willfully or contemptuously refusing to pay. Other statutes are more explicit about what circumstances merit remission, and may also expressly state that remission is available for fines as well as costs in cases of financial hardship. For example, a Georgia statute mandates that all non-restitution criminal justice debt from misdemeanors or ordinance violations "shall be waive[d], modif[ied], or convert[ed] . . . upon a determination . . . that a defendant has a significant financial hardship or inability to pay or that there are any other extenuating factors which prohibit payment or collection."[162] The Georgia statute further provides a rebuttable presumption that an individual has a significant financial hardship in several circumstances, including if he: (i) "earns less than 100 percent of the federal poverty guidelines unless there is evidence that the individual has other resources that might reasonably be used without undue hardship for such individual or his or her dependents;" (ii) has certain disabilities; or (iii) has recently experienced a month or more of incarceration.[163]

Remission may also be authorized under court rules. For example, as discussed in the companion *Guide for Policy Reform* at 24-25, the Supreme Court of Michigan recently enacted court rules that allow Michigan courts to waive all or part of a criminal justice debt owed, modify an existing payment plan, or impose a payment alternative upon finding that the debtor is unable to comply with an order to pay without "manifest hardship."[164]

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debts—and the benefit of getting such a plan before being subjected to collection costs of 25%. It also describes when and how supervision fees and bail judgments may be waived or reduced, and has copies of the forms needed. *See* https://clsphila.org/learn-about-issues/court-fines-and-costs-guide.

[161] *See* §§2.3, 3.3.5, *supra*.

[162] Ga. Code Ann. § 42-8-102(c)–(e).

[163] *Id.*

[164] Michigan Supreme Court, Order No. 2015-12 (May 25, 2016), *available at* http://courts.mi.gov/

TABLE 3

Examples of Remission Statutes

STATE	REMISSION PROVISION
Alabama: Ala. Code 1975 § 15-12- 25(2) (defense costs)	"A defendant who has been ordered to pay the fees of court appointed counsel and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him or her for remission of the payment of these fees or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant, the court may remit all or part of the amount due in fees or modify the method of payment."
Alaska: Alaska Stat. § 18.85.120(c) (costs of defense)	"Upon the person's conviction, the court may enter a judgment that a person for whom counsel is appointed pay for services of representation and court costs... Upon a showing of financial hardship, the court ... (3) may remit or reduce the balance owing on the judgment or change the method of payment if the payment would impose manifest hardship on the person or the person's immediate family."
Delaware: Del. Code Ann. tit. 10, § 8601(d) (costs of defense)	"A defendant who has been required to pay the costs of defense and who is not in contumacious default in the payment thereof may at any time petition the court for remission of the payment of such costs, or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment."
Georgia: Ga. Code Ann. § 42-8-102(e) (fines, surcharges, and any other costs assessed)	"(e)(1)(B) 'Indigent' means an individual who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the individual has other resources that might reasonably be used without undue hardship for such individual or his or her dependents. (e)(1)(C) 'Significant financial hardship' means a reasonable probability that an individual will be unable to satisfy his or her financial obligations for two or more consecutive months. (e)(2) The court shall waive, modify, or convert fines, statutory surcharges, probation supervision fees, and any other moneys assessed by the court or a provider of probation services upon a determination by the court prior to or subsequent to sentencing that a defendant has a significant financial hardship or inability to pay or that there are any other extenuating factors which prohibit payment or collection; provided, however, that the imposition of sanctions for failure to pay such sums shall be within the discretion of the court through judicial process or hearings. (e)(3) Unless rebutted by a preponderance of the evidence that a defendant will be able to satisfy his or her financial obligations without undue hardship to the defendant or his or her dependents, a defendant shall be presumed to have a significant financial hardship if he or she: (A) Has a developmental disability; (B) Is totally and permanently disabled; (C) Is indigent; or (D) Has been released from confinement within the preceding 12 months and was incarcerated for more than 30 days before his or her release."

Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2015-12_2016-05-25_formatted%20order_various%20MCRs-ability%20to%20pay.pdf.

STATE	REMISSION PROVISION
Montana: Mont. Code Ann. § 46-8-113(5) (costs of defense)	"A defendant who has been sentenced to pay costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs or modify the method of payment."
Nevada: Nev. Rev. Stat § 178.3975(3)	"A defendant who has been ordered to pay expenses of the defendant's defense and who is not willfully or without good cause in default in the payment thereof may at any time petition the court which ordered the payment for remission of the payment or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due or modify the method of payment."
Oregon: Or. Rev. Stat. § 161.665 (costs)	"A defendant who has been sentenced to pay costs under this section and who is not in contumacious default in the payment of costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant, the court may enter a supplemental judgment that remits all or part of the amount due in costs, or modifies the method of payment..."
Utah: Utah Code Ann. § 77-32a-4 (West) (defense costs)	"If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs..."
Vermont: Vt. Stat. Ann. tit. 13, § 5238(f) (defense costs)	"A person who may be or has been ordered to pay all or part of the cost of representation by co-payment or reimbursement order may at any time petition the Court making the order for remission of all of the amount or any part thereof. If it appears to the satisfaction of the Court that payment of the amount due will impose manifest hardships on the defendant or the defendant's immediate family or that the circumstances of case disposition and the interests of justice so require, the Court may remit all or part of the amount due or modify the method of payment."
Washington: Wash. Rev. Code § 10.01.160(4) (costs)	"A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs..."
West Virginia: W. Va. Code § 7-8-14(c) (costs of incarceration)	"A defendant who has been sentenced to pay costs and who is not in willful default in the payment of the costs may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's family or dependents, the court may excuse payment of all or part of the amount due in costs, or modify the method of payment."

4.4. Defending Against Incarceration Based on Inability to Pay

When representing a criminal justice debtor who is facing incarceration as a potential consequence for nonpayment or late payment, it is critical that counsel determine whether the client has the ability to pay the debt, including through a repayment plan. If the client is unable to pay, this should be raised as a constitutionally-grounded defense to incarceration for nonpayment. Depending on the jurisdiction, inability to pay may also provide a basis for a defense to other sanctions or negative repercussions, and, as discussed above in Section 4.3, it may provide a basis for waiver or modification of the debt.

As discussed above in Section 2.2, *Bearden v. Georgia*[165] makes clear that incarcerating a defendant for nonpayment of criminal justice debt without careful analysis of his or her ability to pay and of alternative methods of punishment violates the Fourteenth Amendment. Further, subsequent case law has made clear that the ability to pay analysis must comport with sufficient safeguards to protect against erroneous deprivation of liberty.[166] This may require provision of counsel or other protections such as notice, a hearing at which the debtor can present information and respond, and express findings on ability to pay.[167] Further, state procedural protections may exceed federal constitutional minimums.[168]

Thus, in theory, no individual should be incarcerated for nonpayment without meaningful assessment of ability to pay, and lack of ability to pay should provide a constitutional defense to incarceration. In practice, however, substantial anecdotal accounts from knowledgeable observers and public defenders report that courts in many jurisdictions often do not engage in the required analysis of ability to pay, or do so in a cursory or inadequate manner.[169] It is therefore critical that advocates vigorously assert

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[165] 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

[166] *See* §§ 2.2, 2.4-2.5, *supra*.

[167] See § 2.4, *supra* (discussing Turner v. Rogers, 564 U.S. 431, 45–49 (2011)).

[168] *See, e.g.*, Jordan v. State, 939 S.W.2d 255, 257 (Ark. 1997) (requiring written findings of fact regarding ability to pay); Greene v. Dist. Ct. of Polk Cnty., 342 N.W.2d 818–821 (Iowa 1983) (requiring a hearing to determine responsibility for failure to pay prior to commitment and finding that jailing defendant without notice or an opportunity to explain why he had not satisfied the conditional order was a denial of due process); Hendrix v. Lark, 482 S.W.2d 427, 431 (Mo. 1972) (remanding indigent defendant to city court for a hearing to determine her ability to pay the fines and costs, and if unable to pay immediately, ordering an opportunity for her to pay in reasonable installments based upon her ability to pay); Gilbert v. State, 669 P.2d 699, 703 (Nev. 1983) ("[B]efore a defendant may be imprisoned for nonpayment of a fine, a hearing must be held to determine his financial condition, and an indigent defendant must be allowed reduction of fine or discharge of fine through installment payments.").

[169] *See, e.g.*, Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor 120 (2016) (describing courtroom observations of ability to pay in Washington State, and noting officials who deemed debtors willful in nonpayment if they received disability or unemployment benefits but did

this defense if there is risk of incarceration. It is also essential to work with clients to collect and effectively present evidence of their inability to pay. Moreover, if a judge indicates an inclination to reject the claim, counsel should demand express findings and otherwise take all steps to preserve the issue for potential appeal.

While an ability to pay analysis is mandated by the federal constitution, the process and standards for assessing ability to pay, including any evidentiary presumptions and guidance regarding financial evidence the court will consider, vary by jurisdiction[170] as well as by type of proceeding.[171] However, the general principles and strategies laid out above in Section 3.4 for defending against imposition of court fines and fees based on inability to pay are equally applicable to defending against incarceration for nonpayment, and should be considered alongside any jurisdiction-specific laws or court rules.

4.5. Other Constitutional Defenses

In addition to the right to an ability to pay assessment prior to incarceration, rooted in the Fourteenth Amendment, a range of other potential constitutional defenses to collection or incarceration for nonpayment of criminal justice debts may be applicable. For convenience, this guide groups discussion of Due Process and other constitutional challenges to criminal justice debt practices below under "Affirmative Constitutional Claims."[172] Many of the constitutional issues discussed there may also be raised in a defensive posture.

Moreover, some potential constitutional protections may be particularly suited to an individualized defensive proceeding. For example, defendants who face activation of a suspended prison sentence as a result of nonpayment (where payment was a condition

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not make payments, and those who even encouraged begging); Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry 21 (2010) ("For example, a public defender in Illinois observed that rather than evaluating a person's assets and obligations, one judge simply asked everyone if they smoked. If they smoked and had paid nothing since the last court date, he found willful nonpayment and put them in jail without doing any further inquiry.")

[170] *See Confronting Criminal Justice Debt: A Guide for Policy Reform* at 27-30 (2016) for discussion of statutory ability-to-pay schemes, as well as a list of critical elements of such schemes that states should adopt. *See also* Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1634 (2015) ("There has been conflicting case law among the lower courts . . . as to whether the defendant or the state bears the burden of proving indigence and willfulness.").

[171] *See, e.g.*, Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624, 637, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988) (explaining that in a contempt proceeding for willful failure to pay that is criminal in nature, a statute requiring the defendant to carry the burden of persuasion in showing inability to pay would violate the Due Process Clause because it would be inconsistent with state's burden to prove guilt, but that the same statute would be constitutional as applied in a civil proceeding).

[172] *See* § 7.3, *infra*.