

ADOPTED**AMERICAN BAR ASSOCIATION****WORKING GROUP ON BUILDING PUBLIC TRUST
IN THE AMERICAN JUSTICE SYSTEM
SECTION ON CIVIL RIGHTS AND SOCIAL JUSTICE
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
CRIMINAL JUSTICE SECTION
SECTION ON STATE AND LOCAL GOVERNMENT LAW
COMMISSION ON YOUTH AT RISK
MASSACHUSETTS BAR ASSOCIATION
KING COUNTY BAR ASSOCIATION
WASHINGTON STATE BAR ASSOCIATION****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

- 1 RESOLVED, That the American Bar Association adopts the *ABA Ten Guidelines on*
2 *Court Fines and Fees*, black letter and commentary, dated August 2018; and
3
4 FURTHER RESOLVED, That the American Bar Association urges all federal, state,
5 local, territorial, and tribal legislative, judicial and other governmental bodies to apply the
6 *ABA Ten Guidelines on Court Fines and Fees*.

21 known as “fees”—have proliferated to the point where they can eclipse the fines imposed in low-
 22 level offenses.⁴ Many states even impose “collection fees,” payable to private debt collection
 23 firms for the cost of collecting other fees, and well as fines.⁵ All such fees imposed in
 24 connection with a conviction or criminal offense or civil infraction should be eliminated because
 25 the justice system serves the entire public and should be entirely and sufficiently funded by
 26 general government revenue.⁶

27

28 If imposed at all, fees should be commensurate with the service they cover, and consistent with
 29 the financial circumstances of the individual ordered to pay, so that the fees do not result in
 30 substantial hardship to the individual or his/her dependents.⁷ A judge should always be
 31 permitted to waive or reduce any fee if an individual is unable to pay. Fees that are legislatively
 32 mandated should be revised to permit such waiver or reduction based on inability to pay.

33

34 When an individual is unable to pay, courts should not impose fees, including fees for counsel,
 35 diversion programs, probation, payment plans, community service, or any other alternative to the
 36 payment of money.⁸ An individual’s ability to pay should be considered at each stage of
 37 proceedings, including at the time the fees are imposed and before imposition of any sanction for
 38 nonpayment of fees, such as probation revocation, issuance of an arrest warrant for nonpayment,
 39 and incarceration. The consideration of a person’s ability to pay at each stage of proceedings is
 40 critical to avoiding what are effectively “poverty penalties,” *e.g.*, late fees, payment plan fees,
 41 and interest imposed when individuals are unable to pay fines and fees.

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every criminal conviction, including traffic infractions, for Emergency Medical Air Transportation. Cal. Govt. Code § 76000.10(c)(1).

⁴ *Profiting from Probation* at 14.

⁵ *Criminal Justice Debt* at 17.

⁶ The National Task Force on Fines, Fees and Bail Practices was established by the Conference of Chief Justices and the Conference of State Court Administrators. In December 2017, the Task Force issued its “Principles on Fines, Fees, and Bail Practices” (the “National Task Force Principles” or “NTF Principles”) which are available at <http://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx>. Principle 1.5 states, “Courts should be entirely and sufficiently funded from general governmental revenue sources to enable them to fulfill their mandate. Core court functions should generally not be supported by revenues generated from court-ordered fines, fees, or surcharges.”

⁷ NTF Principle 1.6 states that fees should only be used for a narrow scope of “administration of justice” purposes and that “in no case should the amount of such a fee or surcharge exceed the actual cost of providing the service.” See also *The Criminalization of Poverty*, at 53.

⁸ See Amer. Bar Ass’n, Resolution 110 (2004 AM), *ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases*, Guideline 2 (“An accused person should not be ordered to pay a contribution fee that the person is financially unable to afford.”).

44 **GUIDELINE 2: Limits to Fines**

45 *Fines used as a form of punishment for criminal offenses or civil infractions should not result*
 46 *in substantial and undue hardship to individuals or their families. No law or rule should limit*
 47 *or prohibit a judge’s ability to waive or reduce any fine, and a full waiver of fines should be*
 48 *readily accessible to people for whom payment would cause a substantial hardship.*

49
 50 COMMENTARY:

51
 52 Fines should be calibrated to reflect the financial circumstances of the individual ordered to pay,⁹
 53 so that the fines do not result in substantial and undue hardship to the individual or his/her
 54 dependents.¹⁰

55
 56 An individual’s ability to pay should be considered at each stage of proceedings, including at the
 57 time fines are imposed and before any sanction for nonpayment, such as probation revocation,
 58 issuance of an arrest warrant for nonpayment, or incarceration.¹¹

59
 60 **GUIDELINE 3: Prohibition against Incarceration and Other Disproportionate Sanctions,**
 61 **Including Driver’s License Suspensions.**

62
 63 *A person’s inability to pay a fine, fee or restitution should never result in incarceration or*
 64 *other disproportionate sanctions.*

65
 66
 67 COMMENTARY:

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⁹ *Amer. Bar Ass’n, Standards for Criminal Justice: Sentencing*, Standard 18-3.16 (d) (“The legislature should provide that sentencing courts, in imposing fines, are required to take into account the documented financial circumstances and responsibilities of an offender.”). NTF Principle 2.3 states, “States should have statewide policies that set standards and provide for processes courts must follow when doing the following: assessing a person’s ability to pay; granting a waiver or reduction of payment amounts; authorizing the use of a payment plan; and using alternatives to payment or incarceration.” NTF Principle 6.2 urges that state law and court rules “provide for judicial discretion in the imposition of legal financial obligations.”

¹⁰ *See Amer. Bar Ass’n, Resolution 111B (2016 AM)*, cmt. at 13 (urging the abolition of user-funded probation systems supervised by for-profit companies based on a detailed explanation of the Supreme Court’s decision in *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), and the problem of debtors’ prisons—the unlawful incarceration of people too poor to pay court fines and fees); Council of Economic Advisers Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor* (Dec. 2015) (“CEA Brief”), at 5-6, available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

¹¹ *Amer. Bar Ass’n, Standards for Criminal Justice: Sentencing*, Standard 18.3.22(e) (“Non-payment of assessed costs should not be considered a sentence violation.”)

69 Despite the popular belief that “debtors’ prisons” have been abolished in the United States,
 70 people are still incarcerated because they cannot pay court fines and fees, including contribution
 71 fees for appointed counsel.¹² In many states, people are incarcerated because they owe fines and
 72 fees and are unable to pay. Such incarceration has been documented in at least thirteen states
 73 since 2010.¹³ As the Brennan Center has explained, there are four “paths” to debtors’ prison: (1)
 74 many courts may revoke or withhold probation or parole upon an individual’s failure to pay; (2)
 75 some states authorize incarceration as a penalty for failure to pay, such as through civil
 76 contempt; (3) some courts force defendants to “choose” to serve prison time rather than paying a

¹² The ABA opposes incarceration for inability to pay contribution fees for appointed counsel. *E.g.*, Amer. Bar Ass’n, Resolution 110 (2004 AM), *ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases*, Guideline 4 (“Failure to pay a contribution fee should not result in imprisonment or the denial of counsel at any stage of proceedings.”); Amer. Bar Ass’n, Resolution of the House of Delegates 111B (Aug. 2016) (commentary on *Bearden* and debtors’ prisons); Amer. Bar Ass’n, Resolution of the House of Delegates 112C (Aug. 2017) (urging governments to “prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay”). The reasoning underlying Resolution 112C’s principle against pretrial incarceration for inability to pay also applies to any stage of court proceedings that could lead to incarceration for inability to pay. NTF Principle 6.3 states that courts should make an ability-to-pay determination before ordering incarceration or probation revocation for failure to pay. Principle 4.3 states that courts should make an ability-to-pay determination before ordering license suspension for failure to pay.

¹³ American Civil Liberties Union, *In For A Penny: The Rise Of America’s New Debtors’ Prisons* (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf. (documenting incarceration for unpaid fines and fees in Michigan, Ohio, Georgia, Louisiana, and Washington); CLU of Louisiana, *Louisiana Debtors’ Prisons: An Appeal To Justice* (2015), https://www.laclu.org/sites/default/files/field_documents/2015_Report_Louisiana_Debtors_Prisons_0.pdf; ACLU of New Hampshire, *Debtors’ Prisons In New Hampshire* (2015), <http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf>; ACLU of Ohio, *In Jail & In Debt: Ohio’s Pay-To-Stay Fees* (2015), <http://www.acluohio.org/wp-content/uploads/2015/11/InJailInDebt.pdf>; ACLU of Ohio, *The Outskirts Of Hope: How Ohio’s Debtors’ Prisons Are Ruining Lives And Costing Communities* (2013), http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf; ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors’ Prisons: The Ways Court-Imposed Debts Punish People For Being Poor* (2014), <https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf>; Alison Beyea, *Legislature Has a Chance to End Debtors’ Prisons in Maine*, ACLU of Maine blog (Mar. 8, 2016), <https://www.aclumaine.org/en/news/legislature-has-chance-end-debtors-prisons-maine>; Debtors’ Prisons, ACLU of Colorado, <http://aclu-co.org/court-cases/debtors-prisons> (compiling 2013 letters to municipalities of Westminster, Northglenn, and Wheat Ridge concerning illegal jailing of people unable to pay fines and fees); Press Release, ACLU of Colorado, Colorado Legislature Approves Ban on Debtors’ Prisons (Apr. 23, 2014), <http://aclu-co.org/colorado-legislature-approves-ban-debtors-prisons>; Complaint, *Thompson v. Dekalb County*, No. 1:15-cv-280-TWT (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/field_document/2015.01.29_filed_thompson_complaint.pdf; Complaint, *Fuentes v. Benton County*, Washington, No. 15-2-02976-1 (Sup. Ct. Wash. Yakima County Oct. 6, 2015), https://www.aclu.org/sites/default/files/field_document/fuentes_v_benton_county_-_complaint.pdf; Complaint, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Oct. 21, 2015), <https://www.aclu.org/kennedy-v-city-biloxi-complaint>; Complaint for Superintending Control, *In re Donna Elaine Anderson*, Circuit Court Case No. 15-2380-AS (Cir. Court County of Macomb Jul. 9, 2015), <http://www.aclumich.org/sites/default/files/Motion%20for%20Class%20Cert%20as%20filed.pdf>.

77 court-imposed debt; and (4) many states authorize law enforcement officials to arrest individuals
78 for failure to pay and to hold them while they await an ability-to-pay hearing.¹⁴

79
80 In the seminal 1983 *Bearden* decision, the U.S. Supreme Court ruled that courts may not
81 incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing
82 on the individual's ability to pay and making a finding that the failure to pay was "willful."¹⁵
83 ABA policy reflects this principle.¹⁶ The *Bearden* case followed a line of cases in which the
84 Supreme Court had attempted to make clear that individuals who are unable to pay a fine or fee
85 should not be incarcerated for failure to pay.¹⁷ Unfortunately, the problem persists almost a half-
86 century later.

87
88 Fines and fees that are not income-adjusted (*i.e.*, are not set at an amount the person reasonably
89 can pay) are regressive and have a disproportionate, adverse impact on low-income people and
90 people of color.¹⁸ For these and other reasons, incarceration and other disproportionate

¹⁴ *Criminal Justice Debt* at 20-26. *See also Profiting from Probation* at 51-52. This "harsh reality" of people being incarcerated for failure to pay impossible-to-pay fees and fines "harks back to the days after the Civil War, when former slaves and their descendants were arrested for minor violations, slapped with heavy fines, and then imprisoned until they could pay their debts. The only means to pay off their debts was through labor on plantations and farms. . . . Today, many inmates work in prison, typically earning far less than the minimum wage." Alexander, *The New Jim Crow*, at 157.

¹⁵ *Bearden v. Georgia*, 461 U.S. 660, 667-69 (1983).

¹⁶ Amer. Bar Ass'n, Resolution 111B (2016 AM). *See also* Amer. Bar Ass'n, Resolution 112C (2017 MY) (urging governments to "prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay"). The rationale for Resolution 112C's principle against pretrial incarceration for inability to pay also applies to any stage of court proceedings that could lead to incarceration for inability to pay. *See also* Amer. Bar Ass'n, *Standards for Criminal Justice: Sentencing* 18-3.22 (Sentencing courts should consider an individual's ability to pay before determining whether to assess fines or fees and how much to assess).

¹⁷ *See, e.g., Williams v. Illinois*, 399 U.S. 235 (1970) (holding that an Illinois law requiring that an individual who was unable to pay criminal fines "work off" those fines at a rate of \$5 per day violated the Equal Protection Clause because the statute "works an invidious discrimination solely because he is unable to pay the fine"); *Tate v. Short*, 401 U.S. 395 (1971) ("Imprisonment in such a case [of an 'indigent defendant without the means to pay his fine'] is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose [either]; the defendant cannot pay because he is indigent.").

¹⁸ Studies show that the imposition and enforcement of fines and fees disproportionately and regressively affect low-income individuals and families. *See, e.g., CEA Brief*, at 5-8. For example, in many jurisdictions black people disproportionately experience license suspensions for nonpayment of fines and fees, due in part to racial disparities in wealth and poverty. *See Back on the Road California, Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, at 27 (2016) (hereinafter "Stopped, Fined, Arrested"), http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. *See* Legal Aid Justice Center, *Driven by Dollars: a State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt* (2017), <https://www.justice4all.org/wp->

91 sanctions, including driver’s license suspension, should never be imposed for a person’s inability
 92 to pay a fine or fee.¹⁹ The same principle applies with full force to restitution and forfeiture.
 93 Although restitution and forfeiture are beyond the scope of these Guidelines, at minimum it is
 94 clear that a person who is unable to pay *any* court-imposed financial obligation—including
 95 restitution or forfeiture—must not be incarcerated or subjected to other disproportionate sanction
 96 for failure to pay.

97
 98 Just as a person’s ability to pay should be considered in imposing a fine or fee in the first place,
 99 and must be considered when imposing incarceration for failure to pay, the same principles apply
 100 to other disproportionate sanctions short of incarceration. A disproportionate sanction for
 101 nonpayment of court fines and fees includes any sanction with a substantial adverse impact on
 102 the life of the individual.

103
 104 A common sanction used by courts in the vast majority of states for failure to pay a fine is the
 105 suspension of a driver’s license, often imposed without a hearing. People who are prohibited
 106 from driving often lose their ability to work or attend to other important aspects of their lives.²⁰
 107 Suspending a driver’s license can lead to a cycle of re-incarceration, because many such
 108 individuals find themselves in the untenable position of either driving with a suspended license
 109 or losing their jobs, and because driving on a suspended license is itself an offense that may be

[content/uploads/2017/09/Driven-by-Dollars.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf). Such racial disparities in the adverse impact of the imposition and enforcement of court fines and fees also contribute to tension between law enforcement and courts on the one hand and the communities of color they serve on the other, as documented in a devastating 2015 report by the U.S. Department of Justice. See U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department*, at 79-81 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (detailing evidence of how municipal court and policing practices related to court fine and fee collection erode community trust in law enforcement).

¹⁹ NTF Principle 4.3 states that, “Courts should not initiate license suspension procedures until an ability to pay hearing is held and a determination has been made on the record that nonpayment was willful. . . . Judges should have discretion to modify the amount of fines and fees imposed based on an offender’s income and ability to pay.” See also *Robinson v. Purkey*, No. 3:17-cv-1263, 2017 WL 4418134, at *8 (M.D. Tenn. Oct. 5, 2017) (“No person . . . can be threatened or coerced into doing the impossible, and no person can be threatened or coerced into paying money that she does not have and cannot get.”).

²⁰ See *Fowler v. Johnson*, No. 17-11441, 2017 WL 6540926, at *2 (E.D. Mich. Dec. 17, 2017) (finding that “the loss of a driver’s license, particularly in a state like Michigan lacking an efficient and extensive public transportation system, hinders a person’s ability to travel and earn a living” and preliminarily enjoining Michigan’s system for suspending driver’s licenses upon non-payment of traffic tickets).

110 sanctioned with incarceration.²¹ Suspending a driver’s license for nonpayment is therefore out of
 111 proportion to the purpose of ensuring payment and destructive to that end.²²

112

113 Nothing in this Guideline is intended to preclude a court from issuing an arrest warrant to secure
 114 the court appearance of a defendant who failed to appear if the court determines that the
 115 defendant received actual notice of the hearing. Courts should endeavor to ensure that any
 116 defendants arrested on failure-to-appear warrants are expeditiously brought before a judicial
 117 officer. In such circumstances, no person should be jailed without a hearing on ability to pay; in
 118 no event should bail or the bond amount on the warrant be set purposely to correspond with the
 119 amount of any fines and fees owed.

120

121 **GUIDELINE 4: Mandatory Ability-To-Pay Hearings**

122

123 *Before a court imposes a sanction on an individual for nonpayment of fines, fees, or*
 124 *restitution, the court must first hold an “ability-to-pay” hearing, find willful failure to pay a*
 125 *fine or fee the individual can afford, and consider alternatives to incarceration.*

126

127 COMMENTARY:

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129 As set forth in Guideline 3, if a person is unable to pay a fine or fee, he or she should not be
 130 incarcerated or subjected to any other disproportionate sanction, including suspension of a
 131 driver’s license. There must also be procedures to ensure protection of that right, including a
 132 hearing where a court determines whether an individual is able, or unable, to pay the fine or fee
 133 at issue. In other words, at minimum the procedures set forth in *Bearden* must precede any
 134 incarceration or imposition of any other sanction for nonpayment of a fine or fee.²³ These

²¹ See Department of Justice “Dear Colleague” Letter (March 14, 2016), <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf> (“Department of Justice Guidance”), at 6 (“In many jurisdictions, courts are also authorized—and in some cases required—to initiate the suspension of a defendant’s driver’s license to compel the payment of outstanding court debts. If a defendant’s driver’s license is suspended because of failure to pay a fine, such a suspension may be unlawful if the defendant was deprived of his due process right to establish inability to pay.”). See also *Criminal Justice Debt* at 24-25 (explaining the consequences of driver’s license suspensions).

²² In *Robinson*, a federal court in Tennessee ordered the restoration of driver’s licenses for individuals’ whose licenses had been suspended for nonpayment finding that a license suspension is “not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end.” 2017 WL 4418134, at *7. The court held that “taking an individual’s driver’s license away to try to make her more likely to pay a fine is not using a shotgun to do the job of a rifle: it is using a shotgun to treat a broken arm. There is no rational basis for that.” *Id.* at *9.

²³ See *Bearden*, 461 U.S. at 667-69 (incarceration for failure to pay a fine and restitution); *Turner v. Rogers*, 564 U.S. 431, 449 (2011) (incarceration for failure to pay child support); *Robinson*, 2017 WL 4418134, at *8-9 (driver’s license suspension). See also *Department of Justice Guidance* at 3 (“Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to

135 procedures must apply whenever a sanction is being sought for nonpayment of a fine or fee,
 136 including in connection with deferred sentencing, implementation of a suspended incarceration
 137 sentence, or extension or revocation of probation, parole, or other form of supervision.

138
 139 Courts must also provide adequate and meaningful notice of an ability-to-pay hearing to people
 140 alleged to have failed to pay, including notice of the hearing date, time and location, the subject
 141 matter to be addressed, and advisement of all applicable rights, including any right to counsel.²⁴
 142

143 **GUIDELINE 5: Prohibition against Deprivation of Other Fundamental Rights**

144
 145 *Failure to pay court fines and fees should never result in the deprivation of fundamental*
 146 *rights, including the right to vote.*

147
 148 COMMENTARY:

149
 150 Payment of court fines and fees should never be tied to a person’s ability to exercise fundamental
 151 rights,²⁵ which include the right to vote and the right to the care, custody, and control of one’s
 152 children.²⁶ Yet, in certain states, the exercise of these fundamental rights is conditioned on the
 153 payment of court fines and fees by statute or through court practice.

pay was willful. . . . Further, a court’s obligation to conduct indigency inquiries endures throughout the life of a case.”).

²⁴ In connection with the NTF Principles, the National Task Force on Fines, Fees and Bail Practices also published a “Bench Card for Judges” entitled *Lawful Collection of Legal Financial Obligations*, available at http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx. The Bench Card explains the importance of affording “Adequate Notice of the Hearing to Determine Ability to Pay,” and recognizes that such notice “shall include” notice of: the hearing date and time; the total amount due; that the court will evaluate the person’s ability to pay at the hearing; that the person should bring any documentation or information the court should consider in determining ability to pay; that incarceration may result only if alternative measures are not adequate to meet the state’s interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused; the right to counsel; and that a person unable to pay can request payment alternatives, including, but not limited to, community service and/or reduction in the amount owed. *See also Department of Justice Guidance* at 5 (“Courts should ensure that citations and summonses adequately inform individuals of the precise charges against them, the amount owed or other possible penalties, the date of their court hearing, the availability of alternate means of payment, the rules and procedures of court, their rights as a litigant, or whether in-person appearance is required at all. Gaps in this vital information can make it difficult, if not impossible, for defendants to fairly and expeditiously resolve their cases.”).

²⁵ The term “fundamental right” as used in this principle does not include freedom from incarceration, which is addressed in Guidelines 3 and 4.

²⁶ *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (referring to “the political franchise of voting” as “a fundamental political right, because [it is] preservative of all rights”); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously

154
 155 For example, court fines and fees can effectively serve as a poll tax because certain states,
 156 including Georgia, require payment of all outstanding court fines and fees before a person
 157 convicted of a felony can regain his or her ability to vote.²⁷ In other states, reported nonpayment
 158 or willful nonpayment of fines and fees can lead to a revocation of voting rights.²⁸ And
 159 researchers have found that in states where people are prohibited from voting “while incarcerated
 160 or under other forms of criminal justice supervision,” people can suffer from voting restrictions
 161 as a result of “additional sanctions associated with or triggered by nonpayment,” such as
 162 violation of conditions of supervision and revocation of probation.²⁹ Although not required by
 163 state statute, there are also troubling reports that parents have been denied contact with their
 164 children until they have made payment on outstanding court fees—a deprivation of their
 165 fundamental right to make decisions concerning the care, custody, and control of their children.³⁰

166
 167 The deprivation of fundamental rights, such as the right to vote, or to the care, custody, and
 168 control of one’s children, should never result from inability to pay or even a willful failure to pay
 169 by a person with means. No government interest in collecting court fines and fees, or in
 170 achieving punishment and deterrence through such collection, warrants the deprivation of such
 171 fundamental rights.

172

173

scrutinized.”); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (collecting cases recognizing “the fundamental right of parents to make decisions concerning the care, custody, and control of their children”).

²⁷ Alexes Harris, *et al.*, *Monetary Sanctions in the Criminal Justice System: A review of law and policy in California, Georgia, Illinois, Minnesota, Missouri, New York, North Carolina, Texas, and Washington* 14, <http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf>.

²⁸ *Id.* (“In Washington, failure to make three payments in a twelve-month period can lead to a revocation of voting rights. The court can also revoke voting rights if they determine that a person has willfully failed to comply with the terms of payment.”).

²⁹ *Id.* (“In Missouri, Illinois, and New York, nonpayment of legal financial obligations can be considered a violation of conditions of supervision which can potentially lead to an extension of supervision or revocation of probation and parole. In Minnesota, probation can be extended for up to five years for unpaid restitution and probation can be revoked for failure to pay for mandatory conditions of probation.”).

³⁰ In 2017, a Youth Court Judge in Mississippi entered an order prohibiting a mother from having contact with her four-month-old baby until she paid her court fees in full, and was reported to have taken similar action with respect to other parents. The University of Mississippi School of Law, *MacArthur Justice Center Initiated Demands that Led to Mississippi Youth Court Judge Resigning* (Oct. 26, 2017), <https://law.olemiss.edu/macarthur-justice-center-initiated-demands-that-led-to-mississippi-youth-court-judge-resigning>.

174 **GUIDELINE 6: Alternatives to Incarceration, Substantial Sanctions, and Monetary**
 175 **Penalties**

176 *For people who are unable to pay fines or fees, courts must consider alternatives to*
 177 *incarceration and to disproportionate sanctions, and any alternatives imposed must be*
 178 *reasonable and proportionate to the offense.*

179
 180 COMMENTARY:

181
 182 Fines seek to punish and deter—goals that can often be served fully by alternatives to
 183 incarceration and disproportionate sanctions like driver’s license suspension. Reasonable
 184 alternatives include: an extension of time to pay; reduction in the amount owed; and waiver of
 185 the amount owed.³¹ Frequently, the most reasonable alternative to full payment of a fine that a
 186 person cannot afford is reduction of the fine to an amount that an individual can pay.

187
 188 As addressed above, fees seek to recoup court costs, generate revenue for programs through
 189 surcharges or assessments, or cover the cost of services related to the justice system. Fees should
 190 only be imposed if, among other things, the individual is able to pay. If a person who has been
 191 required to pay a fee subsequently cannot afford to pay, the fee should be waived entirely or
 192 reduced to an amount the person can pay.³²

193
 194 Judges must have the authority to waive any or all fines and fees if the person has no ability to
 195 pay. Any non-monetary alternatives to payment of a fine, such as community service, treatment,
 196 or other social services, should be developed in line with the individual’s circumstances.³³
 197 Participation in these alternatives should never be conditioned on the waiver of due process
 198 rights, such as the right to a hearing or to counsel. Nor should additional fees be imposed as a
 199 condition of participating in the alternative ordered.³⁴

200

³¹ *Bearden*, 461 U.S. at 672.

³² NTF Principle 6.5 provides:

Courts should not charge fees or impose any penalty for an individual’s participation in community service programs or other alternative sanctions. Courts should consider an individual’s financial situation, mental and physical health, transportation needs, and other factors such as school attendance and caregiving and employment responsibilities, when deciding whether and what type of alternative sanctions are appropriate.

³³ *Bearden*, 461 U.S. at 667-69; *Report on the Future of Legal Services in the United States*, ABA Commission on the Future of Legal Services (2016), <http://abafuturesreport.com>, at 62 (endorsing the principle that courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees). *See also* Amer. Bar Ass’n, Resolution 102C (2010 MY) (recommending local, state, territorial and federal governments to undertake a comprehensive review of the misdemeanor provisions of their criminal codes, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal sanctions).

³⁴ NTF Principle 6.8 provides that courts should never charge interest on payment plans.

201 Any non-monetary alternatives should be reasonable and proportional in light of the individual’s
 202 financial, mental, and physical capacity, any impact on the individual’s dependents, and any
 203 other limitations, such as access to transportation, school, and responsibilities for caregiving and
 204 employment. Non-monetary alternatives should also be proportional to the offense and not force
 205 individuals who cannot pay to provide free services beyond what is proportional.
 206

207 **GUIDELINE 7: Ability-to-Pay Standard**

208
 209 *Ability-to-pay standards should be clear and consistent and should, at a minimum, require*
 210 *consideration of at least the following factors: receipt of needs-based or means-tested public*
 211 *assistance; income relative to an identified percentage of the Federal Poverty Guidelines;*
 212 *homelessness, health or mental health issues; financial obligations and dependents; eligibility*
 213 *for a public defender or civil legal services; lack of access to transportation; current or recent*
 214 *incarceration; other fines and fees owed to courts; any special circumstances that bear on a*
 215 *person’s ability to pay; and whether payment would result in manifest hardship to the person*
 216 *or dependents.*

217

218 **COMMENTARY:**

219

220 Courts should apply a clear and consistent standard to determine an individual’s ability to pay
 221 court fines and fees.³⁵

222

223 All court actors, including judges, prosecutors, probation officers, and defenders, should be
 224 trained in the standards used in their jurisdiction to determine ability to pay and the constitutional
 225 protections for people who cannot afford to pay court-ordered financial obligations.

226

227 **GUIDELINE 8: Right to Counsel**

228

229 *An individual who is unable to afford counsel must be provided counsel, without cost, at any*
 230 *proceeding, including ability-to-pay hearings, where actual or eventual incarceration could be*
 231 *a consequence of nonpayment of fines and/or fees. Waiver of counsel must not be permitted*
 232 *unless the waiver is knowing, voluntary and intelligent, and the individual first has been*
 233 *offered a meaningful opportunity to confer with counsel capable of explaining the*
 234 *implications of pleading guilty, including collateral consequences.*

³⁵ The National Task Force’s “Bench Card” (http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx), a step-by-step guide for state and local judges to use to protect the rights of people who cannot afford to pay court fines and fees, includes a set of factors judges should consider when making an ability-to-pay determination.

235

236

237 COMMENTARY:

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239 No indigent person should be incarcerated without being offered the assistance of court-
 240 appointed counsel to ensure that due process standards are met and that all potential defenses are
 241 considered. Such counsel should be provided in all proceedings “regardless of their
 242 denomination as felonies, misdemeanors, or otherwise.”³⁶ Moreover, counsel should be offered
 243 whenever eventual incarceration is a possible result regardless of whether the proceeding at issue
 244 is denominated “criminal” or “civil”.³⁷ The cost to the court of providing counsel is not a
 245 legitimate justification for the failure to provide counsel when it is required by law.³⁸

246

247 It is longstanding ABA policy that, “[n]o waiver of counsel be accepted unless the accused has at
 248 least once conferred with a lawyer.”³⁹ This ensures that an individual who intends to waive
 249 counsel has a full understanding of the assistance that counsel can provide.⁴⁰ Judges have the
 250 primary responsibility for ensuring that counsel is appointed, that individuals receive effective

³⁶ Amer. Bar Ass’n, Resolution 114 (MY 2018), https://www.americanbar.org/news/reporter_resources/midyear-meeting-2018/house-of-delegates-resolutions/114.html (urging federal, state, local, territorial and tribal governments “to provide legal counsel as a matter of right at public expense to low-income persons in all proceedings that may result in a loss of physical liberty, regardless of whether the proceedings are: a) criminal or civil; or b) initiated or prosecuted by a government entity.”). See also Amer. Bar Ass’n, *ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings* (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf; Amer. Bar Ass’n, *Standards for Criminal Justice: Providing Defense Services* 5-5.1 (3d ed. 1992), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html.

³⁷ See Amer. Bar Ass’n, *Standards for Criminal Justice: Providing Defense Services* 5-5.2 cmt. (3d ed. 1992), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services_authcheckdam.pdf, at 65 (“[T]he line between criminal and civil proceedings which give rise to a constitutional right to counsel has become increasingly blurred. Thus, protected liberty interests have extended due process concepts to justify the provision of counsel for indigent litigants in such ‘quasi-criminal’ matters[.]”); Amer. Bar Ass’n, Resolution 114 (MY 2018) at 6 (reiterating that commentary about the blurring between criminal and civil proceedings).

³⁸ NTF Principle 4.4 states that indigent defendants should be provided with court-appointed counsel at no charge.

³⁹ Amer. Bar Ass’n, *Standards for Criminal Justice: Providing Defense Services* 5-8.2(b) (3d ed. 1992), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html#8.

⁴⁰ *Id.* cmt., https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services_authcheckdam.pdf, at 105 (“An accused who expresses a desire to proceed without counsel may sometimes fail to understand fully the assistance a lawyer can provide. Accordingly, this standard recommends that ‘[n]o waiver should be accepted unless the accused has at least once conferred with a lawyer.’ Some courts have recognized that counsel may be assigned by the court for this limited purpose. Such a practice helps to counter the argument that any waiver of counsel by a layperson must be the result of insufficient information or knowledge.”).

251 assistance of counsel,⁴¹ and that any waivers of counsel are knowing and voluntary.⁴² Judges
 252 should never encourage unrepresented persons who qualify for public defense services to waive
 253 counsel.⁴³ “An accused should not be deemed to have waived the assistance of counsel until the
 254 entire process of offering counsel has been completed before a judge and a thorough inquiry into
 255 the accused’s comprehension of the offer and capacity to make the choice intelligently and
 256 understandingly has been made.”⁴⁴ Accordingly, prosecutors should not seek waivers of the
 257 right to counsel from unrepresented accused persons.⁴⁵ Only after the defendant has properly
 258 waived counsel may a prosecuting attorney “engage in plea discussions with the defendant,” and
 259 “where feasible, a record of such discussions should be made and preserved.”⁴⁶

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 261

262 **GUIDELINE 9: Transparency**

263 *Information concerning fines and fees, including financial and demographic data, should be*
 264 *publicly available.*

265
 266

⁴¹ *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (“[W]e think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.”)

⁴² *Id.*, *See also Johnson v. Zerbst*, 304 U.S. 458, 465 (1947) (“The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused whose life or liberty is at stake is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court[.]”).

⁴³ *See* Model Code of Judicial Conduct, Rule 2.6 (providing that a judge must “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law,” and should not “act in a manner that coerces any party into settlement”).

⁴⁴ Amer. Bar Ass’n, *Standards for Criminal Justice: Providing Defense Services* 5-8.2. *See also id.* (“A waiver of counsel should not be accepted unless it is in writing and of record.”).

⁴⁵ Amer. Bar Ass’n, *Standards for Criminal Justice: Prosecution Function* 3-5.1(e) (“The prosecutor should not approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused’s counsel consents.”). *See also* Model Rules of Professional Conduct, Rule 3.8(c) (Prosecutors shall not “seek to obtain from an unrepresented accused a waiver of important pretrial rights.”); *id.* Rule 3.8(b) (Prosecutors “shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel”); *id.* Rule 4.1 (providing that officers of the court should not fail to disclose material facts when dealing with persons other than clients).

⁴⁶ Amer. Bar Ass’n, *Standards for Criminal Justice: Prosecution Function* 3-4.1(b) (4th ed. 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html (“A prosecutor should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so.”).

267 COMMENTARY:

268 Courts should track and timely⁴⁷ make available to the public data documenting: a) court revenue
 269 and expenditures, including the aggregate amount of fines and any fees imposed, the aggregate
 270 amount of fines and any fees collected, and the aggregate cost of collecting fines and fees; b) the
 271 amount of fines and fees imposed, waived, and collected in each case; c) any cost to the court of
 272 administering non-monetary alternatives to payment, including community service and treatment
 273 programs;⁴⁸ and d) demographic data regarding people ordered to pay fines and fees.⁴⁹ The need
 274 for transparency is especially compelling with respect to private probation companies.⁵⁰

275

276 **GUIDELINE 10: Collection Practices**

277

278 *Any entities authorized to collect fines, fees, or restitution, whether public or private, should*
 279 *abide by these Guidelines and must not directly or indirectly attempt to thwart these*
 280 *Guidelines in order to collect money; nor should they ever be delegated authority that is*
 281 *properly exercised by a judicial officer, such as the authority to adjudicate whether a person*
 282 *should be incarcerated for failure to pay. Any contracts with collection companies should*
 283 *clearly forbid intimidation, prohibit charging interest or fees, mandate rigorous accounting,*
 284 *outlaw reselling, and otherwise avoid incentivizing harmful behavior. Contracts should*
 285 *include some mechanism for monitoring compliance with these prohibitions.*

286

287 COMMENTARY:

288

289 Many jurisdictions have awarded contracts to private companies to collect fines and fees, for
 290 diversion programs, or to supervise probation. Others have created a public agency or office
 291 responsible for collections of fines and fees. Often these entities, and especially those that are
 292 “for-profit” companies, have an interest in maximizing collections, and thus face inherent

⁴⁷ “Timely” means as soon as feasible after the information is collected.

⁴⁸ The cost to the court of administering any non-monetary alternative to payment should never be imposed on the defendant or respondent.

⁴⁹ See National Center for State Courts, *Principles for Judicial Administration* 11 (2012) (requiring transparency and accountability through the use of performance measures and evaluation at all levels of the court system). See also Amer. Bar Ass’n, Resolution 302 (MY 2011) (urging state and local governments to identify and engage in best practices for court funding to insure protection of their citizens, efficient use of court resources, and financial accountability). NTF Principle 3.2 provides that “[a]ll courts should demonstrate transparency and accountability in the collection of fines, fees, costs, surcharges, assessments, and restitution, through the collection and reporting of financial data and the dates of all case dispositions to the state’s court of last resort or administrative office of the courts.”

⁵⁰ *Profiting from Probation*, at 18 (“A good place for state governments to start would be to require basic transparency about the revenues probation companies extract from probationers. No state does this now.”).

293 conflicts of interest when charging fees for diversion or probation, seeking to collect fines and
294 fees, and informing probationers of their right to counsel in probation revocation hearings
295 concerning charges of probation violation due to nonpayment of fines and fees.⁵¹ Often these
296 entities have imposed additional fees when people cannot immediately pay fines and fees, have
297 misinformed indigent people facing incarceration for nonpayment of their right to counsel in
298 such proceedings, and have failed to help courts identify people whose debts should be waived,
299 reduced, or converted to carefully thought-out non-monetary alternatives.⁵²

300

301 The integrity of the criminal justice system depends on eliminating such conflicts of interest.
302 These conflicts thwart the fair and neutral provision of justice that is integral to due process and
303 must be the hallmark of our justice system.⁵³ Therefore, courts and state and local governments
304 ensure that all entities that collect fines and fees or administer diversion or probation, including
305 for-profit companies, abide by these Guidelines.

306

307 Courts should only forward for collection those cases in which an individual has been found to
308 have willfully failed to pay following a court hearing in adherence to these Guidelines. Any
309 contracts with collection companies should clearly forbid intimidation, prohibit charging interest
310 or fees, mandate rigorous accounting, outlaw reselling, and otherwise avoid incentivizing
311 harmful behavior. Contracts should also include some mechanism for monitoring compliance
312 with these prohibitions.

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314

⁵¹ *Department of Justice Guidance* at 8; *Profiting from Probation* at 42-44.

⁵² *See Rodriguez v. Providence Community Corrections*, 155 F. Supp. 3d 758, 771 (M.D. Tenn. Dec. 17, 2017) (finding that a for-profit collection company's failure to inquire into ability to pay before stacking fees, effectively revoking probation, raised due process and equal protection concerns).

⁵³ *See Amer. Bar Ass'n, Resolution 111B (2016 AM) and Report* (condemning the use of for-profit companies for user-funded probation with reasoning that supports the principle against the use of for-profit companies to collect court fines and fees).

REPORT

In July 2016, in the face of increasing racial tensions, retaliatory violence against police officers, and a growing sense of public distrust in our nation’s justice system, the ABA created the Task Force on Building Public Trust in the American Justice System. The Task Force wrote a Report, received by the ABA Board of Governors in February 2017, that calls on the ABA and state and local bar entities to: (1) encourage the adoption of best practices for reforming the criminal justice system; (2) build consensus about needed reforms and work to carry them out; and (3) educate the public about how the criminal justice system work.¹ In August, 2017, incoming ABA President Hilarie Bass appointed a Working Group on Building Public Trust in the American Justice System to continue the work of the Task Force. The Working Group chose to focus in on one particular issue causing distrust of the justice system – the imposition and enforcement of excessive fines and fees. The Working Group chose to focus first on this topic because it adversely impacts millions of Americans and has contributed significantly to negative public perceptions of the justice system. After a year of study and broad-based consultation within and outside the ABA, the Working Group has developed Ten Guidelines on Court Fines and Fees (the “Guidelines”), which we now propose be adopted by the ABA House of Delegates.

Every day in the United States, courts impose myriad financial obligations on individuals who have been charged with criminal offenses or civil infractions. These include fines imposed as part or all of the punishment levied against them for low-level offenses, such as traffic tickets or civil ordinance violations, as well as misdemeanors and felonies.² They also include fees, which, are not imposed to punish or deter offenses but to raise revenue or fund services.³ Some fees are legislatively-mandated assessments or charges to recoup court costs, while others are “user fees” assessed to help fund the justice system, including costs associated with probation, public defenders, diversion programs, and court costs, as well as other essential government services. They also include orders of forfeiture and restitution, which are not the focus of these

¹ Report of the Task Force on Building Public Trust in the American Justice System (January 2017), available at https://www.americanbar.org/content/dam/aba/administrative/office_president/2_8_task_force_on_building_trust_in_american_justice_system.authcheckdam.pdf. Following the issuance of the Report, the Task Force focused on creating dialogue around the issues of distrust in the justice system, developing a Toolkit for holding forums on safety and justice. The Toolkit is available at https://www.americanbar.org/groups/leadership/office_of_the_president/publictrust.html.

² The term “fines” includes monetary penalties imposed by a court as punishment for a criminal offense or civil infraction. For purposes of these *Guidelines*, restitution and forfeiture are not included in the definition of “fines and fees.”

³ The term “fees” includes fees, court costs, state and local assessments, and surcharges imposed when a person is convicted of criminal offenses and civil infractions. The term, as used in these *Guidelines*, does not include civil filing fees.

Guidelines, although several of the principles underlying these Guidelines apply to forfeiture and restitution as well.⁴

The imposition and enforcement of these fines and fees disproportionately harm the millions of Americans who cannot afford to pay them, entrenching poverty, exacerbating racial and ethnic disparities, diminishing trust in our justice system, and trapping people in cycles of punishment simply because they are poor. In communities around the country, millions of people are incarcerated, subjected to the suspension of driver's and occupational licenses, or prohibited from voting simply because they cannot afford to pay fines or fees imposed by courts. Even children are incarcerated for failure to pay fines or fees, even though children almost by definition lack a personal ability to pay such fines or fees.

An estimated 10 million Americans owe more than \$50 billion resulting from their involvement in the criminal justice system.⁵ Some are sentenced solely to the payment of fines and fees. Others have been sentenced to prison terms in addition to any fines and fees imposed. According to the most recently available numbers, approximately two-thirds of people in prison have been assessed court fines and fees.⁶ This remarkable statistic persists even though people sent to prison often have little prospect of earning enough money to pay their debt: 65 percent of prisoners do not have a high school diploma, and 15 to 27 percent of people leaving prison or jail expect to go to a homeless shelter upon release and as many as 60 percent remain unemployed a year after release.⁷

Studies show that the imposition and enforcement of fines and fees disproportionately and regressively affect low-income individuals and families.⁸ Communities of color are particularly devastated for reasons that include the longstanding racial and ethnic wealth gap,⁹ higher rates of

⁴ For example, as noted below with respect to Guideline 3, a person who is unable to pay an order of restitution should not be incarcerated for failure to pay.

⁵ Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, The Brennan Center of Justice at New York University School of Law (2015) ("*Charging Inmates*"), at 1, available at <https://www.brennancenter.org/publication/charging-inmates-perpetuates-mass-incarceration>.

⁶ Alexis Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 15 Am. J. Sociology 1753, 1769 (2010) (citing statistics from 2004).

⁷ *The Criminalization of Poverty: How to Break the Cycle through Policy Reform in Maryland*, The Job Opportunities Task Force (Jan. 2018), http://www.jotf.org/Portals/0/jotf/publications/COP%20report%20013018_FINAL.pdf ("*The Criminalization of Poverty*") at 46.

⁸ See, e.g., Council of Economic Advisers Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor* (Dec. 2015) ("*CEA Brief*"), at 5-8.

⁹ A 2013 Pew Research Center study of federal data found that the median wealth of white households was 13 times the median wealth of black households, and 10 times the median wealth of Latino households. See Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, Pew Research Center (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession>.

poverty and unemployment,¹⁰ and the over-policing of communities of color, for reasons that include racial and ethnic profiling.¹¹ For example, in many jurisdictions black people disproportionately experience license suspensions for nonpayment of fines and fees, due in part to racial disparities in wealth and poverty.¹² These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties.¹³ Such racial disparities in the adverse impact of the imposition and enforcement of court fines and fees also contribute to tension between law enforcement and courts on the one hand and the communities of color they serve on the other, as documented in a 2015 report by the U.S. Department of Justice.¹⁴

The application of fines and fees is not limited to adults in the criminal justice system. Frequently fines and fees are imposed on juveniles and their families in connection with the

¹⁰ In 2014, the Pew Research Center found that black and Latino people were, on average, at least twice as likely to be poor than were white people in the United States. *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, Pew Research Center (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/1-demographic-trends-and-economic-well-being>.

¹¹ Racial and ethnic profiling—the targeting of people of color for police stops, frisks, and searches without reasonable suspicion of criminal activity and based on perceived race or ethnicity—is well documented in jurisdictions across the country. For example, in 2013, a federal court ruled that the New York City Police Department was liable for a pattern and practice of racial and ethnic profiling in police stops of black and Latino people. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 665 (S.D.N.Y. 2013) (finding the City of New York liable for “targeting young black and Hispanic men for stops based on the alleged criminal conduct of other young black or Hispanic men” in violation of the Fourteenth Amendment Equal Protection Clause). *See also Melendres v. Arpaio*, 989 F. Supp. 2d 822, 899-05 (D. Ariz. 2013) (finding sheriff’s office liable for policies and practices of profiling Latino motorists for police stops). Whether due to racial and ethnic profiling or other factors, well-documented racial disparities in justice-system involvement render communities of color more vulnerable to the adverse impact of the imposition and collection court fines and fees. For example, a 2013 report found that across the United States, black people are 3.73 times as likely to be arrested for marijuana possession even though marijuana use is roughly equal among black and white people as documented by the U.S. Department of Health & Human Services Substance Abuse and Mental Health Services Administration. *See American Civil Liberties Union Foundation, The War on Marijuana in Black and White* 17, 31, 49-50 (2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white> (analyzing 2010 data from the Federal Bureau of Investigation and U.S. Census, and the 2014 National Survey on Drug Use and Health finding that an estimated 15.7% of black people and 13.7% of white people had used marijuana at some point in the past year).

¹² *Back on the Road California, Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, at 27 (2016) (hereinafter “Stopped, Fined, Arrested”), http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. *See discussion supra* notes 63-65 (discussing evidence of racial disparities in wealth and poverty in the United States).

¹³ Legal Aid Justice Center, *Driven by Dollars: a State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt* (2017), <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf>.

¹⁴ *See* U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department*, at 79-81 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (detailing evidence of how municipal court and policing practices related to court fine and fee collection erode community trust in law enforcement).

young person's involvement with the juvenile justice system.¹⁵ A recent report on Alameda County, California, showed that total fees to families for juvenile involvement added up to approximately \$2,000 for an average case.¹⁶

Bedrock constitutional principles of due process and equal protection of the law apply when courts impose and collect fines and fees. More than thirty years ago, the U.S. Supreme Court ruled in *Bearden v. Georgia*, 461 U.S. 660 (1983), that it is unconstitutional to incarcerate people solely for their inability to pay fines or restitution. For decades, the Court has warned that the justice system must not treat those with money more favorably than those without. Yet these practices endure.

The effect is that poor people are punished because of their poverty, in violation of basic constitutional principles guaranteeing fairness and equal treatment of rich and poor in the justice system. This harms us all. When people are jailed, or their driver's licenses are suspended, because they cannot afford to pay court fines or fees, they face heightened barriers to employment and education, disrupting families and undermining community stability.¹⁷ Similarly, requiring fees to access diversion or treatment programs, such as "drug courts," creates a two-tiered system of justice—one for the rich and one for the poor. These effects detract from public trust in our justice system, including our law enforcement officials and our courts.

Although fines are an appropriate sanction in certain circumstances, the Guidelines seek to ensure that no one is subjected to disproportionate sanctions, including incarceration, simply because they do not have the money to pay an otherwise appropriate fine or fee.

An important objective of the Guidelines is to eliminate any and all financial incentives in the criminal justice system to impose fines or fees. The justice system serves the entire public and should be entirely and sufficiently funded by general government revenue. The total funding for any given court or court system should not be directly affected by the imposition or collection of fines or fees (as defined for purposes of the Guidelines). This core principle was adopted by the National Task Force on Fines, Fees and Bail Practices, established by the Conference of Chief

¹⁵ See, e.g., Jessica Feierman, et. al, *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System*, The Juvenile Law Center (2016), <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf>.

¹⁶ See Berkely Law Public Advocate Clinic, *High Pain, No Gain: How Juvenile Administrative Fees Harm Low-Income Families in Alameda County, California* (2016), http://64.166.146.245/docs/2016/BOS/20161025_813/27510_PAC%20High%20Pain%2C%20No%20Gain.pdf.

¹⁷ See, e.g., Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, The Brennan Center of Justice at New York University School of Law (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> ("*Criminal Justice Debt*"), at 5.

Justices and the Conference of State Court Administrators. In December 2017, the Task Force issued its “Principles on Fines, Fees, and Bail Practices” (the “National Task Force Principles” or “NTF Principles”),¹⁸ which were endorsed in 2018 by the Access, Fairness and Public Trust Committee of the Conference of Chief Justices.¹⁹ Principle 1.5 of the NTF Principles states, “Courts should be entirely and sufficiently funded from general governmental revenue sources to enable them to fulfill their mandate. Core court functions should generally not be supported by revenues generated from court-ordered fines, fees, or surcharges.”

“Requiring users to pay for judicial services is, in many ways, anathema to public access to the courts.”²⁰ All components of the justice system, including courts, prosecutors, public defenders, pre-trial services, and probation, should be sufficiently funded from public revenue sources and not reliant on fees, costs, surcharges, or assessments levied against criminal defendants or people sanctioned for civil infractions. As a Louisiana federal court held in December 2017, where judges in a given jurisdiction are responsible for both (a) “managing fines and fees revenue” that fund court operations, and (b) “determining whether criminal defendants are able to pay those same fines and fees,” such judges face an impermissible “institutional incentive to find that criminal defendants are able to pay fines and fees.”²¹

¹⁸ The NTF Principles are available at <http://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx>. In connection with the NTF Principles, the National Task Force on Fines, Fees and Bail Practices also published a “Bench Card for Judges” entitled *Lawful Collection of Legal Financial Obligations*, available at http://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx.

¹⁹ The Access, Fairness and Public Trust Committee officially endorsed the NTF Principles and has “encourage[d] inclusion of the Principles on Fines, Fees and Bail Practices into training for court staff and education for all judicial officers who are authorized by law to make decisions regarding pretrial release, levy fines, assess fees, and order imprisonment for traffic-related offenses, misdemeanors or infractions.” *Resolution 4: In Support of the Principles of the National Task Force on Fines, Fees, and Bail Practices* (Jan. 31, 2018), <http://www.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01312018-Support-Principles-National-Task-Force-Fines-Fees-Bail.ashx>. The Conference of Chief Justices has also endorsed the NTF Bench Card. *Resolution 3: Encouraging Education on and Use of the Bench Card on Lawful Collection of Court-Imposed Legal Financial Obligations Prepared by the National Task Force on Fines, Fees, and Bail Practices* (Feb. 1, 2017), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/02012017-Encouraging-Education-Use-Bench-Card-Lawful-Collection.ashx>. The Supreme Court of Missouri has adopted the Bench Card in full and currently requires all state judges to use it. En Banc Order (June 30, 2017), <https://www.courts.mo.gov/sup/index.nsf/9f4cd5a463e4c22386256ac4004a490f/afb7e8d9e2e4eccc186258150000541b4?OpenDocument>.

²⁰ Geoffrey McGovern & Michael D. Greenberg, *Who Pays for Justice? Perspectives on State Court System Financing and Governance*, RAND Corporation Institute for Civil Justice (2014) at 10-11, available at https://www.rand.org/pubs/research_reports/RR486.html.

²¹ *Cf. Cain v. City of New Orleans*, No. 15-4479, 2017 WL 6372836 (E.D. La. Dec. 13, 2017). The NTF Principles echo this position. Principle 1.5 states, “A judge’s decision to impose a legal financial obligation should be unrelated to the use of revenue generated from the imposition of such obligations. Revenue generated from the imposition of a legal financial obligation should not be used for salaries or benefits of judicial branch officials or operations, including judges, prosecutors, defense attorneys, or court staff, nor should such funds be used to evaluate the performance of judges or other court officials.” *See also Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927) (holding that due process was violated where a court’s revenue, and the judge’s salary, depended in part on the imposition and collection of court fines and fees).

The justice system should not be used as a revenue source for government services.²² State and local governments should not depend on fines and fees imposed in the justice system for general revenue or to fund particular services inside or outside the criminal justice system.²³ “When courts are pressured to act, in essence, as collection arms of the state, their traditional independence suffers.”²⁴

In addition, a number of ABA policies include guidelines designed to protect the right to counsel and to ensure that the poor do not disproportionately suffer because of their indigence. These existing ABA guidelines apply to the collection and imposition of court fines and fees as well.

The current resolution and Guidelines build on ABA policies, the NTF principles, and existing law to create straightforward, coherent, and focused guidelines that can assist courts, administrators, legislators, and advocates seeking to remedy harms presented by the imposition and collection of fines and fees in the justice system. The Guidelines are also intended to be readily accessible and useful for members of the public, including non-lawyers. In this way, the Guidelines serve the original three goals set out in the Task Force report: (1) to encourage the adoption of best practices; (2) to establish consensus around needed reform; and (3) to educate the public. The Guidelines will thus help in building public trust in the American justice system.

²² *Amer. Bar Ass’n, Standards for Criminal Justice: Sentencing*, Standard 18-2.2 (ii) (“Economic sanctions include fines, monetary awards payable to victims, and mandatory community service. The legislature should not authorize imposition of economic sanctions for the purpose of producing revenue.”). See *Amer. Bar Ass’n Resolution 117A (AM 2008)* (urging Congress to support quality and accessible justice by ensuring adequate, stable, long-term funding for tribal justice systems) (citing ABA resolution 10A (AM 2004), adopting *Report of the American Bar Foundation Commission on State Court Funding* (2004)).

²³ See *id.* The history behind court-imposed fees and fines—and incarceration for failure to pay—is closely tied to practices that arose during Reconstruction. As Professors Harris, Evans and Beckett have explained, monetary sanctions were commonplace in the South, “where their imposition was the foundation of the convict lease system that existed from emancipation through the 1940s.” *Drawing Blood from Stones*, 15 *Am. J. Sociology* at 1758. “Charged with fees and fines several times their annual earnings, many southern prisoners were leased by justice officials to corporations who paid their legal debt in exchange for inmates’ labor in coal and steel mines as well as on railroads, quarries, and farm plantations. Collected fees and fines were used to pay judges’ and sheriffs’ salaries. Monetary sanctions were thus integral to systems of criminal justice, debt bondage, and racial domination in the American South for decades.” *Id.* (citations omitted). See also Michelle Alexander, *The New Jim Crow* (2012), at 31 (“[During Reconstruction] vagrancy laws and other laws defining activities such as ‘mischief’ and ‘insulting gestures’ as crimes were enforced vigorously against blacks. The aggressive enforcement of these criminal offenses opened up an enormous market for convict leasing, in which prisoners were contracted out as laborers to the highest private bidder. Douglas Blackmon, in [*Slavery by Another Name: The Re-enslavement of Black People in America from the Civil War to World War II* (2008)], describes how tens of thousands of African Americans were arbitrarily arrested during this period, many of them hit with court costs and fines, which had to be worked off in order to secure their release.”).

²⁴ *Criminal Justice Debt* at 2. See also *id.* at 30; Katherine Beckett & Alexes Harris, *On cash and conviction: Monetary sanctions as misguided policy*, 10 *Criminology & Public Policy* 505, 511 (2011) (“*On cash and conviction*”) (“[I]f the state compels penal targets to use (often expensive and ineffective) state ‘services,’ then the government is obligated to pay for them. Indeed, this fiscal obligation is an important check on government power.”).

Respectfully submitted,
Robert N. Weiner, Chair
Working Group on Building Public Trust in the American Justice System
Section on Civil Rights and Social Justice
August 2018

GENERAL INFORMATION FORM

Submitting Entity: Working Group on Building Public Trust in the American Justice System

Submitted By: Robert Weiner, Chair

1. Summary of Resolution(s). This resolution urges federal, state, local, territorial, and tribal legislative, judicial and other government bodies to promulgate law and policy consistent with and otherwise adhere to, the proposed guidelines for the imposition and collection of court fines and fees.
2. Approval by Submitting Entity. This resolution was passed by the Working Group on Building Public Trust in the American Justice System on May 2, 2018.
3. Has this or a similar resolution been submitted to the House or Board previously?
No.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
 - 04A110, adopting *ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases*
 - 04A107, adopting *Report of the American Bar Foundation Commission on State Court Funding*
 - 10M192C
 - 11M302
 - 16A111B
 - 17M112C
 - 18M114
 - *ABA Standards for Criminal Justice: Sentencing*, Standards 18.2.2 (ii), 18.3.16 (d) & 18.3.22(e)
 - *ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings* (2010)
 - *ABA Standards for Criminal Justice: Providing Defense Services* 5-5.1 & 5-5.2 (1992)

None of these policies would be affected by the adoption of this resolution.
5. If this is a late report, what urgency exists which requires action at this meeting of the House?
N/A
6. Status of Legislation. (If applicable)
N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This policy will enable the ABA and relevant ABA committees to provide guidance to courts, legislatures, and advocates on the ground working to expose and end practices leading to modern-day debtors' prisons, through *amici curiae* in appropriate cases, for example.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2018 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Judicial Division

Section of State and Local Government Law

Government and Public Sector Lawyers Division

Litigation

Young Lawyer's Division

Section on Civil Rights and Social Justice

Criminal Justice Section

Law Practice Division

Solo, Small Firm and General Practice Division

Ethics and Professional Responsibility

Commission on Veteran's Legal Services

Standing Committee on Public Education

Commission on Disability Rights

Commission on Hispanic Legal Rights & Responsibilities

Commission on Homelessness and Poverty

Center for Human Rights

Commission on Immigration

Coalition on Racial & Ethnic Justice

Commission on Youth at Risk

Law Student Division

Standing Committee on Legal Aid and Indigent Defendants

Standing Committee on the Delivery of Legal Services

Commission on Women in the Profession

Standing Committee on Pro Bono and Public Service

Diversity Entities

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Robert Weiner – Chair, Section on Civil Rights and Social Justice and Chair, ABA Working Group on Building Public Trust in the American Justice System

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution adopts the ABA Ten Guidelines on Court Fines and Fees and urges federal, state, local, territorial, and tribal legislative, judicial and other governmental bodies to promulgate law and policy consistent with, and otherwise to adhere to, the Guidelines.

2. Summary of the Issue that the Resolution Addresses

This resolution is intended to address the fundamental unfairness created when people are subjected to disproportionate sanctions, including imprisonment, simply because they do not have the ability to pay a fine or fee for a criminal offense or civil infraction.

3. Please Explain How the Proposed Policy Position will Address the Issue

A policy position from the ABA will provide much needed leadership and guidance to federal, state, local, territorial, and tribal legislative, judicial and other government bodies, and to advocates before those bodies, on how to lawfully impose and enforce court fines and fees and how to address ongoing constitutional violations.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None known.