

DISCUSSION DRAFT, \*NOT FOR CITATION\*, 5-28-19

## Justice Index Fines & Fees Typology:

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### A. Introduction

The Justice Index, [justiceindex.org](http://justiceindex.org), is an online resource created by the National Center for Access to Justice at Fordham Law School that uses data, transparency and competition to support justice system reform. The Justice Index relies on expert opinion and on research to identify selected best policies, highlights those policies in its online matrix, and then ranks the states, compared to one another, on whether they have those policies in place or not. The Justice Index has proven to be an effective tool for promoting reform. It works by introducing reformers to the importance of specific policies, empowering those reformers to champion the policies, and inspiring officials to adopt the policies. It is an effective tool for learning about which states are leading and which are trailing in the national movement to make state justice systems more just.

With support from Arnold Ventures, the NCAJ in 2019 and 2020 will be extending the Justice Index to incorporate into its coverage a set of best policies for controlling excessive reliance on “fines and fees” to finance government. The policy phenomenon of fines and fees has become better known in recent years. In the Ferguson Report, the US Department of Justice documented a pervasive and oppressive practice in Ferguson, Missouri, in which law enforcement officials coordinated efforts with prosecutors and judges to impose fines and fees on vulnerable minority populations as a means of raising revenue to pay for the functions of government. Reliance on fines and fees as a substitute for needed tax revenue has emerged as a practice that imposes substantial debt and multiple additional harms, including unwarranted incarceration, on individuals and on communities across the country.<sup>2</sup> For these reasons, information about fines and fees policies is important to include in any indexing presentation, such as the Justice Index, that reports on the performance of state justice systems in the United States.

In NCAJ’s Justice Index Fines and Fees Project, NCAJ will consult with fines and fees experts to identify selected best policies for controlling fines and fees, highlight those policies in the Justice

Index, and rank the performance of the states on whether they have adopted those policies. As with other elements of the Justice Index, NCAJ will rely on a substantial pro bono initiative to carry out the research needed to uncover the presence and absence of the policies in states across the country. NCAJ will also partner with allied organizations to incorporate their established research findings into the Justice Index. More information about the Justice Index's overall methodology is available in [Introduction to the Justice Index](#) and in [the Justice Index, itself](#).

As part of the Justice Index Fines and Fees Project, NCAJ is presently developing a "typology" that relies on a set of categories to organize the "problems and solutions" that define the "field of fines and fees reform" into an upstream, mid-stream, and downstream framework. Starting upstream with the need to finance government and the creation of fines and fees, the typology then shifts its focus to midstream with coverage of the role of law enforcement officers, prosecutors, defenders, and judges, before arriving downstream where its focus moves to collection, privatization of collection, distribution of revenue, issues of accountability, and policies for tracking and analyzing data.

While the Justice Index can rank states based on state or local policies, one of its strengths to date has been its fronting of state policies. Policies with statewide applicability are important in increasing the visibility of the issues they regulate and the accountability of the officials responsible for implementing the policies. Because fines and fees are regulated and implemented at all levels of government (including through courts with statewide jurisdiction as well as courts with local jurisdiction), NCAJ is interested in considering with experts and stakeholders the important questions about which fines and fees policies are best if adopted at state v. local levels of government.

In this discussion draft, we invite reformers to consider the fines and fees policy landscape as a whole. At this time, NCAJ is specifically inviting comments on all of the sections of this memo, including A (the introduction), B (setting forth typology categories), C (setting forth a top dozen provisional indicators), and D (setting forth a comprehensive set of problems and policies). Comments should be directed to David Udell, [dudell@fordham.edu](mailto:dudell@fordham.edu)

## **B. Typology Categories**

### **Upstream:**

- I. Insufficient Funding
- II. Creation of Fines & Fees

### **Midstream:**

- III. Police
- IV. Prosecutors and Defenders
- V. Judges

### **Downstream:**

- VI. Consequences
- VII. Alternative Sanctions
- VIII. Collection

- IX. Privatized Collection
- X. Distribution of Revenue
- XI. Oversight
- XII. Data

### C. Top Dozen Provisional Indicators

The Justice Index asks: “Does the state through a statewide statute, rule, regulation, appropriation, or other written guidance . . . ”

#### **Upstream:**

1. **Ban** - Eliminate all fees, including surcharges
2. **Universal waiver for indigency** – Treat waiver for indigency as establishing “inability to pay” fines and fees for all purposes and in all subsequent proceedings
3. **Cap** – Cap the portion of municipal budgets that may be drawn from revenue generated by fines and fees

#### **Midstream:**

4. **Notice** – Provide constitutionally adequate notice containing a clear statement of:
  - a. amount of money owed and why
  - b. availability of waiver
  - c. right to request and receive a hearing on inability to pay
5. **Day Fines** – Impose graduated levels of fines and fees calibrated to the individual’s level of income and assets
6. **Drivers licenses** – Prohibit suspension of driver’s licenses as a consequence of debt
7. **Incarceration** – Prohibit incarceration as a consequence of debt, including default on court appearance.
8. **Voting Rights** – Prohibit suspension of voting rights as a consequence of debt
9. **Compromise** – Authorize judiciary to accept and/or order alternative outcomes: partial payment, waiver, exemption, and community service

#### **Downstream:**

10. **Privatized Collection** – Prohibit private debt collectors from collecting public debt (and, where private debt collection is used, regulate contracts and increase oversight)

11. **Conflicts** – Prohibit the use of fines and fee revenue to pay for salaries of justice system personnel, including prosecutors, defenders, court clerks, and judges
12. **Task Force** - Create a task force that will be accountable for all fines and fees policies, and that will track and audit expenditures on collection of fines and fees, revenue generated by fines and fees, and other matters relating to fines/fees

## D. Comprehensive List of Problems & Policies

### **I. Insufficient Funding**

1. Funding is insufficient for courts and other branches of government.
  - **Best policy:** State and local government should fully fund state and local courts from general revenue.<sup>3</sup>
  - **Best policy:** Federal government should contribute to funding of state and local courts.
2. Funding deficits incentivize state and local government to privatize justice functions.<sup>4</sup>
  - **Best policy:** States should not privatize justice functions.
  - **Best policy:** Insofar as justice functions are privatized, states should monitor private companies performing those functions.<sup>5</sup>

### **II. Creation of Fines & Fees**

3. Fines and fees are excessive both in number and in amount of money.
  - **Best policy:** States should eliminate fees and surcharges.<sup>6</sup>
4. Fines and fees are adopted without regard to impact.<sup>7</sup>
  - **Best policy:** States should establish task forces that would examine and evaluate existing and proposed fines and fees to determine impact.<sup>8</sup>
5. Fines and fees are used to finance government.
  - **Best policy:** States should not rely on fines and fees revenue, but should finance government through tax revenue.<sup>9</sup>
6. Fines and fees function as a selective tax on vulnerable people, often of color.<sup>10</sup>
  - **Best policy:** States should eliminate court imposed fees.<sup>11</sup>
  - **Best policy:** States should examine court fee policies and practices to uncover racial bias.
7. Fines and fees revenue is an excessive component state and city budgets.
  - **Best policy:** States should eliminate fee collection revenue.<sup>12</sup>

- **Best policy:** Insofar as fees are collected, states should impose limits on the percentage of state and local budgets that may be contributed by revenue from fines and fees<sup>13</sup>
8. Fines and fees regimes are not accountable to central authority.<sup>14</sup>
- **Best policy:** States should centralize governmental authority for fines and fees, empowering the governing entity to review fines and fees policies, to issue an annual report on amounts collected, and to identify and implement recommendations for reform .<sup>15</sup>
9. Fines and fees embedded in law and policy (statutes, regulations, court policies, contracts with private sector vendors) are often unreasonable and harmful to individuals and society:
- **Best policy:** States should assure that a punitive fine does not result in a substantial and undue hardship to a person or their family.<sup>16</sup>
  - **Best policy:** States should eliminate fees.<sup>17</sup>
  - **Best policy:** States should eliminate surcharges.<sup>18</sup>
  - **Best policy:** States should eliminate interest (and multipliers).<sup>19</sup>
  - **Best policy:** States should not privatize justice functions.
  - **Best policy:** States should monitor private companies performing justice functions.<sup>20</sup>
10. Restitution [tbd, or deleted].
- **Best policy:** [tbd]
11. Fines and fees are imposed without regard to burden on individual of overall amount of money or total number of fines and fees.
12. Fines and fees revenue that is used to fund dedicated functions of government gives rise to problems, including conflicts of interest.
- **Best policy:** States should not rely on fines and fees to fund government, but insofar as they do, the revenue should be directed exclusively to the general fund.
13. Fines and fees increase when imposed and managed by privatized entities (such as drug testing companies, telephone companies)
- **Best policy:** States should not rely on private companies to perform justice functions, but where private companies are involved, states should designate institutions with capacity to monitor and report publicly on their performance.<sup>21</sup>

### III. Police

14. Police pursue fines and fees, instead of protecting the public<sup>22</sup>
- **Best policy:** States should prohibit use of fines and fees to fund law enforcement.<sup>23</sup>

15. Police pursuit of fines and fees amplifies racial bias and impact
  - **Best policy:** States should track and publish racial disparities
  - **Best policy:** States should “monitor and eliminate racial disparities.”<sup>24</sup>
16. Police target vulnerable communities with higher amounts of fines and fees
  - **Best policy:** States should “monitor and eliminate racial disparities.”<sup>25</sup>
17. Police pursuit of fines and fees erodes trust and legitimacy in communities.
  - **Best policy:** States should support training of police on how pursuit of fines and fees can undermine legitimacy of law enforcement in communities.<sup>26</sup>
  - **Best policy:** [note: Consider whether a best policy is needed where the officers who pursue fines and fees are privatized, e.g. private security, school/campus security]

#### IV. Prosecutors and Defenders

18. Prosecutors fund their own offices and salaries with fines and fees, creating a conflict of interest that undermines their integrity as prosecutors<sup>27</sup>
  - **Best policy:** States should assure that prosecutors are funded from general revenue, not fines and fees.<sup>28</sup>
19. Defenders fund their own offices and salaries with fines and fees,<sup>29</sup> undermining their integrity as defenders, and undermining the constitutional promise of “a free lawyer if you cannot afford to pay for one yourself”
  - **Best policy:** States should assure that prosecutors are funded from general revenue, not fines and fees.<sup>30</sup>
20. Prosecutors and defenders do not consider the amounts of fines and fees when making charging decisions, or when negotiating plea agreements, that will be accompanied by requirements to pay fines and fees.
  - **Best policy:** States should require prosecutors to consider a defendant’s ability to pay before making any charging decisions<sup>31</sup>
  - **Best policy:** States should require prosecutors and defenders to notify defendant of fines and fees associated with proposed pleas, and should consider ability to pay before committing anyone to a plea agreement imposing fines and/or fees.
21. Prosecutors sometimes threaten to impose fines and fees to compel witnesses to testify.<sup>32</sup>
  - **Best policy:** tbd.<sup>33</sup>
22. Prosecutors pursue non-payment of fines and fees, and seek issuance of arrest warrants based on non-payment.
  - **Best policy:** Prosecutors should exercise discretion to not bring fee nonpayment cases against individuals who are incapable of making payment.<sup>34</sup>

## V. Judges

23. States do not assure provision of notice in fines and fees matters:<sup>35</sup>
- **Best policy:** “Courts should provide notice to individuals about amounts owed, legal rights, legal obligations, and all options for relief relating to court debt.”<sup>36</sup>
  - **Best policy:** “Require that criminal justice system debt statements be issued to defendants.”<sup>37</sup>
  - **Best policy:** Require provision of notice of hearing.
  - **Best policy:** Provide notice to individuals of any consequence that may attach to failure to pay.<sup>38</sup>
  - **Best policy:** Provide notice of possibility of waiver of fines and fees.<sup>39</sup>
  - **Best policy:** Courts should provide notice of standards for waiver.<sup>40</sup>
  - **Best policy:** Courts should provide notice of exemption from supervisory fees.<sup>41</sup>
24. State courts fail to hold “ability to pay hearings,” despite the US Supreme Court’s holding in *Bearden v. Georgia*, 461 U.S. 660 (1983) and other hearing requirements contained in state law.<sup>42</sup>
- **Best policy:** States should adopt the use of bench cards and monitoring strategies to boost state court reliance on ability to pay hearings.<sup>43</sup>
  - **Best policy:** States should “require ability to pay determinations before fines or fees are imposed.”<sup>44</sup>
  - **Best policy:** States should require ability to pay hearing before incarcerating anyone for failure to pay.<sup>45</sup>
  - **Best policy:** States should require ability to pay hearings be held prior to other punishments, including license suspension, probation revocation, termination of voting rights.
  - **Best policy:** States should assure that defendants may ask for and obtain an inability to pay hearing at any point in the process.
25. States do not have standards for decision-making on “ability to pay” fines and fees.
- **Best policy:** States should “codify critical elements of ability to pay proceedings in state law.”<sup>46</sup>
  - **Best policy:** States should develop standards for determining ability to pay.<sup>47</sup>
  - **Best policy:**<sup>48</sup>
  - **Best policy:** State courts should set standards defining constitutionally adequate service of notice.
  - **Best policy:** State law should assure the right to an in-person on the record hearing to decide the issue of ability to pay.
  - **Best policy:** State law should establish a presumption of inability to pay for people who are “homeless, incarcerated, confined in a mental health facility, juveniles, or whose income is below the poverty level”.<sup>49</sup>
  - **Best policy:** Courts should clearly delineate how inability to pay is determined.<sup>50</sup>
  - **Best policy:** State law should presume that anyone under age 18 is indigent.

26. States do not authorize judges, or government in any respect, to accept partial payment of fines and fees.<sup>51</sup>
  - **Best policy:** “Ensure judges have the authority to modify, mitigate, or waive fees for those unable to pay despite good faith efforts”<sup>52</sup>
27. States do not have standards in place to ensure that fines are proportional to income, in cases in which judges have authority to modify fines.<sup>53</sup>
  - **Best policy:** Implement day fines
  - **Best policy:** Set standards for sliding scale fines and for day fines.<sup>54</sup>
28. State law does not define standards for issuing default judgments, capias warrants, or orders to incarcerate for failure to appear.
  - **Best policy:** [tbd]<sup>55</sup>
29. State law does not assure a right to counsel in ability to pay hearings.
  - **Best policy:** States should recognize a right to counsel should be established for all ability to pay hearings.<sup>56</sup>
30. Fines and fees create a conflict for judges insofar as the revenue funds judicial salaries
  - **Best policy:** States should prohibit reliance on fines and fees revenue to fund judicial salaries.<sup>57</sup>

## VI. Consequences

31. Fines and fees are collected from people unable to afford payment (when defendants who are indigent, receive incorrect decisions on ability to pay, or are denied hearings).
  - **Best policy:** Courts must make determinations of willfulness of nonpayment and, if not willful, must allow defendant extra time, reduce the amount, and/or waive the payment entirely.<sup>58</sup>
32. Fines and fees are collected from people who borrow money from relatives and friends when this should not be required by the states.
  - **Best policy:** Courts must make determinations of willfulness of nonpayment and, if not willful, must allow defendant extra time, reduce the amount, or waive the payment entirely.<sup>59</sup>
33. Fines and fees court appearances cause unnecessary harm by requiring people to miss work and default on other professional and personal commitments
  - **Best policy:** “Courts should minimize the need for in-person appearances related to criminal justice debt so that people do not have to miss work.”<sup>60</sup>
34. Fines and fees are basis for drivers’ license suspensions<sup>61</sup> that pressure defendants to drive without a license or to forfeit employment
  - **Best policy:** “End driver’s and professional license suspensions as a penalty for nonpayment of criminal justice debts.”<sup>62</sup>
  - **Best policy:** States should decline to impose harsh policies for fines and fees.<sup>63</sup>



- **Best policy:** States should never suspend drivers' license without determining ability to pay.
  - **Best policy:** State suspensions of drivers' licenses should not be for indefinite length.
  - **Best policy:** States should not charge additional fees to reinstate suspended licenses.
35. Fines and fees are basis for incarceration through civil and criminal contempt proceedings, and issuance of warrants for failure to appear.
- **Best policy:** States should prohibit incarceration for failure to pay fines and fees.<sup>64</sup>
  - **Best policy:** Courts should not convert fines and fees into “jail time” to “pay off” debt through incarceration
  - **Best policy:** Courts should not incarcerate people who are awaiting ability to pay hearing
36. Fines and fees are used to set length of probation.<sup>65</sup>
- **Best policy:** “Decouple payment of court debt from probation terms, or otherwise limit the use of supervision to monitor payments”<sup>66</sup>
  - **Best policy:** “Ensure that probation cannot be imposed or extended solely because of outstanding criminal justice debt”<sup>67</sup>
37. Fines and fees are used to deny voting rights
- **Best policy:** States should ensure that all voting rights are not contingent on payment of fines and fees.<sup>68</sup>
  - **Best policy:** States should ensure that restoration of voting rights at the end of a sentence does not require full payment of outstanding fines and fees.<sup>69</sup>
38. Fines and fees cause ineligibility, suspension, and revocation of professional licenses.
39. Fines and fees are treated as a bar to expunging or sealing of court records.
- **Best policy:** States should “ensure that outstanding criminal justice debt is not a barrier to expungement.”<sup>70</sup>
40. Fines and fees are collected by garnishing wages, bank accounts, or tax refunds.
41. Fines and fees are used to seize and reduce commissary accounts.
- **Best policy:** States should “Prohibit the use of commissary money to pay mandatory surcharges.”<sup>71</sup>
42. Fines and fees result in state-imposed liens on an individual's property.

## VII. Alternative Sanctions

43. Alternative sanctions are not authorized.
- **Best policy:** States should authorize alternatives to fines and fees.<sup>72</sup>

44. Community service is sometimes compensated, or credited, beneath minimum wage.
  - **Best policy:** States should compensate community service at market wage.
45. Community service requirements does not always take into account issues of compatibility with age, residence, employment, transportation options, and other considerations.
  - **Best policy:** “Where community service is used as an alternative to paying fines and fees, effective accountability mechanisms should apply to ensure that associated conditions, such as transportation to such service or availability of child care, do not operate as bars to completion of the service and that service opportunities that fit with existing jobs or other such constraints are actually available.”<sup>73</sup>
  - **Best policy:** Eliminate fines and fees for juveniles.
46. Alternatives including day, diversion, and treatment programs are not routinely offered.
  - **Best policy:** Courts and states should encourage the development of alternatives like diversion programs and treatment programs that allow defendants to receive credits toward fines and fees through participation.<sup>74</sup>
47. New fees are imposed for participation in day, diversion, and treatment programs.
  - **Best policy:** Prohibit alternative programs from assessing additional fees.
48. Courts do not afford sufficient opportunity to obtain amnesty or write-off debt in reasonable time.
  - **Best policy:** “Create amnesty programs.”<sup>75</sup>
49. Courts do not offer installment plans to pay fines and fees over time.
  - **Best policy:** “Make payment of criminal justice debt easier”<sup>76</sup>
  - **Best policy:** Authorize installment plans to pay fines and fees

### VIII. Collection

50. Fines and fees are not always dischargeable in bankruptcy [tbd]
51. Fines and fees cannot be adjusted after imposition
  - **Best policy:** “Provide real opportunities for individuals to have debts waived, reduced, or payments modified after imposition”<sup>77</sup>
52. Fines and fees cannot be paid through convenient options, such as: telephone, online, after hours, or by credit card.
  - **Best policy:** Courts should expand options for payment by phone or online, and all forms of payment should be accepted.<sup>78</sup>
53. Fines and fees accrue interest charges if not paid promptly, and interest or penalty additions are not always waivable.<sup>79</sup>

- **Best policy:** Eliminate penalty payments and interest charges.<sup>80</sup>
- **Best policy:** Authorize courts to offer waiver of interest and penalty charges.
- **Best policy:** Hold inability to pay hearings before adding to amounts of debt

## **IX. Privatized Collection**

54. Private companies incentivize profit over justice.<sup>81</sup>
  - **Best policy:** States should eliminate the use of for-profit companies to collect court fines and fees.<sup>82</sup>
55. Private companies extend length of sentence and/or of treatment, based on profit motive.
  - **Best policy:** Private companies should have no authority to recommend or set sentence length.<sup>83</sup>
56. Private companies offer kickbacks (“site commissions”) for contracts with jails and prisons that increase people’s debt (e.g. prison phone services, financial transfer services)
  - **Best policy:** States must safeguard against profiteering (and other violations of law) between state employees and private contractors.<sup>84</sup>
57. Private companies are not subject to open records laws
  - **Best policy:** Expand public records laws to include revenue and collection of court debt, even when private contractors are involved.<sup>85</sup>
58. Private companies are excused from certain consumer protection laws if activity involves justice system.<sup>86</sup>
  - **Best policy:** Monitor and enforce fair collection practices for all private debt collection companies working with the state.<sup>87</sup>

## **X. Distribution of Revenue**

59. Revenue goes to entities that have no rational nexus to justice system.
  - **Best policy:** Fines and fees should go exclusively to general fund.
60. Revenue goes to entities that have a close nexus to the justice system, thereby creating conflicts of interest, such as the interest of judges, prosecutors and defense counsel in raising more revenue to increase salaries
  - **Best policy:** Fees should go exclusively to general fund.
61. Revenue goes to numerous destinations without overall coherence, rationality, or consideration of conflicts of interest.
  - **Best policy:** Fines and Fees revenue should go exclusively to general fund

## **XI. Oversight**

62. Revenue goes to numerous destinations without transparency or organization, thereby preventing public consideration of amounts distributed, purposes for which they are used, or public policy implications.
- **Best policy:** “Establish a commission to review existing and proposed fines and fees,” including how the revenue generated is used, and publish the findings.<sup>88</sup>
63. There is no accountable system of review of existing fines and fees.
- **Best policy:** “Establish a commission to review existing and proposed fines and fees” and publish the findings.<sup>89</sup>
64. No incentives are in place to reduce amounts of fines and fees collected.
65. No accountability exists for privatization of collection process.
- **Best policy:** “Establish a commission to review existing and proposed fines and fees” and publish the findings.<sup>90</sup>
66. Local level courts are not consolidated under central accountable body.<sup>91</sup>
- **Best policy:** “A state’s court of last resort or administrative office of the courts should have knowledge of every lower court operating within the state and supervisory authority over the judicial officers, court clerks, and other staff of each such court.”<sup>92</sup>

## XII. Data

67. Don’t know much is collected, and from whom
- **Best policy:** “Courts should collect and analyze data regarding imposition and collection of fines and fees in the court system, and cooperate with reform-minded organizations seeking to study the system and provide recommendations.”<sup>93</sup>
68. Don’t know how many warrants are issued for failure to pay.
69. Don’t know how many people are incarcerated due to fines and fees.
70. Don’t know how many people receive ability to pay hearings.
- \*71. Don’t know how many people have their drivers’ license suspended due to failure to pay fines and fees.<sup>94</sup>
72. Don’t have cost/benefit analysis of policies that suspend drivers’ licenses for failure to pay fines and fees.
73. Don’t have cost benefit analysis of administration and enforcement of fines and fees.<sup>95</sup>
74. Don’t know whether imposition of fines and fees undercuts trust in the justice system.

75. Don't know whether imposition of fines and fees leads to court avoidance.
76. Don't know whether imposition of fines and fees leads to additional consequences.

### **XIII. Appendix – Additional Important Subjects:**

- 1. Juvenile Fines and Fees** – This subject is not yet developed in this memo.

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<sup>1</sup> This memo, “Justice Index Fines & Fees Typology,” is a draft that NCAJ intends to revise and expand in 2019-2020 based on consultation with experts and with other stakeholders interested in fines and fees problems and solutions. Contact David Udell, [dudell@fordham.edu](mailto:dudell@fordham.edu), with questions and suggestions, or to receive a latest draft.

<sup>2</sup> Sources relied on by NCAJ in developing the typology include:

- i) Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, Brennan Center, “Criminal Justice Debt: A Barrier to Reentry” (2010)(“Brennan Barrier”);
- ii) Rebekah Diller, Brennan Center, “The Hidden Costs of Florida’s Criminal Justice Fees,” (2010)(“Brennan Florida”);
- iii) Roopal Patel and Meghna Philip, Brennan Center, “Criminal Justice Debt: A Toolkit for Action” (2012)(“[Brennan Toolkit](#)”);
- iv) Conference of State Court Administrators, “The End of Debtors’ Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations” (2015-2016)(“[COSCA](#)”);
- v) Harvard Law School Criminal Justice Policy Program, “Confronting Criminal Justice Debt: A Guide for Policy Reform” (September 2016)(“[CJPP](#)”);
- vi) US Department of Justice, Office of Civil Rights, Dear Colleague Letter (March 16, 2016)(“[DOJ/Dear Colleague](#)”);
- vii) Arizona Courts, “Justice for All” (2016)(“[AZ Task Force](#)”)
- viii) Fair and Just Prosecution, “Issues at a Glance: Fines, Fees, and the Poverty Penalty” (2017)(“[Fair and Just Prosecution](#)”);
- ix) The Financial Justice Project, “San Francisco Fines and Fees Task Force: Initial Findings and Recommendations (2017)(“[SF Task Force](#)”);
- x) U.S. Commission on Civil Rights, “Targeted Fines and Fees Against Communities of Color (September 2017)(“[US CCR](#)”);
- xi) National Center for State Courts, National Task Force on Fines, Fees and Bail Practices, “Principles on Fines, Fees, and Bail Practices”(December 2017)(“[NCSC](#)”);
- xii) New Jersey Courts, Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees (2018)(“[NJ Courts](#)”);
- xiii) American Bar Association, “Ten Guidelines on Court Fines and Fees” (August 2018)(“[ABA](#)”);
- xiv) Abby Shafroth, National Consumer Law Center, “Criminal Justice Debt in the South: A Primer for the Southern Partnership to Reduce Debt” (December 2018)(“[NCLC](#)”);
- xv) Fair and Just Prosecution, Brennan Center, and The Justice Collaborative, “21 Principles for the 21<sup>st</sup> Century Prosecutor” (2018)(“[21 Principles](#)”);

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- xvi) Priya Raghavan, Brennan Center, “Criminal Justice Solutions: Model State Legislation” (2018)(“[Brennan Leg.](#)”);
- xvii) New York City Bar, Report, “New York Should Re-Examine Mandatory Court Fees Imposed on Individuals Convicted of Criminal Offenses and Violations” (November 2018)(“[NYC Bar](#)”);
- xviii) Brian Highsmith, National Consumer Law Center, “Commercialized (In)Justice (2019)(“[NCLC, Commercialized Injustice](#)”);
- xix) Harvard Law School Criminal Justice Policy Program, Day Fines DRAFT (Draft 2019) (CJPP Day Fines DRAFT).
- <sup>3</sup> See CJPP, at 12 (“Fully fund courts from state budgets”); and NCLC (“Fund courts and law enforcement from general revenues, not from fines and fees”)
- <sup>4</sup> For a flow chart of privatized justice functions, see [NCLC, Commercialized \(In\)Justice graphic](#).
- <sup>5</sup> See CJPP, at 12 (“Remove perverse incentives of private probation companies”); and DOJ/Dear Colleague, at 2 (“Courts must safeguard against unconstitutional practices by court staff and private contractors”); NCLC Commercialized (in)Justice, at 42 (“Funding the full cost of the criminal justice system, including services provided by private companies, from government general revenues, rather than extracting it from the often low-income individuals (and their families) processed through the system”)
- <sup>6</sup> See NCLC, at 9 (“Eliminate fees, costs and surcharges for everyone, or at minimum for those for whom the cost would impose hardship.”)
- <sup>7</sup> Brennan Toolkit, Key Reform 1, at 11.
- <sup>8</sup> See CJPP, at 34 (“Establish a commission to review existing and proposed fines and fees” and “Include fiscal impact statements in new legislation”); Brennan Barrier, at 32 (“Lawmakers should evaluate the total debt burden of existing fees before adding new fees or increasing fee amounts”). Montana has such a commission, see Montana S.B. 59 (2017).
- <sup>9</sup> See CJPP, at 12 (“Fully fund courts from state budgets”); and NCLC, at 7 (“Fund courts and law enforcement from general revenues, not from fines and fees”).
- <sup>10</sup> Michael W. Sances and Hye Young You, “[Who Pays For Government? Descriptive Representation and Exploitative Revenue Sources](#),” The Journal of Politics 79, no. 3 (July 2017)(finding that “use of fines as revenue is common and that it is robustly related to the share of city residents who are black”).
- <sup>11</sup> See NCLC, at 9 (“Eliminate fees, costs and surcharges for everyone, or at minimum for those for whom the cost would impose hardship.”).
- <sup>12</sup> See NCLC, at 9 (“Eliminate fees, costs and surcharges for everyone, or at minimum for those for whom the cost would impose hardship.”).
- <sup>13</sup> See CJPP, at 11 (“Cap the contribution of court revenue to local operating costs”); and NCLC, at 7 (“Limit the contribution of fine and fee revenues to local operating budgets”).
- <sup>14</sup> Brennan Toolkit Key Reform 1, at 11.
- <sup>15</sup> See CJPP, at 34 (“Establish a commission to review existing and proposed fines and fees” and “Include fiscal impact statements in new legislation”). Montana has such a commission, see Montana S.B. 59 (2017).
- <sup>16</sup> See ABA, at 2.
- <sup>17</sup> See NCLC, at 9 (“Eliminate fees, costs and surcharges for everyone, or at minimum for those for whom the cost would impose hardship.”).

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- <sup>18</sup> See CJPP, at 12 (“Eliminate surcharges imposed on criminal defendants”); and NYC Bar, at 10-14 (“Eliminate mandatory surcharges for youthful offenders”; “Eliminate mandatory surcharges for violations”; “Eliminate imposition of multiple surcharges”).
- <sup>19</sup> See NCLC, at 11 (“Eliminate financial penalties on those unable to pay in full and during financial hardship”). [Washington law](#) does this.
- <sup>20</sup> See CJPP, at 12 (“Remove perverse incentives of private probation companies”); and DOJ/Dear Colleague, at 2 (“Courts must safeguard against unconstitutional practices by court staff and private contractors”).
- <sup>21</sup> See Brennan Florida, at 26 (“The Legislature should limit service charges by private debt collectors and ensure adequate oversight”).
- <sup>22</sup> Rebecca Goldstein, Michael W. Sances, Hye Young You, “[Exploitative Revenues, Law Enforcement, and the Quality of Government Service](#),” Urban Affairs Review (2018)(finding that “police departments in cities that collect a greater share of their revenue from fees solve violent and property crimes at significantly lower rates”).
- <sup>23</sup> See CJPP, at 13 (“Eliminate fines and fees that are specifically earmarked for law enforcement agencies”).
- <sup>24</sup> CJPP, at 14.
- <sup>25</sup> CJPP, at 14.
- <sup>26</sup> See NCLC, at 12 (“provide trainings to judges and other stakeholders on problems associated with assessment and attempted enforcement of unaffordable fines and fees, and how such costs can undermine judicial legitimacy and create a two-tiered system of justice”).
- <sup>27</sup> Some prosecutors are [contracting with private attorneys](#) to prosecute code violations, and the private attorneys then bill the defendant. California recently [passed a bill](#) prohibiting this practice.
- <sup>28</sup> Fair and Just Prosecution, at 7 (“Avoid conflicts of interest by discontinuing and discouraging the use of fines and fees as a criminal justice or court revenue stream”).
- <sup>29</sup> According to an [NPR survey in 2014](#), “in at least 43 states and the District of Columbia, defendants can be billed for a public defender.”
- <sup>30</sup> Fair and Just Prosecution, at 7 (“Avoid conflicts of interest by discontinuing and discouraging the use of fines and fees as a criminal justice or court revenue stream”); Brennan Barrier (“Public defender fees should be eliminated, to reduce pressures that can lead to conviction of the innocent, over-incarceration, and violations of the Constitution”).
- <sup>31</sup> Fair and Just Prosecution, at 8 (“Consider a defendant’s ability to pay before taking positions in relevant court proceedings” and “Consider the impact of mandated fines and fees when making charging decisions”).
- <sup>32</sup> Fair & Just Prosecution, at 5 (referencing ACLU lawsuit, “[American Civil Liberties Union \(ACLU\), Lawsuit Launches Organizations’ Nationwide Efforts to Hold Abusive Prosecutors Accountable](#),” October 17, 2017).
- <sup>33</sup> See CJPP, at 26 (“Monitor civil rights consequences”).
- <sup>34</sup> Fair and Just Prosecution, at 8 (“Do not prosecute non-payment, and oppose the revocation of drivers’ licenses for non-payment”). See [Daily Memphian](#), Shelby County DA’s office won’t prosecute many revoked drivers’ license cases,”(Oct. 20, 2018).
- <sup>35</sup> Colorado has a good example of expanded notice requirements, see Colo. H.B. 16-1311 (2016).

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- <sup>36</sup> Quoted language from NCLC, at 12. See also, CJPP, at 31 (“Disseminate information to the public”); US CCR, at 77 (“States and municipalities should institute clear and effective procedures to provide notice to individuals of their rights when charged fines and fees, including the right to request appointed counsel, to an ability to pay determination, to fine and fee alternatives, and to legal processes such as compliance hearings”); SF Task Force, at 14 (“Change notices to include information about ability to pay, post information on the court’s website, investigate ways to communicate via text and email or accept ability to pay documentation via the internet, just as payments are accepted. Notices should be available in multiple languages and be readable at a fourth grade reading level (for people with disabilities”).
- <sup>37</sup> Quoted language from CJPP, at 35. See also, SF Task Force, at 12 (“Include easy-to-read information about alternative payment options based on ability to pay on the notices of the fee/fine and on relevant websites” and “In addition to sending notices and reminders by traditional mail, the [govt] should also send these by text and email”).
- <sup>38</sup> NCLC, at 12 (“Courts should provide clear information to individuals about their rights, obligations, and options for relief relating to court debt”).
- <sup>39</sup> Brennan Toolkit, Key Reform 2, at 14.
- <sup>40</sup> NCLC, at 12 (“Courts should provide clear information to individuals about their rights, obligations, and options for relief relating to court debt”).
- <sup>41</sup> Brennan Toolkit, Key Reform 2, at 14.
- <sup>42</sup> Texas, Louisiana and Ohio have laws mandating ability to pay inquiries, see [Tex. S.B. 1319](#) (2017)(at sentencing); [La. H.B. 249](#) (2017)(prior to enforcing any unpaid fines/fees); [Oh. Rev. Code § 2947.14](#) (2017)(before incarceration).
- <sup>43</sup> See CJPP Day Fines DRAFT, at 11 (“Conduct meaningful ability to pay determinations and tailor criminal justice debts at sentencing”); NCLC, at 11 (“Courts should issue court rules, bench cards and other guidance, and present trainings regarding critical fines and fees issues where the law tends to provide judges significant discretion, including how judges should conduct ability to pay hearings” and “Court leadership should actively monitor courts within their supervisory authority for compliance with relevant laws and court rules”).
- <sup>44</sup> NCLC, at 8.
- <sup>45</sup> See NJ Courts, at 47 (“No bench warrant shall be issued against a defendant who becomes delinquent on time payments unless an ability-to-pay hearing is scheduled on proper notice to the defendant”); see also, Miss. Court Rule 26.6 (requiring court make a determination of willfulness before issuing a warrant).
- <sup>46</sup> Quoted language from CJPP, at 27. See also, NCSC, at 5 (“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”); and US CCR, at 75 (“Courts and municipalities should have effective, readily available, and readily understandable processes for determining indigency before imposing any fines, including provisions for the appointment of counsel as appropriate. Judges should use bench cards to ensure consistent application of ability to pay standards”).
- <sup>47</sup> NCLC, at 12 (“Courts should develop tools for determining ability to pay”); SF Task Force, at 18 (“Use a data driven multi-agency determination to base citations on low-income [individual’s] ability to pay”); AZ Task Force, at 2 (“Create a Simplified Payment Ability Form to be used statewide by judges, probation officers, pretrial officers, or other court staff when evaluating a defendant’s ability to pay”).



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- <sup>48</sup> NCLC, at 12 (“Courts should develop tools for determining ability to pay” and “Courts should provide clear information to individuals about their rights, obligations, and options for relief relating to court debt.”).
- <sup>49</sup> US CCR, at 75 (“Courts and municipalities should establish a standard for evaluating an individual’s ability to pay including a presumption of inability to pay for people who are homeless, incarcerated, confined in a mental health facility, juveniles, or whose income is below the poverty level”); SF Task Force, at 12 (“Have a presumption of inability to pay for anyone who is homeless, receiving public benefits, or at/below 250% Federal Poverty Line”).
- <sup>50</sup> NCLC, at 12 (“Courts should develop tools for determining ability to pay”); SF Task Force, at 12 (“Allow individuals to verify inability to pay by showing their EBT card, enrollment letter from the Human Services Agency or other benefit card. Allow individuals to self-report under penalty of perjury. Use shared data agreements between departments to verify people’s income while maintaining client confidentiality. For example, allow interested County departments and courts to use a “look up tool” to determine if someone is receiving means tested benefits. Use the same process in all City/County/Court proceedings”); AZ Task Force, at 15 (“Use a person’s qualification in a means-tested assistance program (such as SNAP) as evidence of limited ability to pay sanctions, much like the fee waiver and deferral guidelines now in place”).
- <sup>51</sup> Texas recently passed a [law](#) granting judges the power to waive fees.
- <sup>52</sup> Quoted language from COSCA, at 24. See also, AZ Task Force, at 2 (“authorize judges to mitigate mandatory minimum fines, fees, surcharges, and penalties for those defendants for whom imposing mandatory fines and full fees and surcharges would cause unfair economic hardship”).
- <sup>53</sup> CJPP Day Fines DRAFT, at 11; see also Edwin Zedlewski, “Alternatives to Custodial Supervision: The Day Fine,” National Institute of Justice (2010); DOJ 1996 monograph, How to Use Day Fines.
- <sup>54</sup> NCLC, at 8 (“Scale fines to each person’s ability to pay”).
- <sup>55</sup> AZ Task Force, at 4 (“Provide courts with the ability to collect and use updated contact information, such as a database service, to find current location information before issuing a warrant or a reminder in aging cases”). Require that process servers electronically log their attempts to serve papers, using wireless or GPS technology, see NYC law.
- <sup>56</sup> ABA, at 11 (“An individual who is unable to afford counsel must be provided counsel, without cost, at any proceeding, including ability-to-pay hearings, where actual or eventual incarceration could be a consequence of nonpayment of fines and/or fees”); and US CCR, at 76 (“Courts and municipalities should establish a program to provide counsel at no cost at the imposition of a fine or fee and at an indigency determination as appropriate”); Brennan Florida, at 25 (the state “should provide counsel in all collections or LFO-related collection contempt proceedings that may result in incarceration”).
- <sup>57</sup> See NCSC, at 3 (“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, and court staff, nor should such funds be used to evaluate the performance of judges or other court officials”).
- <sup>58</sup> See Miss. Rule 26.6
- <sup>59</sup> See Miss. Rule 26.6
- <sup>60</sup> NCLC, at 12.
- <sup>61</sup> California has recently adopted a state law barring the state from suspending drivers’ licenses based on failure to pay traffic fines, see Cal. Veh. Code § 42008.8 (2019).

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- <sup>62</sup> Quoted language from NCLC, at 14. See also, NCSC, at 6 (“Courts should not initiate license suspension procedures for nonpayment of a Legal Financial Obligation until an ability to pay hearing is held and a determination has been made on the record that nonpayment was willful.”); SF Task Force, at 14 (“[courts should develop a policy of not referring failure to pay (FTP) and failures to appear (FTA) to the Department of Motor Vehicles for license suspension”). San Francisco Superior Court has such a policy.
- <sup>63</sup> ABA, at 8 (“Prohibition against incarceration and other disproportionate sanctions, including driver’s license suspensions and deprivations of other fundamental rights”); and NCLC, at 11 (“Courts should issue court rules, bench cards and other guidance, and present trainings regarding critical fines and fees issues where the law tends to provide judges significant discretion, including identifying whether and how courts should decline to use harsh enforcement tactics such as issuance of arrest warrants or extension of probation for nonpayment, as well as guidelines to ensure reasonable notice and opportunities to avoid harsh consequences”).
- <sup>64</sup> ABA, at 8 (“Prohibition against incarceration and other disproportionate sanctions, including driver’s license suspensions and deprivations of other fundamental rights”).
- <sup>65</sup> Brennan Toolkit, Key Reform 4, at 20.
- <sup>66</sup> CJPP Day Fines DRAFT, at 30.
- <sup>67</sup> NCLC, at 14.
- <sup>68</sup> Brennan Barrier, at 33 (“Legislatures should eliminate poll taxes that deny individuals the right to vote when they are unable to pay criminal justice debt”).
- <sup>69</sup> ABA, at 8 (“Prohibition against incarceration and other disproportionate sanctions, including driver’s license suspensions and deprivations of other fundamental rights”).
- <sup>70</sup> NCLC, at 15.
- <sup>71</sup> NYC Bar, at 14.
- <sup>72</sup> CJPP, at 20 (“Authorize alternatives to monetary sanctions”); CJPP Day Fines DRAFT, at 24 (“Careful consideration of alternatives to payment”); US CCR, at 75 (“Once a person has been deemed indigent, alternatives to payment should be made available, including for example converting fines and fees into community service or waiving the fines and fees”); NCLC, at 11 (“Courts should issue court rules, bench cards and other guidance, and present trainings regarding critical fines and fees issues where the law tends to provide judges significant discretion, including identifying when and how courts should consider waiver of fines and fees or alternatives to payment”); SF Task Force, at 12 (“For total inability to pay, offer options including community service (without participation fees, based on an hourly rate at or above minimum wage, and based on the reduced fine amount); and in which service is satisfied by participation in social services programs, job training, education, drug treatment, etc.; or suspension or dismissal of fine”).
- <sup>73</sup> US CCR, at 76; see also Brennan Barrier, at 33 (“Courts should offer community service programs that build job skills for individuals unable to afford criminal justice debt”).
- <sup>74</sup> CJPP, at 25 (“Create diversion courts”); NJ Courts, at 43 (“Where the offense is non-violent and otherwise lesser/petty, the legislature should permit that defendants to receive credit towards their fines and fees for hours spent in treatment in a substance abuse/mental health program/individual or group therapy, including Drug Court, so long as the treatment is related to the commission of the underlying offense; and “Encourage the creation and expansion of diversionary programs wherein participating defendants who perform volunteer services or complete appropriate treatment services have matters against them dismissed.”).
- <sup>75</sup> CJPP, at 23.

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- <sup>76</sup> NCLC, at 12.
- <sup>77</sup> NCLC, at 10.
- <sup>78</sup> NCLC, at 12 (“Make payment of criminal justice debt easier”); NCSC, at 3 (“Judicial branch leaders should increase access to the courts by providing flexibility in hours of service and through the use of electronic payment of fines and costs”); US CCR, at 76 (“Options for payment plans and to pay without having to appear in court should also be available to remove barriers to payment when an individual has the ability to pay”).
- <sup>79</sup> Brennan Toolkit Key Reform 3, at 17.
- <sup>80</sup> See Brennan Barrier, at 32 (“States should eliminate “poverty penalties” that impose additional costs on individuals who are unable to pay criminal justice debt all at once, such as payment plan fees, late fees, collection fees, and interest”).
- <sup>81</sup> NCLC, Commercialized Injustice (2019).
- <sup>82</sup> CJPP, at 12 (“Remove perverse incentives of private probation companies”).
- <sup>83</sup> CJPP Day Fines DRAFT, at 30 (“Decouple payment of court debt from probation terms, or otherwise limit the use of supervision to monitor payments”); NCLC Commercialized (In)Justice, at 42 (“Eliminating other conflicts of interest that tie a company’s profits to the financial obligations shouldered by program participants or the length of time individuals remain under supervision”).
- <sup>84</sup> DOJ/Dear Colleague, at 2 (“Courts must safeguard against unconstitutional practices by court staff and private contractors”); NCLC, Commercialized (in)justice, at 42 (“Prohibiting commission payments in all of their forms and requiring that agencies negotiate contracts based on delivering the best value to consumers and providing services in a manner that furthers the public interest”).
- <sup>85</sup> CJPP, at 35 (“Expand public records laws to include revenue and collection of court debt”); NCLC Commercialized (In)Justice, at 42 (“Demand transparency from state and local governments concerning contracts with private companies and costs imposed on individuals by these companies. Companies that perform functions of our criminal legal system should be subject to the same, or substantively similar, records requirements as government agencies”).
- <sup>86</sup> From NCLC Commercialized (In)Justice, at 39 (“Unfortunately, collectors exploit gaps in consumer protection laws — which generally prohibit such false threats and misstatements of law — pertaining to collection of court-imposed fines.”).
- <sup>87</sup> CJPP, at 17 (“Encourage fair collection practices”); NCLC Commercialized (In)Justice, at 41 (“Advocates can also demand effective oversight of companies profiting from the criminal legal system, including oversight by agencies charged with industry regulation, consumer protection, and civil rights enforcement”).
- <sup>88</sup> Quoted language is from CJPP, at 34. See also, NCSC, at 5 (“All courts should demonstrate transparency and accountability in their 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. This reporting of financial information should be in addition to any reporting required by state or local authority”); NSCS, at 5 (“The amounts, source of authority, and authorized and actual use of Legal Financial Obligations should be compiled and maintained in such a way as to promote transparency and ease of comprehension. Such a listing should also include instructions about how an individual can be heard if they are unable to pay”).
- <sup>89</sup> Quoted language is from CJPP, at 34. See also, NCSC, at 5 (“All courts should demonstrate transparency and accountability in their 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

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the state’s court of last resort or administrative office of the courts. This reporting of financial information should be in addition to any reporting required by state or local authority”); NCSC, at 5 (“The amounts, source of authority, and authorized and actual use of Legal Financial Obligations should be compiled and maintained in such a way as to promote transparency and ease of comprehension. Such a listing should also include instructions about how an individual can be heard if they are unable to pay”).

<sup>90</sup> Quoted language is from CJPP, at 34. See also, NCSC, at 5 (“All courts should demonstrate transparency and accountability in their 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. This reporting of financial information should be in addition to any reporting required by state or local authority”); NCSC, at 5 (“The amounts, source of authority, and authorized and actual use of Legal Financial Obligations should be compiled and maintained in such a way as to promote transparency and ease of comprehension. Such a listing should also include instructions about how an individual can be heard if they are unable to pay”).

<sup>91</sup> NCSC has provided multiple model statutes on political subdivisions of courts. New Jersey also provides recommendations on this collection of problems, including court consolidation, see NJ Courts.

<sup>92</sup> Quoted language is from NCSC, at 3. See also, CJPP, at 13 (“Exercise supervisory control over local courts”); NCLC, at 12 (“Court leadership should actively monitor courts within their supervisory authority for compliance with relevant laws and court rules”); NJ Courts, at 39 (“Develop a Judiciary policy to monitor the imposition of contempt of court financial assessments by Municipal Court judges to avoid the inappropriate use of contempt of court, to require compliance with court rules, and to require justification on the record and a separate court order.”). But see, study on [home rule issues](#) in Colorado city courts.

<sup>93</sup> Quoted language is from NCLC, at 12. See also, NCSC, at 5 (“All courts should demonstrate transparency and accountability in their 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. This reporting of financial information should be in addition to any reporting required by state or local authority”; “All judicial proceedings should be recorded, regardless of whether a court is recognized in law as a “court of record”; “The amounts, source of authority, and authorized and actual use of Legal Financial Obligations should be compiled and maintained in such a way as to promote transparency and ease of comprehension. Such a listing should also include instructions about how an individual can be heard if they are unable to pay.”).

<sup>94</sup> For an example of a best policy, see Minn. HF 3358 (requiring the state public safety commission to report on drivers’ license suspensions).

<sup>95</sup> SF Task Force, at 6 (“More research is needed on municipal fines and fees to better understand why cities turn to them; the implications for residents and revenue; and to understand which cities are most likely to rely on fines and fees. (For example, are smaller cities more likely to turn to fines and fees because they have fewer opportunities to generate revenue? Or are cities with larger populations of people of color or immigrants more likely to rely on fine and fee income?”)).