

National Indexing Project on Fines and Fees

Project Overview and Policy Benchmarks



National Center *for*
Access to Justice

AT FORDHAM LAW SCHOOL

About the National Center for Access to Justice

The National Center for Access to Justice (www.ncforaj.org) works to advance the principle that everyone should have a meaningful opportunity to be heard, secure their rights and obtain the law's protection. We use research, data and analysis to expose how the justice system fails to live up to that ideal and, all too often, functions as a source of oppression. We work to identify and promote practices that can improve access to justice, and we measure existing laws and policies against those goals.

One of NCAJ's signature efforts is the Justice Index (www.justiceindex.org), an online resource that measures the performance of every US state against a set of more than 100 best policies to make the justice system broadly accessible and fair.

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NCAJ also worked closely with an expert advisory group composed of advocates, academics and reformers with a diverse range of expertise on fines and fees issues. That group's role and composition is described in an appendix to this paper.

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Summary

Arnold Ventures is supporting an effort by NCAJ to identify a set of policies that should govern the imposition of criminal justice fines and fees by state and local governments across the US. This project is an extension of the Justice Index, a resource created by NCAJ that measures the performance of every US state against a set of best policies to make the justice system broadly accessible and fair.¹

The Fines and Fees Problem

States and localities across the United States impose monetary fines as punishment for a broad range of offenses. Many jurisdictions also impose various fees that are in theory not a form of punishment, but an effort to shift the financial costs of the justice system away from taxpayers and onto the backs of those who are hauled before the courts. These fees force people to pay for some or all of the costs of their own prosecution and punishment, and in some cases to contribute to government programs that are wholly unrelated to the justice system.²

The cumulative financial burden of these court-imposed financial obligations can be staggering, particularly for low-income people. Courts often make no effective efforts to assess a person's ability to pay, let alone ensure that the amounts of fines and fees imposed are tailored to that reality. Many people across the country are incarcerated or otherwise sanctioned for "failing" to pay fines and fees they simply cannot afford. Some of the punishments that states impose for failure to pay—like driver's license suspensions—exacerbate the poverty that prevents people from paying in the first place.

The scale of these problems is daunting and their human toll is devastating. Fortunately, awareness of these once-neglected problems has grown tremendously in recent years.

The Department of Justice's 2015 investigation of policing in Ferguson, MO spurred nationwide outrage with its portrait of that municipality's racist, predatory justice system—and its intense focus on extracting money from poor, black residents.³ But Ferguson was no anomaly.

¹ The Justice Index can be found online at <https://justiceindex.org>. NCAJ expects to update the entire Index with new data in 2020.

² A related but distinct issue, is the issue of restitution—where people convicted of offenses are required to pay monetary compensation to individuals harmed by their unlawful conduct. This fines and fees indexing project does not include a focus on restitution, and does not offer a perspective on good practice in that arena.

³ US Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department*, March 14, 2015, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

The larger reality is that localities across the US are increasingly reliant on fines and fees revenue, and courts face a corresponding pressure to keep that money flowing.⁴ This has given rise to a perverse financial incentive to over-police and over-punish. One recent study found that over 280 US municipalities draw more than 20 percent of their general revenues from fines and fees, and that 720 municipalities levy fines, fees and forfeitures revenue at a rate of more than \$100 per capita for every resident.⁵

Nor was the racism of Ferguson’s approach to fines and fees something new. Instead, it echoed a larger, ugly history. As the US Supreme Court acknowledged in *Timbs v. Indiana*, excessive fines became a key part of many states’ efforts to control and oppress black communities not long after the end of slavery.⁶

The US Department of Justice’s Ferguson report spurred increasing awareness of the widespread injustices around criminal justice fines and fees. In the last five years there have been a number of efforts to offer strong, principled guidance to states on fines and fees issues. For example:

- In March 2016, the US Department of Justice issued a “Dear Colleague” letter that sought to lend clarity to courts’ constitutional obligations around the imposition of fines and fees—notably the obligation to refrain from incarcerating people for failure to pay, when they are genuinely unable to do so.⁷ The Trump Administration rescinded the letter in 2017, but it remains a source of clear-eyed guidance on the fundamental rights concerns at stake in these cases.⁸
- In August 2018, the American Bar Association issued ten guidelines on fines and fees, setting out principles that should guide courts and legislatures in pursuing a rights-respecting approach to fines and fees.⁹

⁴ See Mike Maciag, “Addicted to Fines,” *Governing* Special Report, August 21, 2019, <https://www.governing.com/topics/finance/fine-fee-revenues-special-report.html>; Kasey Hendricks and Diana Cheyenne Harvey, “Not One but Many: Monetary Punishment and the Fergusons of America,” *Sociological Forum*, July 31, 2017, <https://onlinelibrary.wiley.com/doi/abs/10.1111/socf.12360>.

⁵ See Mike Maciag, “Addicted to Fines,” *Governing* Special Report, August 21, 2019, <https://www.governing.com/topics/finance/fine-fee-revenues-special-report.html>

⁶ *Timbs v. Indiana*, 586 U.S. ____.

⁷ US Department of Justice, Office of Civil Rights, Dear Colleague Letter (March 16, 2016), available at <https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf>.

⁸ US Department of Justice, “Attorney General Jeff Sessions Rescinds 24 Guidance Documents,” July 3, 2018, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>.

⁹ American Bar Association, “Ten Guidelines on Court Fines and Fees” (August 2018), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-ten-guidelines_.pdf?logActivity=true.

- In 2016, the National Conference of State Court Administrators issued a paper offering guidance on how courts should address the rights issues posed by the handling of fines and fees cases.¹⁰

There are many other examples.¹¹ There have also been efforts to articulate sweeping redesigns of the entire model of punishment through fines and fees.¹²

Identifying Policy Solutions

With support from an Expert Advisory Group¹³ composed of leading advocates and thinkers on this topic, NCAJ has identified a set of 17 key fines and fees policies that we think every US state should be able to implement. Each of these speaks to one or more of the following core principles:

- States may use fines as an appropriate punishment for violations of law, so long as they are proportionate to the severity of the offense, and defined with reference to what an individual can afford to pay without undue hardship.
- States should ensure that fines imposed as punishment for any violation of law are tailored to reflect what a person can afford to pay.
- States should ensure that fines are not used to shift the costs of the justice system away from government and onto the shoulders of individuals in conflict with the law, and should abolish fees as a predatory alternative to taxation across the board.

¹⁰ Conference of State Court Administrators, “The End of Debtors’ Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations” (2015-2016), <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>.

¹¹ See for example, Harvard Law School Criminal Justice Policy Program, “Confronting Criminal Justice Debt: A Guide for Policy Reform” (September 2016), <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf>; The Financial Justice Project, “San Francisco Fines and Fees Task Force: Initial Findings and Recommendations (2017), <https://sftreasurer.org/sites/default/files/2019-09/SF%20Fines%20%26%20Fees%20Task%20Force%20Initial%20Findings%20and%20Recommendations%20May%202017.pdf>; National Center for State Courts, National Task Force on Fines, Fees and Bail Practices, “Principles on Fines, Fees, and Bail Practices” (December 2017), <https://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx>; New Jersey Courts, Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees (2018), <https://www.njcourts.gov/courts/assets/supreme/reports/2018/sccmcoreport.pdf>; Abby Shafroth, National Consumer Law Center, “Criminal Justice Debt in the South: A Primer for the Southern Partnership to Reduce Debt” (December 2018), <https://www.nclc.org/images/pdf/criminal-justice/white-paper-criminal-justice-debt-in-the-south-dec2018.pdf>.

¹² See for example Sharon Brett and Mitali Nagrecha, *Proportionate Financial Sanctions: Policy Prescriptions for Judicial Reform*, Harvard Law School Criminal Justice Policy Program, September 2019, http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf. Some advocates have also begun calling for the outright abolition of most or even all monetary sanctions as a form of punishment.

¹³ For details on the expert advisory group’s composition, see Appendix.

- States should ensure that courts take a rigorous and proactive approach to ensuring that no person is incarcerated or otherwise punished for “failing” to pay fines and fees that they are unable to afford to pay without undue hardship.
- States should not impose unreasonably harsh collateral consequences, such as the suspension of voting rights or of driver’s licenses, on people with unpaid fines and fees.
- States should make rigorous efforts to collect key data on the imposition and human impact of fines and fees, and make that data publicly available.

Thanks to the work described earlier, states do not actually lack for sources of clear, principled guidance on the issues they should focus on in developing fines and fees policies. What they do not have, is a comprehensive vision of the range of concrete laws and policies they should have in place to implement an approach to fines and fees that is consistent with these larger principles.

NCAJ’s fines and fees project looks to bridge that gap by providing a clear set of policies states can and should adopt to curb abuses related to fines and fees—both as a source of guidance, and as a benchmark against which government can be held accountable. Many of the most pervasive injustices linked to fines and fees are the product of concrete policy decisions that can be identified and changed.

NCAJ will in 2020, field a research effort to compare the policies of every US state against our fines and fees policy benchmarks. We will also assess whether states that do not meet some of those benchmarks, have at least achieved incremental progress in the right direction.

When the research is complete, NCAJ will publish the results in full along with our analysis of what they signify. We will also produce a series of data visualizations that will allow for comparisons between states, and insights into other aspects of the fines and fees phenomenon. The result will be a clear and consistent portrait of the policy landscape across all 50 states on these issues. This will serve not only as a valuable empirical resource, but also as a useful advocacy tool that will help to align the efforts of advocates around important goals. It can be deployed to show states where they lead, where they lag behind, and what concrete steps they can take to improve their performance relative to others.

This paper presents the final set of Fines and Fees Benchmarks with a detailed explanation of NCAJ’s fines and fees project. Part I describes the process by which NCAJ developed and finalized our fines and fees policy benchmarks. Part II sets forth the 17 policy benchmarks we ultimately selected, and explains the rationale for the inclusion and particular framing of each one. Part III presents two short form views of the entire policy benchmark set, along with the numerical weight assigned to each benchmark. Part IV briefly outlines the next steps NCAJ will take— fielding a research effort to compare states’ policies against our benchmarks, and presenting the final results.

I. Developing the Fines and Fees Policy Benchmarks: Overview of Process

Drafting and Finalizing the Fines and Fees Policy Benchmarks

In the first half of 2019, NCAJ drafted provisional set of fines and fees policy benchmarks. We then spent the second half of the year improving, reimagining and refining them. We finalized the policy benchmarks in December 2019.

As a key part of this process, we convened an expert advisory group made up of people with deep knowledge of fines and fees issues. The group was composed of activists and thinkers who are all committed to reform, with a diverse range of perspectives and of specific expertise.¹⁴

The group's role was twofold: to offer concrete suggestions about what the policy benchmarks should and should not include, and to ensure that the work in its entirety was subject to robust discussion and critique. We asked group members to provide detailed feedback on two different drafts of the policy benchmarks. We hosted three calls with the group as a whole as well as a number of conversations with individual group members, to discuss substantive issues that emerged throughout this process.

After finalizing the policy benchmarks, we also asked for the experts' feedback on our approach to assigning different numerical weights to each of them. As described below, this is how we capture the relative importance of each policy benchmark.

While the expert group's feedback heavily influenced the development of the policy benchmarks and there was broad agreement on many issues, the end result is not entirely the product of consensus. In some places, it represents NCAJ's own institutional perspective on the best way to bridge gaps between the differing ideas and perspectives that emerged within our group across key issues. The most salient of these decision points are described in section II of this paper, which explains the rationale for each policy benchmark's inclusion in the set.

Measuring State Performance

NCAJ's Justice Index is a tool that measures whether states have adopted key policies that we regard as important components of a fair and accessible justice system. We use the Index to publicize these policies, to facilitate access to them, and to promote debate around them. It serves multiple purposes: as a source of concrete policy guidance to states, as a set of concrete standards advocates can rally around and promote, as a set of findings that researchers can turn to for knowledge of geographical disparities, and, perhaps most importantly, as a benchmark against which state officials can be held accountable. In all these ways we support good policies' replication and movements for reform across the country.

¹⁴ For a list of expert advisory group members, see the Appendix to this paper.

This project applies the Justice Index’s methodology to the fines and fees context. We approach the inquiry as to whether a state has each one of our selected policies as a binary, yes or no question—states either have the recommended policy in place and get credit for it, or they do not. Where we find that states have in place policies that are of interest to the public, but do not match the policy, we do not give credit for the policy, but we do publicize the policy, making it available to the public for review and consideration.

Each primary policy benchmark is framed as an affirmative description of a policy we believe every state should have adopted. In assessing the states, we ask whether each of these descriptions represents an accurate description of the policies they actually have in place. We do not purport to measure the degree to which states succeed in the practical implementation of good policies. As an extension of the Justice Index, this fines and fees project adheres to this same basic methodology.¹⁵

This approach requires a delicate balance between two key imperatives. On the one hand, we need our policy benchmarks to be concrete and substantive enough to serve as a clear and useful description of good policy. On the other hand, we need to avoid the kind of prescriptive detail that could lead us to deny recognition to states whose policy approaches achieve a desired result by different means.

Primary and Secondary Policy Benchmarks

In applying the Justice Index’s methodology to the fines and fees context, we face a particular challenge. Since the goal is to articulate a vision of best—and not merely “acceptable”—policies, our benchmarks set a deliberately high bar. However, the prevailing policy landscape is quite bleak across many key fines and fees issues. In fact, we anticipate that the majority of states will fail to meet many of our policy benchmarks—and there are some benchmarks that no state will meet even though every state can and should.

At the same time, there is considerable and important diversity among states on their policy approaches to these issues. Some have taken positive but limited steps to improve their laws and policies. Or to put it another way, not all states that fail to meet our policy benchmarks are in fact equal. We believe that this fines and fees indexing exercise will be most useful and accurate if it is able to recognize some of this policy diversity, without diluting the principled stands we’ve taken in framing the main policy benchmarks.

We have addressed this dilemma by creating “secondary” policy benchmarks that ask whether states that do not meet some of the primary policy benchmarks have at least adopted one or more of several enumerated alternative policies. These generally represent either incomplete progress in the direction of the main policy benchmark, or an alternative approach which while

¹⁵ For more on the Justice Index’s methodology, see <https://justiceindex.org/methodology/general-methodology/#site-navigation>

inadequate does represent a step up compared to the prevailing status quo in many other states. These secondary benchmarks are afforded considerably less weight than the primary policies they relate to. In this way we are able to capture some of the complex range of existing policies, and push for incremental progress in sensible directions, without giving undue credit to states that have taken only minor steps forward.

The adoption of secondary policy benchmarks also allows us to address another key dilemma. Our policy benchmarks look for statewide implementation of best policies. It is not in fact possible to assess fines and fees policies across all local jurisdictions in the country. In the fines and fees arena, however, many of the most pervasive problems—and their policy solutions—lie at the local level.

Different states have varying degrees of legal control over the behavior of county- and municipal-level courts, and varying degrees of political will to exercise the control they do have.¹⁶ What this means in practice is both that some states may have good policies in place that do not extend to the local level, and that some important local jurisdictions may have policies in place that are much better than those that prevail at the state level. In an effort to capture aspects of both of these realities, we have introduced secondary policy benchmarks underneath many of the primary benchmarks that do two things:

- 1) Ask whether a state meets the primary benchmark **except for** the policies of some local jurisdictions. This allows us to afford partial recognition to a state that has one of our best policies on the books, but either cannot or does not extend its reach to the local level; and
- 2) Ask whether a significant local jurisdiction (we define this as a county or municipality with a population of at least 50,000) meets the primary policy benchmark with regard to its own policies, even though the state itself fails to do so. Some of our expert advisory group members raised the concern that this approach seems to give credit to the state for local-level progress that it had nothing to do with. However, we ultimately placed a higher priority on encouraging states to facilitate local-level progress even where the state itself lags behind. We have, however, taken the concern into account by affording this secondary benchmark a low weight so that it does not unduly inflate the score of any state.

¹⁶ One key distinction is between states that have a “unified” court system—one where state authorities have the power to oversee and govern the conduct of courts at all levels—and those that do not. See <https://www.ncsc.org/Topics/Court-Management/Court-Unification/State-Links.aspx?cat=States%20Legally%20Described%20as%20Unified>

Scoring

Every state will receive a composite score that reflects the degree to which it has met the fines and fees policy benchmarks. The complexity here is that the policies set down in those benchmarks are not all of equal importance because a range of factors – like the number of people affected and the nature of those impacts -- may determine the importance of a given policy. The total abolition of fees, surcharges and other court costs, for example, is a far more important policy goal than affording all people the option of paying fines down over time on a reasonable payment plan.

We account for this reality by assigning different numerical weights to each of the 17 main policy benchmarks. These range from 3 to 10, and the benchmarks' weighted values add up to a total possible score of 100. This allows us to offer greater recognition to states that adopt policy benchmarks that are particularly transformative, or whose impact is likely to be particularly deep or far-reaching. This is not a finely-tuned, objective metric but a reflection of broad perspective arrived at in consultation with the advisory group. The secondary, "second best" policy benchmarks are also weighted and are worth some fraction of the point value assigned to the primary benchmark they sit beneath.

Apart from all of this, our approach to scoring is straightforward and simple:

- 1) **If a state meets one of our main policy benchmarks**, we add that policy's point value to the state's overall score. In this scenario, we do not look to the secondary benchmarks at all.
- 2) **If a state does not meet one of our main policy benchmarks**, we ask whether the state at least meets one or more of any related secondary benchmarks. If it does, we add those secondary benchmarks' point value to the state's overall score. If it does not, the state earns no points.

When a state does not meet either the main policy benchmark or the secondary benchmark, but has a policy that we determine is of significant interest to the public, the state earns no points (as noted, above) but we will make the policy visible.

II. Fines and Fees Policy Benchmarks Explained

The following pages set forth and explain each of NCAJ's fines and fees policy benchmarks, including the rationale for their inclusion. It also describes any difficult choices we had to make in deciding precisely how to frame them.

1. Abolition of all Fees

The state has abolished all fees, costs, surcharges and assessments in all matters involving a violation of law. This includes but is not limited to charges for: i) appointed counsel; ii) probation or parole supervision; iii) electronic monitoring; iv) diversion programs; v) services such as treatment and drug testing; and vi) costs of incarceration including room, board and health care.

Secondary Benchmarks

- a) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 has abolished all the fees, costs, surcharges and assessments that it has the power to abolish.
- b) **No charges for counsel:** Statewide, there are no fees linked to the services of a public defender or other appointed counsel.
- c) **No charges for incarceration:** Statewide, there are no charges to incarcerated people for the costs of their incarceration including room, board and health care.
- d) **Significant steps:** The state has taken one or more significant steps, other than those described above, to curtail court-ordered fees, costs, surcharges or assessments within the last four years. This could for example include: i) abolition of particular fees, costs, surcharges or assessments; or ii) a reduction of, or cap on, amounts charged.

Rationale

Fees and surcharges, as distinct from fines, represent an indefensible effort to force the people who pass through the justice system to bear its operational costs, and/or to generate other revenues through the courts as an alternative to taxation. These charges are regressive, discriminatory and create a *de facto* reality of disproportionate punishment. While these user fees are in theory not punitive, they greatly compound the often-crushing financial burden of fines imposed as punishment for violations of law.¹⁷ We argue that vital public services concerning law enforcement and justice, which are important to all members of society, should instead be fully funded through tax revenues.

At present, no US state meets the high but essential bar set by our primary benchmark. There is, however, considerable diversity among states with regard to just how pernicious and widespread the use of fees is. Our secondary policy benchmarks should allow us to capture and acknowledge key elements of that diversity.

Secondary benchmark 1(a) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the primary benchmark's substantive criteria with regard to its own policies. Secondary benchmarks 1(b) and 1(c) ask whether the state at least refrains from charging people fees for appointed counsel and the costs of incarceration, respectively—two especially pernicious fees that we believe we should credit states for avoiding.

Secondary benchmark 1(d) asks whether the state has taken other “significant” steps within the last four years to curtail the use of court fees. This open-ended benchmark represents an

¹⁷ See, for example, Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor*, New York: Russel Sage Foundation, 2016; Human Rights Watch, *Profiting from Probation: America's "Offender-Funded" Probation Industry*, February 5, 2014, <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>.

approach we have embraced in only one other instance across the entire set of benchmarks, because it greatly complicates the task of measurement. Here, however, we think this approach necessary to afford us an extra level of flexibility in capturing unique markers of progress some states may have realized on this vital issue.

2. No Juvenile Court Fines and Fees

The state has abolished all juvenile court fines, fees, costs, surcharges and assessments, including both those imposed on youth and those imposed on their parents, guardians or other responsible adults.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark's substantive criteria, except with regard to some counties and/or municipalities.
- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 has abolished all the juvenile court fines, fees, costs, surcharges and assessments that it has the power to abolish.
- c) **Abolished juvenile fees:** The state has abolished all juvenile court fees, costs, surcharges and assessments imposed on youth, parents, guardians or other responsible adults—but has not abolished all fines in these cases.
- d) **Abolished juvenile fines:** The state has abolished all juvenile court fines—but has not abolished all fees, costs, surcharges and assessments imposed on youth, parents, guardians or other responsible adults in these cases.
- e) **Significant steps:** The state has taken steps within the last four years to eliminate some, but not all, fines and/or fees for juveniles.

Rationale

In contrast to benchmark 1 above, that calls for the abolition of all fees, this benchmark looks to the abolition of all **fines** as well as fees—but only in juvenile court cases. This reflects NCAJ's belief that imposing fines and fees on juveniles typically means punishing the youths' families, and in many cases adding to the burdens of poverty for the juvenile, their parents and their siblings.¹⁸

Secondary benchmark 2(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 2(b) looks to encourage local-level progress by acknowledging the existence of any major local

¹⁸ See Jessica Feierman, *Debtor's Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System*, Juvenile Justice Center, 2016, <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf>.

jurisdiction that meets the primary benchmark’s substantive criteria with regard to its own policies.

Secondary benchmark 2(c) asks whether the state has at least abolished all juvenile court fees—but not all juvenile court fines. Secondary benchmark 2(d) asks the reverse—whether the state has abolished all juvenile fines, but not all juvenile fees.

Secondary benchmark 2(e) asks whether the state has taken other “significant” steps within the last four years to curtail the use of court fees. This open-ended framing represents an approach we have embraced in only one other instance across the entire set of policy benchmarks, because it greatly complicates the task of measurement. Here, however, we think it necessary to afford us an extra level of flexibility in capturing unique markers of progress some states may have realized on this vital issue.

3. Conflicts of Interest Around Fines and Fees Revenues

The state has no fines, fees, costs, surcharges or assessments whose revenues are explicitly directed to support law enforcement or the courts.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark’s substantive criteria, except with regard to some counties and/or municipalities.
- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 meets the primary benchmark’s substantive criteria, with respect to all of the fines, fees, costs, surcharges and assessments it levies on its own authority.
- c) **Cap on fines and fees revenue:** The state caps the proportion of municipal and county budgets that may be drawn from fines and fees revenue.

Rationale

Courts and law enforcement agencies should not have to consider their own financial bottom line when deciding whether and what kind of punishment to impose on people who violate the law. When fines and fees revenue is tied directly to the budgets of law enforcement and justice system functions, it creates a conflict of interest by incentivizing ramped-up enforcement and the imposition of steeper financial penalties.¹⁹

Secondary benchmark 3(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 3(b) looks to encourage local-level progress by acknowledging the existence of any major local

¹⁹ See Macier, *supra* note 2; Dick Carpenter, Kyle Sweetland and Jennifer McDonald, *The Price of Taxation by Citation: Case Studies of Three Georgia Cities that Rely Heavily on Fines and Fees*, Institute for Justice, October 2019, <https://ij.org/wp-content/uploads/2019/10/Taxation-by-Citation-FINAL-USE.pdf>.

jurisdiction that meets the primary benchmark’s substantive criteria with regard to its own policies.

Secondary benchmarks 3(c) and 3(d) describe policy approaches that one or more states have taken and which we want to be sure to credit as better than the absence of any controls at all. Secondary benchmark (c) asks whether the state at least imposes a cap on the proportion of local budget revenues that can lawfully be derived from fines and fees revenue.

4. Ability to Pay Determinations at Sentencing

The state requires courts to conduct an ability to pay determination whenever they impose fines, fees, costs, surcharges or assessments.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark’s substantive criteria, except with regard to some counties and/or municipalities.
- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 meets the primary benchmark’s substantive criteria, with respect to the practice of its own courts.
- c) **Meets With Regard to Fines Only:** The state meets the primary benchmark’s substantive criteria with regard to fines, but not fees.
- d) **Right to ability to pay determination:** The state has a statute codifying a person’s right to request an ability to pay determination at sentencing or at any other time, but the inquiry is not conducted automatically.

Rationale

While the US Supreme Court has held that no person can be incarcerated merely for paying a fine or fee that they are genuinely unable to pay, many states have failed to ensure meaningful respect for this protection.²⁰

As a significant part of addressing this problem, we believe courts should always consider a person’s ability to pay when imposing fines and fees—and not only when a person raises the issue affirmatively. In tandem with several other policy benchmarks, this also speaks to the

²⁰ See Harris, *supra* note 16; Human Rights Watch, *supra* note 16; ACLU, “ACLU and Biloxi Settle Lawsuit over Jailing of Indigent People,” March 5, 2016, <https://www.aclu.org/press-releases/biloxi-and-aclu-settle-lawsuit-over-jailing-indigent-people>; Myesha Braden, Leah Watson, Talia Gilbert and Jason Enos, *Too Poor to Pay: How Arkansas’s Offender-Funded Justice System Drives Poverty and Mass Incarceration*, Lawyers’ Committee for Civil Rights Under Law, March 26, 2019, https://adobeindd.com/view/publications/f3b39ab5-1da5-409e-97a6-a0b060d2f578/1/publication-web-resources/pdf/FINAL_ARReport_Draft1_031419.pdf.

larger principle that fines should be tailored to reflect the financial capacity of the person they are being levied against.

This policy benchmark does not apply to fines and fees imposed without the court's direct involvement—as for example with the issuance of a speeding ticket that the driver does not contest or seek to modify in court.

Secondary benchmark 4(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 4(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the primary benchmark's substantive criteria with regard to its own policies.

Secondary benchmark 4(c) looks to a situation where a state meets the primary benchmark with regard to the imposition of fines, but not fees, surcharges, etc. Secondary benchmark 4(d) asks whether the state that does not meet the primary benchmark, at least codifies a person's right to request an ability to pay determination at sentencing.

5. Proof of Willful Failure to Pay

The state requires the government to prove that a person's failure to pay any fine, fee, cost, surcharge or assessment was willful, before incarcerating or imposing any other sanction on an individual for failure to pay.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark's substantive criteria, except with regard to some counties and/or municipalities.
- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 meets the primary benchmark's substantive criteria, with respect to the practice of its own courts.

Rationale

This speaks to the reality that states too often overlook the constitutional prohibition on incarcerating a person for failing to pay a fine or fee when the person is genuinely unable to do so.²¹ With this in mind, we take the position that states should require the government to affirmatively prove that any failure to pay was willful before incarcerating or otherwise punishing someone on that basis—as opposed for example to requiring the accused to raise this affirmatively.

²¹ Ibid. See also Ferguson report, *supra* note 3.

Secondary benchmark 5(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 5(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the primary benchmark's substantive criteria with regard to its own policies.

6. Right to Counsel When Incarceration is Possible

The state has codified a right to counsel in all proceedings where a person faces possible incarceration for failure to pay fines, fees, surcharges and assessments.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark's substantive criteria, except with regard to some counties and/or municipalities.
- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 meets the primary benchmark's substantive criteria, with respect to the practice of its own courts.

Rationale

Under the US Constitution, the right to counsel should apply in any situation where a court imposes a sentence of immediate incarceration or a sentence that may result in incarceration later for failure to pay.²² To ensure that this right is respected and understood to attach in all such situations, states should codify the expectation.

Secondary benchmark 6(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 6(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the primary benchmark's substantive criteria with regard to its own policies.

²² The US Supreme Court and federal appellate courts have consistently held that the right to counsel should apply in *at least* the following cases: criminal contempt proceedings employed to punish a person for non-payment of fines and fees; sentencing proceedings where fines and fees are imposed if incarceration could result from nonpayment; probation revocation proceedings where incarceration may result because of nonpayment of fines and fees; and juvenile proceedings where detention may be imposed along with or instead of fines and fees. See *Turner v. Rogers*, 564 U.S. 431, 441 (2011); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Alabama v. Shelton*, 535 U.S. 654, 674 (2002); *Shayesteh v. City of South Salt Lake*, 217 F.3d 1281, 1283–84 (10th Cir. 2000); *United States v. Foster*, 904 F.2d 20, 21 (9th Cir. 1990); *United States v. Perez-Macias*, 335 F.3d 421, 428 (5th Cir. 2003); *United States v. Pollard*, 389 F.3d 101, 105–06 (4th Cir. 2004); *Mempa v. Rhay*, 389 U.S. 128, 135 (1967); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); *Bearden v. Georgia*, 461 U.S. 660, 668–69 (1983); *In re Gault*, 387 U.S. 1, 35–42 (1967).

7. Ability to Pay Standards

The state has codified substantive standards that all state and local courts are required to use, giving clear guidance to judges on how ability to pay should appropriately be determined.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark's substantive criteria, except with regard to some counties and/or municipalities.
- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 meets the primary benchmark's substantive criteria, with respect to the practice of its own courts.

Rationale

This benchmark recognizes that even when courts conduct ability to pay determinations, they often are not guided by clear, uniform standards—substantive and not merely procedural—about the way those proceedings should be conducted, the evidence that should be considered and the criteria that should be used to gauge what a person is able to pay. This is a key driver of a serious problem: ability to pay determinations exercises are often *pro forma*, wildly inconsistent across different courtrooms, and without meaningful protective value.²³

Within our expert advisory group, there was robust discussion as to whether this benchmark should articulate a clear expectation of how the “substantive standards” referred to here should be framed. Some expressed concern that as framed, the benchmark would afford credit to states who have codified standards that are indefensibly weak or ill-conceived.

Ultimately, the absence of good policy models in the current practice of states made us reluctant to recommend a specific set of standards. There could be a diverse range of policy approaches that do an acceptable job of meeting the principled goal that informs this benchmark, and we feel it is important to be able to credit these where they do emerge. Benchmark #8 on presumption of indigence, however, grew out of this conversation and a desire to address the concerns it pointed to.

Another advantage to framing the benchmark in these more general terms, is that it will better highlight the startling reality that many states have not taken any steps in this direction, adequate or not.

Secondary benchmark 7(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 7(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the primary benchmark's substantive criteria with regard to its own policies.

²³ See *supra* note 17.

8. Standards that Trigger Presumption of Indigence

The state has codified standards that trigger a presumption that a person is indigent and unable to pay fines, fees, costs, surcharges or assessments, in cases involving a violation of law. This presumption must be triggered by at least one of the following: receipt of means-tested public assistance, income below an enumerated threshold, and/or eligibility for court-appointed counsel.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark's substantive criteria, except with regard to some counties and/or municipalities.
- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 meets the primary benchmark's substantive criteria, with respect to the practice of its own courts.

Rationale

This benchmark works in tandem with #7, on ability to pay standards. Ability to pay is a far more expansive concept than indigence. The former is relevant to all cases where an individual is sentenced to fines and fees, while the latter describes situations where people lack the financial means to pay any amount of fines and fees.

As a subset of their broader approach to ability to pay determinations, it is particularly important for states to codify concrete standards that trigger at least a presumption of indigence so that courts are able to capture cases where people cannot reasonably expected to pay any amount of monetary sanctions or fees. We also believe that this policy approach would lend greater efficiency to proceedings, and reduce unnecessary burdens placed on individuals to prove the fact of their own poverty.

Within our expert advisory group, we also found that it was easier to arrive at consensus views of what some of these triggers ought to hinge on. For that reason we were able to frame this benchmark in more prescriptive terms than the broader benchmark on ability to pay standards.

Secondary benchmark 8(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 8(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the primary benchmark's substantive criteria with regard to its own policies.

9. Discretion to Waive or Modify Fines and Fees

The state ensures that all judges have discretion to waive or modify all fines, fees, costs, surcharges or assessments based on ability to pay, at imposition or at any point afterwards.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark's substantive criteria, except with regard to some counties and/or municipalities.
- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 meets the primary benchmark's substantive criteria, with respect to the practice of its own courts.
- c) **Meets only partially:** The state meets the primary benchmark's substantive criteria with respect only to all fines, or with respect to some or all fees, costs, surcharges and assessments.

Rationale

One key principle flowing throughout this set of policy benchmarks is the idea that the amount of fines and fees imposed on any person should reflect an understanding of what that person can afford to pay. Wide judicial discretion to adjust or waive fines and fees is an essential component of any effort to live up to that policy ideal. In reality, judges often face significant limits on their ability to waive or modify certain financial obligations based on ability to pay.²⁴

Secondary benchmark 9(a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 9(b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the primary benchmark's substantive criteria with regard to its own policies. Secondary benchmark 9(c) looks to ensure that we can afford some recognition to states that have taken positive steps that align with the primary benchmark except that they are limited in their scope of application.

10. Payment Plans

The state mandates that anyone can choose to pay fines and fees on a payment plan if they cannot afford to pay immediately, without incurring any additional fees or interest charges.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark's substantive criteria, except with regard to some counties and/or municipalities.

²⁴ See Maura Ewing, "A Judicial Pact to Curt Costs for the Poor," *The Atlantic*, December 25, 2017, <https://www.theatlantic.com/politics/archive/2017/12/court-fines-north-carolina/548960/>; New York City Bar Association, *New York Should Re-Examine Mandatory Court Fees Imposed on Individuals Convicted of Criminal Offenses and Violations*, May 2019, <https://s3.amazonaws.com/documents.nycbar.org/files/2018410-MandatorySurchargesCriminalCharges.pdf>.

- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 meets the primary benchmark’s substantive criteria, with respect to the practice of its own courts.

Rationale

Restrictions on entry into long-term payment plans for fines, fees and surcharges constitute a needless barrier to payment for many individuals. Fees linked specifically to the “privilege” of entering into such payment plans are essentially a tax on poverty, since low income individuals are mostly likely to need time to pay down legal financial obligations. Any person sentenced to pay fines or fees should be able to automatically enter into a long-term payment arrangement, at any time, without incurring additional charges.

Secondary benchmark 10 (a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 10 (b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the primary benchmark’s substantive criteria with regard to its own policies.

11. Individualized Fines

The state has taken one or more specific steps to mandate, encourage or facilitate courts’ use of individualized fines (“day fines”) that are scaled according to both the severity of the offense and the individual’s economic status.

Secondary Benchmarks

- a) **At least one court piloting:** At least one court, at any level within the state, is currently implementing or piloting a system of proportional fines as described in the primary benchmark.

Rationale

This benchmark seeks to position the Index in support of campaigns to promote the use of individualized, scalable fines (referred to as “day fines” in foreign jurisdictions that have adopted this approach). This represents a progressive approach to calibrating fines and fees to an individual’s ability to pay. Implemented correctly, it has the potential to address many of the underlying problems with the use of financial sanctions in US courts. It also has the advantage of being a concrete model that is already in use in other parts of the world. The benchmark is framed explicitly around incremental progress and experimentation, on the understanding that no US jurisdiction at any level currently relies on the day fines model.²⁵

²⁵ Germany and several other European countries use a day fines system. In the US, there were several local-level experiments with day fines regimes in the 1980s and 1990s, but none took root and no such initiatives have been undertaken in recent years. See Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and*

There was some debate within the expert advisory group as to whether the goal of pushing states to experiment with this approach was of sufficient importance to warrant being a primary benchmark, as opposed to being framed as a secondary benchmark somewhere else. The balance of opinion within the group was in favor of inclusion, and NCAJ was also persuaded to keep it as it is.

The lone secondary benchmark seeks to recognize and promote environments that foster the use of day fines models in individual courts at any level, even where this is not the result of state government action.

12. Meaningful Notice

The state, in any case where fines, fees, costs, surcharges and assessments are imposed:

- (a) **Waiver, modification and conversion:** Requires notice of any opportunities to seek waiver, modification or conversion of fines and fees; and notice of the steps required to do so;
- (b) **Ability to pay determination:** Requires notice of any opportunities to secure an ability to pay determination at any time after imposition, and the steps required to do so;
- (c) **Payment plans:** Requires notice of any opportunities to enter into or modify the terms of a payment plan after sentencing, and the steps required to do so;
- (d) **Payment due:** Requires notice before any payment becomes due;
- (e) **Payment late or overdue:** Requires notice when payments are late or overdue, including the steps a person should take if they cannot afford to make payment.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** For each component of the primary benchmark: The state meets the primary benchmark's substantive criteria, except with regard to some counties and/or municipalities.

Rationale

Reversing the (Costly) Punitive Trend, Georgetown Law School, American Criminal Law Review, 55:2 (2018), <https://www.law.georgetown.edu/american-criminal-law-review/in-print/volume-55-number-2-spring-2018/day-fines-reviving-the-idea-and-reversing-the-costly-punitive-trend/>; Susan Turner and Joan Petersilia, *Day Fines in Four US Jurisdictions*, RAND Corporation, March 1996, <https://csgjusticecenter.org/wp-content/uploads/2013/07/1996-RAND-day-fines-4-BJA-pilot-sites.pdf>. In December 2019, the New York City council took up a bill that would pilot a day fines system for some low-level offenses in the City. The bill text can be found at: <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4265946&GUID=CB87BD3F-CC74-4FD0-ACC4-5B0217281D1A&Options=&Search=>.

The benchmark seeks to capture core components of the meaningful notice all people should have of their rights and obligations in relation to fines and fees. The secondary benchmark seeks to recognize and promote good practice at the state level, if state regulation of county and municipal practices is lacking.

Like the benchmark on data and unlike all of the other benchmarks, each sub-part of this benchmark will be scored separately, with one point awarded if the state meets that part of the benchmark and zero if it does not, for a maximum total score of 5.

13. Driver's License Suspensions for Unpaid Fines and Fees

State law does not allow for the suspension of driver's licenses for failure to pay fines, fees, costs, surcharges and assessments; nor for failure to appear in court.

Secondary Benchmarks

- a) **Meets but for some driving-related offenses:** The state does not suspend licenses for failure to pay, except that state law provides that licenses may be suspended for nonpayment of fines and fees imposed for some driving-related offenses.
- b) **Meets only re: failure to pay:** The state meets this benchmark with regard to failure to pay, but not with regard to failure to appear.
- c) **Meets only re: failure to appear:** The state meets this benchmark with regard to failure to appear, but not with regard to failure to pay.

Rationale

Driver's license suspensions are an overly harsh punishment for the non-payment of fines and fees.²⁶ This is precisely why many states make use of the mechanism, viewing it as a useful tool to coerce people into payment. In reality, suspensions have the perverse effect of making it harder for many people to earn the money they need to satisfy those obligations. Without a reliable means of transportation that allows people to work, care for their children and provide for basic needs, people with suspended licenses often face the desperate and paradoxical choice of breaking the law or losing their jobs and failing their families. Suspensions also tend to put people in a position where they have little choice but to violate the law as they struggle to work, take care of their children, and provide for other basic needs.

²⁶ See Mario Salas and Angela Ciolfi, *Driven by Dollars: A State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, Carson Whitelemons, Ashley Thomas, Sarah Couture, *Driving on Empty: Florida's Counterproductive and Costly Driver's License Suspension Practices*, October 2019, Legal Aid Justice Center, Fall 2017, <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf>; <https://finesandfeesjusticecenter.org/content/uploads/2019/11/florida-fines-fees-drivers-license-suspension-driving-on-empty.pdf>; For an extensive overview of the problem and links to other relevant content, see Free to Drive Campaign, <https://www.freeto-drive.org/resources/#page-content>.

This benchmark reflects NCAJ’s position that no such use should be made of license suspensions. Instead, suspensions should only be applied when drivers engage in behavior that endangers others on the roads.

Secondary benchmark 14 (a) looks to acknowledge states that meet the benchmark *except* with regard to license suspensions for payment of some driving-related offenses. Secondary benchmarks 14 (b) and 14 (c) recognize the limited but important value of state laws that at least refrain from suspending licenses for either failure to pay *or* failure to appear, but not both.

14. Voting Rights

The state does not condition restoration of voting rights on payment of fines, fees, costs, assessments, or surcharges, including any payments that are a condition of probation or parole.

Rationale

The suspension of or refusal to reinstate voting rights for failure to pay fines and fees is a grossly disproportionate punishment.²⁷ In some states, people convicted of certain crimes lose their right to vote until they have completed their sentences—and this is treated as including the full payment of any outstanding fines and fees.

This is the only primary benchmark that has no secondary benchmarks. The consensus view between NCAJ and the expert advisory group, was that the fundamental rights at stake cannot be the subject of compromise or respected only partially.

15. Does not Condition Expungement on Payment of Fines and Fees

The state does not condition the expungement or sealing of records, on payment of fines or fees.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark’s substantive criteria, except with regard to some counties and/or municipalities.

Rationale

²⁷ See Alicia Bannon, Mitali Nagrecha, Rebekah Diller, *Criminal Justice Debt: a Barrier to Reentry*, Brennan Center for Justice, 2010, pp. 29-30, <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; Lawrence Mower, “State Supreme Court Agrees with Legislature: Felons Must Pay All Costs to Regain Vote,” *Miami Herald-Times*, January 16, 2020, <https://www.miamiherald.com/news/politics-government/state-politics/article239355253.html>.

As with driver's license suspensions, there is no rational or defensible connection between unpaid fines and fees, and expungement or sealing of records.

The lone secondary benchmark looks to acknowledge states that meet the benchmark *except* with regard to license suspensions for payment of some driving-related offenses.

16. Private Collection of Fines and Fees Debt

The state does not allow courts to use private collections firms to collect unpaid fines and fees.

Secondary Benchmarks

- a) **Meets except for some counties and municipalities:** The state meets the primary benchmark's substantive criteria, except with regard to some counties and/or municipalities.
- b) **One major county or municipality meets:** At least one county or municipality with a population of at least 50,000 meets the primary benchmark's substantive criteria, with respect to the practice of its own courts.
- c) **Payment not tied to collection:** The state permits private collections of unpaid fines and fees, but requires that collectors' compensation be unrelated to the amount of money they collect.
- d) **No charge for debt collection:** The state prohibits courts from imposing surcharges on unpaid fines and fees sent to private collection.
- e) **Contract terms:** The state includes provisions in all contracts with private collectors hired to pursue court debt, that incorporate protections in the Fair Debt Collections Practices Act, or substantively equivalent terms.
- f) **Fair debt collection laws:** The state has fair debt collection practices laws that apply to the collection of fines and fees by private debt collectors.

Rationale

When courts use private collections firms to pursue unpaid fines and fees, some or all of the cost of retaining these firms is often passed directly on to criminal justice debtors.²⁸ Even where this is not the case, collections firms are typically paid based on the amount of unpaid debt they are able to recover. As is true in the private sphere, this can incentivize abusive and misleading collections tactics by firms looking to maximize their bottom line.

²⁸ See Teresa Matthew, "The Only Winners in California's Fines and Fees System are Private Debt Collectors," *The Appeal*, July 2, 2018, <https://theappeal.org/california-fines-and-fees-system-private-debt-collectors/>; Human Rights Watch, *Get on the Ground! Policing, Poverty and Racial Inequality in Tulsa, Oklahoma*, September 12, 2019, Chapter IV, <https://www.hrw.org/report/2019/09/12/get-ground-policing-poverty-and-racial-inequality-tulsa-oklahoma/case-study-us-law#73f4cc>.

In the fines and fees arena, these larger realities are combined with the underlying problem that people are often assessed fines and fees they cannot afford to pay. Companies' incentives to squeeze payment out of debtors are entirely at odds with the responsibility of courts to ensure that people are clearly and consistently informed of their rights and given opportunities to argue that amounts owed should be reduced or waived based on ability to pay.

There was some discussion within the expert advisory group as to whether a ban on private collections was appropriate, or whether the focus should instead be on the regulation of privatized collections. NCAJ felt that the best policy is for courts to eschew the use of private collections altogether, in part because the kinds of business models envisioned as an alternative to the problematic ones described above do not generally exist. We did, however, look to capture credible efforts to regulate the conduct of private collections firms in the secondary benchmarks.

Secondary benchmark 16 (a) asks whether the state has implemented the necessary reforms at the state level even if this does not extend across all local jurisdictions. Secondary benchmark 16 (b) looks to encourage local-level progress by acknowledging the existence of any major local jurisdiction that meets the primary benchmark's substantive criteria with regard to its own policies. Secondary benchmark 16 (c) describes a situation where collections agencies are paid at a rate that is not tied to amounts collected. Secondary benchmark 16 (d) captures a situation where courts use private collections but do not impose additional charges meant to force people who owe fines and fees to help pay for the services of the collectors sent against them. Secondary benchmarks 16 (e) and 16(f) ask whether the state at least protects debtors against abusive collections tactics, either by contract or by statute, respectively.

17. Collection and Publication of Data

The state collects and publishes the following data at the state, county and municipal levels:

- (a) **Total amounts:** The total amount of fines, fees, surcharges and assessments imposed, and amounts of revenue in each category collected.
- (b) **Incarceration:** The total number of people incarcerated for failure to pay fines, fees, surcharges or assessments, including probation revocations for failure to pay.
- (c) **Race:** Data, broken down by sentenced individuals' race and ethnicity, on the total amount of fines and fees imposed.
- (d) **Age:** Data, broken down by sentenced individuals' age, on the total amount of fines and fees imposed.
- (e) **Gender:** Data, broken down by sentenced individuals' gender, on the amount of fines and fees imposed.
- (f) **Income:** Data, broken down by sentenced individuals' income level at the time of sentencing, on the amount of fines and fees imposed.

Secondary benchmark:

- a) **Meets except for some counties and municipalities:** For any of the above, the state meets the primary benchmark’s substantive criteria, except with regard to some counties and/or municipalities.

Rationale

This benchmark looks to whether states collect and publish data that makes it possible to know how much revenue is derived from fines and fees, to determine the impact of fines and fees on the people they are assessed against, and to reveal key disparities in their use and imposition.

Like the benchmark on notice and unlike all of the other benchmarks, each sub-part of this benchmark will be scored separately, with one point awarded if the state meets that part of the benchmark and zero if it does not, for a maximum total score of 6.

The secondary benchmark looks to whether the state at least collects and publishes this key data at the state level, even if it fails to do so with regard to the practice of counties and municipalities.

III. Weighting and Numerical Scoring

Below, we present a simplified, at-a-glance overview of the entire benchmark set that was described in detail above, along with the numerical weight assigned to each primary and secondary benchmark. Included here are two different charts. The first lists *only* a shorthand description of the 17 primary benchmarks—this is meant to offer a clear and simple snapshot of the primary benchmark set in its totality. The second chart does the same thing at a higher level of detail, adding simplified descriptions of the secondary benchmarks to the picture presented by the first chart.

Short Form Primary Benchmarks With Weighting

<u>Benchmark</u>	<u>Weight</u>
1) Abolishes all Fees	10
2) Abolishes Juvenile Fines and Fees	6
3) Eliminates Conflicts Around Revenue	6
4) Requires Ability to Pay Determinations at Sentencing	6
5) Requires Government to Prove Willful Failure to Pay	10
6) Provides Right to Counsel When Incarceration is Possible	6
7) Sets Ability to Pay Standards	5

8) Sets Presumption of Indigence Standards	5
9) Authorizes Discretion to Waive or Modify Fines and Fees	8
10) Authorizes Payment Plans	3
11) Tests Individualized Fines (“Day Fines”	3
12) Provides Meaningful Notice (x5)	5 (5x1)*
13) Does not Suspend Driver’s Licenses for Debt	6
14) Does Not Deny Voting Rights for Debt	6
15) Does Not Deny Expungement for Debt	6
16) Does not Allow Private Debt Collection	3
17) Collects and Publishes Data (x6)	6 (6x1)*
TOTAL	100

Short Form Primary & Secondary Benchmarks with Weighting

<u>Benchmark</u>	<u>Weight</u>
1) Abolishes all Fees	10
• At least one major county or municipality meets the benchmark	1
• No charges for public defender or appointed counsel	2
• No charges for incarceration costs	2
• Other significant steps within last four years	3
2) Abolishes Juvenile Fines and Fees	6
• Meets except for some some counties and municipalities	3
• At least one major county or municipality meets the benchmark	1
• Abolishes all juvenile fees but not fines	2
• Abolishes all juvenile fines but not fees	4
• Significant steps within last four years	2
3) Eliminates Conflicts Around Revenue	6
• Meets except for some some counties and municipalities	3
• At least one major county or municipality meets the benchmark	1
• Cap on local fine and fees revenue	2
4) Requires Ability to Pay Determinations at Sentencing	6

<ul style="list-style-type: none"> Meets except for some some counties and municipalities. 	3
<ul style="list-style-type: none"> At least one major county or municipality meets the benchmark 	1
<ul style="list-style-type: none"> Meets with regard to Fines but not fees 	3
<ul style="list-style-type: none"> Right to request ability to pay hearing codified by law 	2
5) Requires Government to Prove Willful Failure to Pay	10
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	5
<ul style="list-style-type: none"> At least one major county or municipality meets the benchmark 	1
<ul style="list-style-type: none"> Right to ability to pay determination after sentencing 	2
6) Provides Right to Counsel When Incarceration is Possible	6
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	3
<ul style="list-style-type: none"> At least one major county or municipality meets the benchmark 	1
7) Sets Ability to Pay Standards	5
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	2.5
<ul style="list-style-type: none"> At least one major county or municipality meets the benchmark 	1
8) Presumes Indigence	5
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	2.5
<ul style="list-style-type: none"> At least one major county or municipality meets the benchmark 	1
9) Authorizes Discretion to Waive or Modify Fines and Fees	8
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	3
<ul style="list-style-type: none"> At least one major county or municipality meets the benchmark 	1
<ul style="list-style-type: none"> Meets the benchmark only with respect to fines or some fees 	4
10) Authorizes Payment Plans	3
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	1.5
<ul style="list-style-type: none"> At least one major county or municipality meets the benchmark 	1
11) Tests Individualized Fines (“Day Fines”)	3
<ul style="list-style-type: none"> At least one court using or piloting day fines 	1
12) Provides Meaningful Notice (x5)	5 (5x1)*
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	2.5 (5x0.5)*
13) Does not Suspend Driver’s Licenses for Debt	6

<ul style="list-style-type: none"> State does not suspend for non-payment, except for some driving-related offenses 	2
<ul style="list-style-type: none"> State meets benchmark for failure to pay, but not failure to appear 	3
<ul style="list-style-type: none"> State meets benchmark for failure to appear, but not failure to pay 	3
14) Does Not Deny Voting Rights for Debt	6
15) Does Not Deny Expungement for Debt	6
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	3
16) Does not Allow Private Debt Collection	3
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	1.5
<ul style="list-style-type: none"> At least one major county or municipality meets the benchmark 	1
<ul style="list-style-type: none"> Collectors' fees not linked to amount collected 	1
<ul style="list-style-type: none"> No additional fees when court debt sent for collection 	1
<ul style="list-style-type: none"> Collectors' contracts incorporate FDCPA-like terms 	1
<ul style="list-style-type: none"> State has fair debt collections law that applies to court debt 	1
17) Collects and Publishes Data (x6)	6 (6x1)*
<ul style="list-style-type: none"> Meets except for some some counties and municipalities 	3 (6x0.5)*
TOTAL	100

* These benchmarks contain multiple elements worth one point each. The secondary benchmarks are scored the same way, but with each element worth half a point each. See section II above, for a fuller discussion.

IV. Next Steps

In 2020, NCAJ will field a research effort to measure the laws and policies of every US state against our fines and fees policy benchmarks. This effort is likely to rely heavily on a significant pro bono effort by one or more law firms who will research states' laws and policies and help assess them against the fines and fees benchmarks, under NCAJ's supervision.

Those conducting the research will be asked to support every data point with citations. NCAJ will, in turn, check every citation for accuracy and for consistency of interpretation. Some of the necessary research may require direct outreach to and state court administrators, or other authorities and stakeholders. State officials will be afforded opportunity to review the proposed

findings for their respective states, and to challenge proposed findings. NCAJ will finalize the findings.

Once research has been completed and the findings are finalized, NCAJ will compile the results, and assign aggregate scores to every state. With all of this in hand, we will produce a report that describes and analyzes the results. We will also build a website to present and visualize all of the fines and fees data. We anticipate that this will serve as a valuable empirical resource and advocacy tool for reformers across the country.

Appendix: Expert Advisory Group Members

NCAJ consulted extensively with an expert advisory group, made up of leading thinkers, researchers and advocates with a diverse range of expertise on fines and fees issues. All told, we received substantive input on drafts of our fines and fees benchmarks from 19 of these experts.

The final policy benchmarks are attributable to NCAJ alone, and we take full responsibility for their content. However, we also want to emphasize that their content was greatly improved by the feedback, suggestions and criticism we received from the expert advisory group members. We're tremendously grateful for the time and effort the experts put in to this process.

18 of the 19 expert advisory group members who provided feedback, explicitly agreed to be identified and credited with having participated. They are as follows:

- Samuel Brooke, Deputy Legal Director, Economic Justice Project, Southern Poverty Law Center.
- Nusrat Choudhury, Legal Director, ACLU-Illinois
- Beth Colgan, Professor of Law, UCLA Law School
- Jessica Feierman, Senior Managing Director, Juvenile Law Center
- Lisa Foster, Co-Director, Fines and Fees Justice Center
- Sarah Geraghty, Managing Attorney, Impact Litigation, Southern Center for Human Rights
- Beth Huebner, Professor, Department of Criminology and Criminal Justice, University of Missouri-St. Louis
- Juliene James, Director of Criminal Justice, Arnold Ventures
- Matt Menendez, Counsel, Brennan Center for Justice
- Mitali Nagrecha, Director, National Criminal Justice Debt Initiative, Harvard Law School Criminal Justice Policy Program.
- Adeola Ogunkeyede, Legal Director, Civil Rights and Racial Justice Program, Justice and Legal Aid Center
- Ricard Pochkhanawala, formerly Research Attorney, Institute for Justice.
- Jeff Selbin, Clinical Professor of Law and Faculty Director, Policy Advocacy Clinic, UC Berkeley Law School

- Abby Shafroth, Attorney, National Consumer Law Center
- Anne Stuhldreher, Director, The Financial Justice Project, Office of the Treasurer for the City and County of San Francisco.
- Jo-Ann Wallace, President and CEO, National Legal Aid and Defender Association
- Joanna Weiss, Co-Director, Fines and Fees Justice Center
- Carson Whitelemons, Criminal Justice Manager, Arnold Ventures