

PUNISHED FOR POVERTY: HOW FEES AND FINES TRAP THE POOR IN PERPETUAL DEBT

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ABSTRACT

This Article demonstrates how court-imposed fees and fines on indigent criminal defendants cause a feedback loop of debt for the poor. In most states, courts are not required to consider a criminal defendant's ability to pay when imposing fees and fines. As a result, criminal defendants face mandatory fees and fines that they are unable to pay. Thus, the amount of unpaid fees and fines across the United States totals in the billions of dollars.

This Article examines the chronological history of fees, fines, and current legislative efforts to address their imposition and impact on indigent defendants. It argues that mandatory fees and fines for indigent criminal defendants without considering their ability to pay are unconstitutional. While fees and fines can play an important role in the criminal justice system, imposing them on indigent defendants does not serve the purpose of restorative justice, protecting victims, or providing funding for the criminal justice system.

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INTRODUCTION

“Raising money for government through law enforcement whatever the source—parking tickets, police-issued citations, court-imposed fees, bills for court appointed attorneys, punitive fines, incarceration charges, supervision fees, and more—can lay a debt trap for the poor.”¹ The use of cost-shifting as an economic sanction for those convicted of crimes has been the subject of recent challenges in both state legislatures and the courts.

This Article explores the nature of the problem, recent legislative changes, and the attempts to challenge these statutorily mandated enactments on the grounds that they are unconstitutional.² Part I discusses the background of fees and fines across various states, their purpose, and the

1. *People v. Dueñas*, 242 Cal. Rptr. 3d 268, 272 (Cal. Ct. App. 2019) (quoting *Rivera v. Orange Cnty. Prob. Dep’t*, 832 F.3d 1103, 1112, n.7 (9th Cir. 2016)).

2. While the focus of this Article is on fees and fines in misdemeanor and felony cases, it can apply to traffic tickets and other infractions as well. For example, the constitutional prohibition against excessive fines has been applied to a parking ticket and subsequent impoundment of a defendant’s car. *City of Seattle v. Long*, 493 P.3d 94, 109 (Wa. 2021) (holding costs to recoup impoundment of defendant’s vehicle was a fine subject to the excessive fines clause, requiring inquiry into defendant’s ability to pay, and even a payment plan constituted an excessive fines clause violation because it deprived defendant of his livelihood). The amount assessed for traffic infractions has increased and surcharges have been added. See Min Su, *Taxation by Citation? Exploring Local Governments’ Revenue Motive for Traffic Fines*, 80 PUB. ADMIN. REV. 36, 38 (2019). Moreover, there are collateral consequences for failure to pay a traffic violation, and a traffic violation itself may result in increased car insurance premiums. See also *What Happens if You Have Unpaid Traffic Tickets?*, PROGRESSIVE: LIFE LANES, <https://www.progressive.com/lifelanes/on-the-road/driving-with-unpaid-tickets/> (last visited Dec. 10, 2024).

system of fees and fines today. Part II discusses how and why courts imposing fees and fines on indigent defendants to fund criminal justice services creates a cycle of poverty. Part III examines recent actions by state legislatures to review the system of imposing fees and fines. Part IV examines alternatives and solutions to unnecessary fees and fines from a California perspective, including a discussion of how certain counties in California are eliminating administrative fees and fines. Part V analyzes constitutional challenges at the state and Supreme Court levels to fees and fines imposed on indigent defendants. Finally, Part VI concludes that while legal financial obligations (LFOs) can function as compensation, punishment, deterrence, and fee for service, they should not be used to levy fees and fines upon indigent defendants who lack the ability to pay. Thus, this Article explores multiple aspects of fees and fines among LFOs.

I. BACKGROUND AND HISTORY OF FEES AND FINES

Our criminal justice system has “evolved into a service-based institution that charges costs and fees per person processed.”³ The United States Department of Justice (DOJ) defines “fees” to be itemized payments for court activities, supervision, or incarceration charged to people accused of or determined guilty of infractions, misdemeanors, or felonies that may be unrelated to a conviction or punishment.⁴ The DOJ defines “fines” as monetary punishments for infractions, misdemeanors, or felonies that may be imposed to deter crime or punish people convicted of an offense.⁵ In most jurisdictions throughout the United States, courts do not consider a defendant’s ability to pay when instituting fees and fines, but instead determine the amount based on the type of offense.⁶

One of the first instances of the government charging fees to criminal defendants was California’s Victim Compensation Program (CalVCP) created in 1965.⁷ This program was funded by court-ordered fines and

3. Alexes Harris et al., *Studying the System of Monetary Sanctions*, 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 1, 25 (2022).

4. U.S. DEP’T OF JUST., OPINION LETTER TO COURTS REGARDING FINES AND FEES FOR YOUTH AND ADULTS, n.2 (Apr. 20, 2023), <https://www.justice.gov/opa/press-release/file/1580546/download>.

5. *Id.*

6. COUNCIL OF ECON. ADVISERS, ISSUE BRIEF: FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1 (Dec. 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

7. See Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>; see also CAL. LEGIS. ANALYST’S OFF., *Analysis of the 2008–09 Budget Bill: Criminal Justice Victim Compensation and*

penalties from defendants guilty of a criminal offense.⁸ CalVCP collected a portion of these fines and penalties to pay crime victims for the unreimbursed qualifying expenses such as: cost for medical treatment, mental health counseling, relocation, wage loss, and other losses resulting from a violent crime.⁹

In 1984, Michigan passed a bill requiring prisoners to reimburse counties for a portion of their incarceration costs.¹⁰ At the federal level, the Crime Victims Fund was established by the Victims of Crime Act of 1984.¹¹ This fund is financed from federal criminal fines, forfeited bail bonds, penalties, and special assessments, and is not funded by tax dollars.¹² As of 2024, the balance of the Crime Victims Fund is over \$1.4 billion.¹³ Money from the fund is allocated towards tribal victim services, state compensation grants, state victim assistance grants, and other crime victim services and programs.¹⁴

In the 1990s, three-quarters of Texas' 110 counties collected probation fees equivalent to half or more of its total expenses.¹⁵ During this time, certain counties in Texas "heavily" considered the amount of probation fees collected when conducting staff performance reviews.¹⁶ By 2005, 90% of

Government Claims Board (1870), https://lao.ca.gov/analysis_2008/crim_justice/cj_anl08007.aspx (last visited Dec. 10, 2024).

8. See CAL. LEGIS. ANALYST'S OFF., *supra* note 7.

9. *Compensation*, STANISLAUS CNTY. DIST. ATT'Y'S OFFICE, <https://www.stanislaus-da.org/victim-services/compensation.shtm> (last visited Dec. 10, 2024). In 1982, California voters passed Proposition 8 to establish the "Victim's Bill of Rights," which requires victim restitution in connection with all criminal cases. S.F. DIST. ATT'Y, *Victim Rights*, Victim Services, <https://www.sfdistrictattorney.org/victim-services/victims-rights/> (last visited Dec. 10, 2024); see also CAL. CONST. art. I, § 28(b)(13). This was part of a cultural shift that victims should be made whole through restitution for their crime-related losses. See Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, 4 NEW THINKING CMTY. CORR. 1, 4 (Jan. 2017).

10. Shapiro, *supra* note 7; MICH. COMP. LAWS § 801.81–801.83 (2024).

11. 34 U.S.C. § 20101.

12. U.S. DEP'T OF JUST. OFF. FOR VICTIMS OF CRIME, *Crime Victims Fund*, <https://ovc.ojp.gov/about/crime-victims-fund> (last visited Dec. 10, 2024).

13. U.S. DEP'T OF JUST. OFF. FOR VICTIMS OF CRIME, FY 2007–FY 2024 CRIME VICTIMS FUND END OF YEAR BALANCE, (July. 31, 2024), <https://ovc.ojp.gov/about/crime-victims-fund/fy-2007-2024-cvf-balance.pdf>.

14. U.S. DEP'T OF JUST. OFF. FOR VICTIMS OF CRIME, *Crime Victim Fund Allocation Process*, <https://ovc.ojp.gov/about/crime-victims-fund/allocation-process> (last visited Dec. 10, 2024).

15. Peter Finn & Dale Parent, *Texas Collects Substantial Revenues from Probation Fees*, 57 FED. PROB. 17, 17 (1993).

16. *Id.* at 18.

jails charged inmates fees for various programs and services, such as medical care, work release, daily stays, and phone calls.¹⁷

Today, with the rising costs of the criminal justice apparatus, including courts, jails, prisons, probation, and parole, state legislatures have been reluctant to raise taxes to fund the criminal justice system.¹⁸ Instead, states have continued raising funds for these costs by charging fees and fines to convicted defendants.¹⁹ In 2014, at least 43 states and the District of Columbia billed defendants for a public defender through an upfront application fee and reimbursement fees up to the full cost of the representation.²⁰ Forty-nine states also charge daily rental fees for tracking devices and alcohol monitoring devices, including the cost associated with installing and maintaining a landline phone.²¹

In the past three decades, the use of monetary sanctions has increased along with the amounts that criminal defendants are ordered to pay.²² Arising out of the anti-tax movement in the 1970s and 1980s, anti-tax proponents have sought to shift criminal justice costs from the taxpayers to criminal defendants through monetary sanctions.²³ State and federal statutes authorized monetary sanctions or legal financial obligations (LFOs) that include fines, fees, victim restitution, surcharges, interest, assessments, asset forfeiture, and other court costs imposed on people convicted of crimes.²⁴ For example, California's system of LFOs had grown to the point where an appellate jurist described it as creating "a system that begins to match the complexity of the federal income tax."²⁵ As the Supreme Court has recognized, LFOs can be used for reasons other than the penal goals of retribution and deterrence because they are a revenue source, while other

17. BARBARA KRAUTH ET AL., U.S. DEP'T OF JUST. NAT'L INST. OF CORR. INFO. CTR., FEES PAID BY JAIL INMATES: FEE CATEGORIES, REVENUES, AND MANAGEMENT PERSPECTIVES IN A SAMPLE OF U.S. JAILS 2–3 (Dec. 18, 2005).

18. Martin et al., *supra* note 9, at 4.

19. *Id.*

20. *State-By-State Court Fees*, NPR (May 19, 2014), <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>.

21. Shapiro, *supra* note 7.

22. Mary Pattillo & Gabriela Kirk, *Pay Unto Caesar: Breaches of Justice in the Monetary Sanctions Regime*, 4 UCLA CRIM. JUST. L. REV. 49, 55 (2020); MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 6 (Nov. 21, 2019).

23. Devah Pager et al., *Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment*, 87 AM. SOCIO. REV. 529, 529–30 (2022); Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517, 519 (2021); Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1486 (2016).

24. Pattillo & Kirk, *supra* note 22, at 49; Appleman, *supra* note 23, at 1486.

25. *People v. Castellanos*, 98 Cal. Rptr. 3d 1, 8 (Cal. Ct. App. 2009) (Kriegler, J., concurring).

forms of punishment cost the state money.²⁶ In fact, due process may be violated to the extent judges or other state actors impose fees or fines that result in a direct personal benefit to that state actor.²⁷

After decades of states funding the criminal justice system from fees and fines imposed on criminal defendants, indigent defendants have made successful constitutional attacks against mandatory fees and fines regardless of the defendant's ability to pay.²⁸ As a result, some states have reduced the amount of fees and fines assessed against indigent defendants.²⁹

II. THE PROBLEM OF COURTS BILLING INDIGENT DEFENDANTS FOR CRIMINAL JUSTICE SERVICES

While a particular legal financial obligation (LFO) may seem reasonable in isolation, cumulatively they create burdensome debt that can have a greater negative impact on an indigent defendant than the official punishment.³⁰ The imposition of LFOs on those who lack the ability to pay is regressive, imposes a disproportionate burden on the poor, and may require court involvement when the LFOs are not paid.³¹

Unpayable fees and fines treat indigent defendants more harshly than the well-to-do, both through attempted collection of those debts and through the many collateral consequences attached to the failure to pay debts quickly.³² Moreover, people of color bear a disproportionate share of this criminal justice debt.³³ People of color account for almost two-thirds of the population

26. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (“[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.”) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)).

27. Rebekah Diller et al., *Reflections on Fees and Fines as Statecraft*, 98 NYU L. REV. 262, 270 (2023); see, e.g., *Cain v. White*, 937 F.3d 446, 448, 454 (5th Cir. 2019) (holding that it is a violation of due process for a judge to make an ability to pay determination when the judge controlled the expense fund supported by these fees and fines).

28. Michael Mitchell, *States Made Steady Progress in 2023 Stemming Tide of Criminal Legal Fees*, CTR. ON BUDGET AND POL’Y PRIORITIES (June 26, 2023), <https://www.cbpp.org/blog/states-made-steady-progress-in-2023-stemming-tide-of-criminal-legal-fees>; see *State v. Gibbons*, 545 P.3d 686, at 691 (Mont. 2024).

29. Mitchell, *supra* note 28.

30. Appleman, *supra* note 23, at 1488; see generally YALE L. SCH. LIMAN CTR., *FEES, FINES, AND THE FUNDING OF PUBLIC SERVICES: A CURRICULUM FOR REFORM*, (Brian Highsmith ed., 2020).

31. Pager et al., *supra* note 23, at 546; COUNCIL OF ECON. ADVISERS, *supra* note 6, at 4; Courtney E. Lollar, *Eliminating the Criminal Debt Exception for Debtors’ Prisons*, 98 N.C. L. REV. 427, 432 (2020).

32. Martin et al., *supra* note 9, at 8–9.

33. Diller et al., *supra* note 27, at 264; Kleiman, *supra* note 23, at 547. Some argue that the use of LFOs to create a debt burden based on race in southern states sustained peonage against Black people contrary to the Thirteenth Amendment. Tamar R. Brickhead, *The New Peonage*, 72 WASH & LEE L. REV. 1595, 1595 (2015); see Amanda Isabel Mauri et al., *Who Benefits from Criminal Legal Reform? A Natural*

in state prisons.³⁴ Repaying court debt is time-consuming for those with limited finances and prolongs a defendant's involvement with the criminal justice system.³⁵ Court debt hinders their ability to cover essential costs like food, housing, healthcare, transportation, and family obligations.³⁶ Debts resulting from imprisonment or license suspension make it difficult to secure employment, housing, or meet child support obligations.³⁷ Thus, fees and fines imposed on the indigent lead to financial hardship and yield no rehabilitative benefits.³⁸

The strain of hardships from debt also burdens indigent defendants and their relationship with family members, exposes them to bad credit, wage garnishment, and indefinite monitoring by the criminal justice system.³⁹ This is particularly onerous when LFOs are imposed on juveniles and their parents.⁴⁰ Offenders on probation and parole who fail to make such payments may have their voting rights diminished and government benefits cut.⁴¹ If they later recidivate, they may also have their probation or parole revoked.⁴² The inability to pay fees and fines during their term of noncustodial supervision "can lead to loss of employment or shelter, compounding interest, yet more legal action, and an ever-expanding financial burden—a

Experiment to Assess Racial Disparities in a Policy Targeting Monetary Sanctions, J. EXP. CRIMINOLOGY (Jan. 2024), <https://doi.org/10.1007/s11292-023-09597-3>.

34. U.S. COMM'N ON CIV. RTS., TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 91 (Sept. 2017).

35. Harris et al., *supra* note 3, at 4; CARL LIEBERMAN ET AL., U.S. CENSUS BUREAU, CRIMINAL COURT FEES, EARNINGS, AND EXPENDITURES: A MULTI-STATE RD ANALYSIS OF SURVEY AND ADMINISTRATIVE DATA 5 (Feb. 2023).

36. Pattillo & Kirk, *supra* note 22, at 55; YALE L. SCH. LIMAN CTR., *supra* note 30; Andrea Giuffre, *The Impact of Legal-Financial Obligations on Relationships with Family, Friends, and Acquaintances: A Qualitative Study of Community Supervised Men with Sexual and Nonsexual Offense Convictions*, 50 CRIM. JUST. & BEHAV. 747, 748 (2023).

37. MENENDEZ ET AL., *supra* note 22, at 5.

38. Lollar, *supra* note 31, at 434.

39. Pager et al., *supra* note 23, at 532; Pattillo & Kirk, *supra* note 22, at 55; Michael Makowsky, *A Proposal to End Regressive Taxation through Law Enforcement*, in FEES, FINES, AND THE FUNDING OF PUBLIC SERVICES: A CURRICULUM FOR REFORM 1, 6 (Brian Highsmith ed., 2020); Kleiman, *supra* note 23, at 522.

40. See Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movements*, 98 N.C. L. REV. 401, 401–08 (2020); *but cf. In re M.B.*, 257 Cal. Rptr. 3d 498, 500–01 (Cal. Ct. App. 2020) (upholding a mandatory minimum fine of \$100 on juveniles).

41. Appleman, *supra* note 23, at 1511–12.

42. Ebony Ruhland et al., *The Role of Fines and Fees on Probation*, 47 CRIM. JUST. & BEHAV. 1244, 1246–47 (2020).

cycle as predictable and counterproductive as it is intractable.”⁴³ Unlike civil debts, LFOs are not dischargeable in bankruptcy.⁴⁴

Once assessed, fees, fines, and other LFOs trap individuals in a vicious cycle of debt and punishment.⁴⁵ In a study on the effect of LFOs on homelessness, the following conversation took place in Washington State with a 43-year-old homeless man named Sean:

- **Interviewer:** Okay. How much do you worry about your LFOs?
- **Sean:** I quit worrying about it. I just accepted being homeless.
- **Interviewer:** Yeah?
- **Sean:** Too poor to make it.
- **Interviewer:** So where do you tend to stay right now?
- **Sean:** On the street. Like in front of buildings, on the side of buildings. Like I just had court today 'cause I got woken up behind *ampm*. And so they gave me a trespassing charge for sleeping behind *ampm*.
- **Interviewer:** Okay. Does that happen more frequently? Or does that happen often, I guess you could say?

43. *Rivera v. Orange Cnty. Probation Dept.*, 832 F.3d 1103, 1112 n.7 (9th Cir. 2016).

44. *Kelly v. Robinson*, 479 U.S. 36, 52–53 (1986); *see also* Kleiman, *supra* note 23, at 527; Pamela Foohey, *Fines, Fees, and Filing Bankruptcy*, 98 N.C. L. REV. 419, 421–22 (2020); Lollar, *supra* note 31, at 429–30.

45. Diller et al., *supra* note 27, at 267. For example, in *Dueñas*, the defendant was an unemployed mother of two young children who suffered from cerebral palsy. The defendant, along with her husband, survived on public assistance and lived with relatives. When the defendant was a teenager, she received three juvenile citations, but because she could not pay the \$1,088 in fees and fines, her driver's license was suspended. Over the next several years, she suffered three misdemeanor convictions for driving with a suspended license and one conviction for failure to appear, which resulted in her being jailed and thereby incurring other fees and fines that she could not pay. These fees and fines were referred to collections. She later pled no contest to driving with a suspended license. In 2016, she was placed on three years' probation on the condition that she serve 30 days in the county jail, and pay an additional \$300 fine or serve an additional nine days in jail, as well as pay a \$30 court facilities assessment, a \$40 court operations assessment, and a \$150 fine, all of which were statutorily mandated regardless of ability to pay. She was successfully able to challenge these probation conditions. *Dueñas*, 242 Cal. Rptr. 3dat 270–71.

- **Sean:** Yeah, with everyone yeah. It's illegal to be homeless in [X] county.
- **Interviewer:** It's illegal to be homeless in [X] county?
- **Sean:** Yeah.
- **Interviewer:** And so you just end up getting all these extra charges on it? Does that add up to more fees and fines and all that?
- **Sean:** Yeah.
- **Interviewer:** So it keeps building?
- **Sean:** Yeah.
- **Interviewer:** So can you think of ways of getting out [of debt]? Or is it basically like this is just kind of—
- **Sean:** Get out of [X] county.⁴⁶

This is a typical cycle of LFOs preventing indigent defendants from being housed and then being fined for trespassing on private property.⁴⁷ In such scenarios, LFOs effectively criminalize poverty simply by imposing monetary obligations on indigent defendants who cannot afford to pay.⁴⁸ If such individuals are unhoused, they can face further criminal punishment to the extent that state or local law prohibits camping on public property.⁴⁹

According to the American Civil Liberties Union, four out of five criminal defendants in the United States cannot afford a lawyer.⁵⁰ Based on a 2015 random sample of criminal defendants from eight states ranging from California and New York to Georgia and Texas, more than half of those

46. Mary Pattillo et al., *Monetary Sanctions and Housing Instability*, 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 57, 63–64 (2022).

47. *Id.* at 64.

48. Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U MIA. RACE & SOC. JUST. L. REV. 1, 3–4 (2020).

49. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2210 (2024) (upholding enforcement of anti-camping law against homeless even if camping was involuntary).

50. Emma Andersson, *If You Care About Freedom, You Should Be Asking Why We Don't Fund Our Public Defender Systems*, AM. CIV. LIBERTIES UNION (Mar. 8, 2022), <https://www.aclu.org/news/criminal-law-reform/if-you-care-about-freedom-you-should-be-asking-why-we-dont-fund-our-public-defender-systems>.

sampled received means-tested state benefits or government assistance.⁵¹ When defendants who receive public benefits are required to pay LFOs, they serve as conduits that funnel state welfare aid to the criminal justice system.⁵² Even if defendants are not receiving state benefits, fees and fines are another form of regressive taxation to fund government services.⁵³

From 2012 to 2018, Florida, New Mexico, and Texas accumulated around \$1.9 billion from fees and fines.⁵⁴ Nationally, fees and fines exceed \$27.6 billion in 2021.⁵⁵ A substantial portion of fees and fines are never collected and likely uncollectable, undermining fees and fines as a dependable government revenue source.⁵⁶ It costs the government on average 121 times more to collect these monetary sanctions than it costs the Internal Revenue Service to collect taxes.⁵⁷ Several states have employed private collection agencies to manage their delinquent fees and fines accounts, incentivizing private companies to keep debtors in the system as a revenue source by adding surcharges and other consequences for missed payments.⁵⁸

In 2019, the Brennan Center for Justice found that “courts rely excessively on criminal fee and fine practices that are costly and inefficient, unfairly burden the poor, and do little to deter crime or improve public safety.”⁵⁹ Based on these findings, the Brennan Center for Justice recommended that states and localities: (1) eliminate court-imposed fees, (2) require courts to assess fines based on ability to pay, (3) stop the practice of jailing for failure to pay, (4) eliminate driver’s license suspension for nonpayment of fees and fines, and (5) purge old balances of unpaid fees and fines that are unlikely to be paid.⁶⁰

Those advocating for reforming the fees and fines system are not limited to liberal or progressive-leaning organizations. Former United States Attorney for the Middle District of Pennsylvania David Freed, a Republican nominated by President Donald Trump, said that a “realistic system of fines and fees based on ability to pay will benefit criminal defendants AND the

51. Harris et al., *supra* note 3, at 2, 18.

52. *Id.* at 22.

53. Judith Resnik & David Marcus, *Inability to Pay: Court Debt Circa 2020*, 98 N.C. L. REV. 361, 361 (2020).

54. MENENDEZ ET AL., *supra* note 22, at 10; Briana Hammons, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?*, FINES & FEES JUST. CTR., 4 (2021), <https://finesandfeesjusticecenter.org/2021/04/28/new-ffjc-report-how-much-criminal-justice-debt-does-the-u-s-really-have/>.

55. MENENDEZ ET AL., *supra* note 22, at 10.; Hammons, *supra* note 54.

56. MENENDEZ ET AL., *supra* note 22, at 10.

57. *Id.* at 5.

58. U.S. COMM’N ON CIV. RTS., *supra* note 34, at 14.

59. MENENDEZ ET AL., *supra* note 22, at 11.

60. *Id.*

government entities tasked with funding the criminal justice system—current system does not work and bears no relation to actual court costs.”⁶¹ Legislative reforms of excessive fees and fines to protect indigent defendants from additional societal costs will require bipartisan advocacy at all levels and branches of government.

III. RECENT STATE LEGISLATIVE ACTIONS TO REVIEW FEES AND FINES

Since laws enacted by legislative bodies created fees and fines, these bodies possess the authority to change the laws. Congress has authorized federal courts to consider a criminal defendant’s ability to pay when imposing fines.⁶² Some states have required courts to determine a defendant’s ability to pay discretionary criminal fees or fines.⁶³ In California, courts have the discretion to address this issue even without an objection.⁶⁴ Other states, such as Kentucky, Illinois, and Michigan, have eliminated the imposition of certain fees and fines if a defendant lacks the ability to pay.⁶⁵ The national norm, however, is still to impose fees and fines regardless of the defendant’s financial situation.⁶⁶ Under federal law, however, social security and disability benefits should not be used to determine one’s ability to pay.⁶⁷

Even where “ability to pay” must be considered, some states strictly define “ability to pay,” while other states grant courts broad discretion in

61. David Freed (@DaveFreed41), Twitter (Nov. 29, 2019, 9:42 AM), <https://twitter.com/DaveFreed41/status/1197571090400337920>.

62. 18 U.S.C. §§ 3571–72.

63. See *State v. Blazina*, 344 P.3d 680, 683–86 (Wash. 2015) (holding trial court must make individualized inquiry into defendant’s current and future ability to pay before it imposes legal financial obligations (LFOs), after reviewing literature regarding problems associated with LFOs imposed upon indigent); *Commonwealth v. Mead*, 446 A.2d 971, 973 (Pa. Super. Ct. 1982) (holding trial court did not make sufficient determination as to defendant’s ability to pay statutory discretionary fine imposed as additional penalty).

64. *Hale v. Morgan*, 22 Cal.3d 388, 394 (1978) (discussing constitutionality of a statute); *People v. Yeoman*, 31 Cal. 4th 93, 118 (2003) (stating reviewing court may consider claim posing pure question of law); *People v. Williams*, 17 Cal. 4th 148, 168 n.6 (1988) (Baxter, J., dissenting) (discussing court’s inherent power to permit withdrawal of a plea).

65. Lieberman et al., *supra* note 35, at 4.

66. Diller et al., *supra* note 27, at 267.

67. 42 U.S.C. § 407(a); *City of Richland v. Wakefield*, 380 P.3d 459, 461 (Wash. 2016) (reversing and remanding district court’s order of monthly payments towards defendant’s LFOs; the Supreme Court of Washington held district court violated state and federal laws by improperly determining defendant’s present and future ability to pay, thereby imposing LFOs on an indigent and disabled defendant who relied on social security benefits); *State v. Eaton*, 99 P.3d 661, 666 (Mont. 2004) (reversing and remanding district court’s order to pay restitution from defendant’s net income because calculations included social security benefits which improperly levies a burden).

making such determinations.⁶⁸ In Oregon, the Oregon Supreme Court held funds that an indigent defendant's mother paid to secure the defendant's bail could not be used to form the basis that the defendant himself had the ability to pay attorney fees for his court-appointed counsel.⁶⁹ Kentucky ties ability to pay to poverty levels.⁷⁰ Colorado requires courts to examine several factors, including (1) whether the defendant is experiencing homelessness; (2) has income, employment, and expenses; (3) has debts and liabilities; (4) whether they qualify for or receive public assistance; (5) whether they have real or personal property and the status of that property; (6) whether they are using public housing, (7) the defendant's family income compared to the federal poverty level; and (8) any other circumstances.⁷¹ Once the defendant presents this evidence, the burden then shifts to the prosecution to prove ability to pay.⁷² In Illinois and Michigan, judges have discretion to determine ability to pay.⁷³ Some courts in California require the present ability to pay,⁷⁴ while others take into account future access to funds, including prison wages.⁷⁵

68. Lieberman et al., *supra* note 35. See *State v. Below*, 332 P.3d 329, 331–32 (Or. App. 2014) (holding the trial court erred in imposing LFO because there was no evidence of defendant's present ability to pay and it was speculative he might acquire resources in the future). See also *Commonwealth v. Ford*, 217 A.3d 824, 825 (Pa. 2019) (holding defendant's agreement to pay specific fine as part of plea bargain did not constitute evidence of his ability to pay); *Stewart v. State*, 906 S.2d 1128, 1129 (Fla. App. 2005) (reversing assessment where determination of ability to pay was required by statute).

69. *State v. Morales*, 476 P.3d 954, 958 (Or. 2020).

70. Lieberman et al., *supra* note 35, at 4.

71. See Elizabeth Wilson, *Justice Favors the Rich: Expanding Griffin's Promise and Combatting Criminal Debt*, 55 U.C. DAVIS L. REV. 2695, 2723 (2022). Pennsylvania also requires courts to examine a defendant's entire financial picture. *Id.* at 2724.

72. *Id.* at 2723.

73. Lieberman et al., *supra* note 35.

74. *People v. Dueñas*, 242 Cal. Rptr. 3d at 279–80 (holding present ability to pay must be established).

75. *People v. Cowan*, 260 Cal. Rptr. 3d 505, 514 (Cal. Ct. App. 2020). There are no guarantees that an inmate will be able to work in prison and even if able, prison wages are minimal at best. See *How Much Do Prisoners Make in Each State*, KENT STATE ONLINE (Aug. 27, 2021), <https://onlinedegrees.kent.edu/sociology/criminal-justice/community/how-much-do-prisoners-make-in-each-state> (noting average pay is \$0.63 per hour and eight states pay nothing). See also Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>; *State v. Lundy*, 176 Wash. App. 96, 99 (2013) (stating defendant's burden of proof and record suggests the defendant will have ability to pay in the future). Not only are prison wages de minimis but they provide for essential things like canteen and phones. See Robin Kaiser-Schatzlein, *Wake-Up Call*, MOTHER JONES, Sept.–Oct. 2023, at 44, 46–47 (asserting phone calls are among the most important services that prisons offer, but a handful of private companies provide them and charge high prices and then share these revenues with the institution).

This contrasts with the streamlined procedures most courts have for determining if civil litigants get fee waivers⁷⁶ or criminal defendants are provided public defender services.⁷⁷ A universal definition and standard would help ensure equitable treatment for all indigent criminal defendants. The costs of determining ability to pay generally pale in comparison to the costs of collecting fees from the indigent.⁷⁸

A few states have abolished or limited administrative fees levied in juvenile delinquency cases.⁷⁹ Some states have ended driver's license suspension for unpaid traffic tickets and provided sliding scale fee waivers for people in poverty.⁸⁰ In the past decade, many states have begun to reduce certain fees and fines, and some states have committed to reviewing the numerous fees and fines facing defendants.⁸¹

In 2018, Washington enacted laws to establish indigence criteria, ban fees for financially incapable defendants, end 12% interest on fines, and empower courts to adjust payment terms by reducing or forgiving debts.⁸² Additionally, Washington permits courts to convert fees and fines into community service hours as an alternative sanction for non-payment.⁸³

In 2020 and 2021, California eliminated 40 fees and assessments,⁸⁴ but still has the following mandatory fees and assessments: court facilities

76. In California, a civil litigant fills out a standard statewide form to determine if they are entitled to a fee waiver and court clerks generally can make the eligibility determination from the information provided on the form. See JUD. COUNCIL OF CA., FORM FW-001 REQUEST TO WAIVE COURT FEES (rev. Apr. 1, 2024).

77. States are required to appoint counsel to those who cannot afford counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963); see CAL. GOV. CODE § 27707 (West 2024).

78. MENENDEZ ET AL., *supra* note 22, at 9.

79. Selbin, *supra* note 40, at 412–13.

80. Pattillo & Kirk, *supra* note 22, at 58; Harris et al., *supra* note 3, at 24. See, e.g., *People v. Ramirez*, 426 P.3d 714, 716–20 (Wash. 2018) (holding lower court failed to satisfy requirements of an individualized inquiry into ability to pay when court asked prosecutor two questions and no questions to defendant).

81. See generally CRIM. JUST. POL'Y PROGRAM AT HARV. L. SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 16 (2016), <https://cjdebtreform.org/sites/criminaldebt/themes/debtor/blob/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform.pdf>.

82. These reforms were part of House Bill 1783 enacted in 2018. See *Washington House Bill 1783—An Act Relating to Legal Financial Obligations*, FINES & FEES JUST. CTR., (Feb. 1, 2017), <https://finesandfeesjusticecenter.org/articles/wa-house-bill-e2shb-1783-legal-financial-obligations/>. For example, courts in Washington had upheld the imposition of mandatory fees and fines against constitutional challenges. See *State v. Mathers*, 376 P. 3d. 1163, 1167, 1170 (2016) (holding that the imposition of mandatory fees did not violate equal protection or excessive fine clauses because they were not punitive). When fees and fines became discretionary, they were subject to ability to pay conditions. See Wilson, *supra* note 71, at 2722.

83. See FINES & FEES JUST. CTR., *Washington House Bill 1783*, *supra* note 82.

84. In 2020, California enacted Assembly Bill 1869 that eliminated 23 fees. See ASSEMB. B. 1869 § 1(A), 2020 Gen. Assemb., Reg. Sess. (Cal. 2020). In 2021, California enacted Assembly Bill 177

criminal conviction assessment,⁸⁵ restitution fine,⁸⁶ probation/parole revocation restitution fine,⁸⁷ court operations assessment,⁸⁸ state court construction penalty,⁸⁹ county assessment fee,⁹⁰ emergency medical services,⁹¹ compounded by mandatory state penalties⁹² and surcharges on certain penalties and fines.⁹³ In 2020, California was also the first state in the nation to eliminate administrative fees and outstanding criminal fee debt in the criminal legal system, which the University of California, Berkeley School of Law estimated to be in the \$16 billion range.⁹⁴ The vast majority of this debt is uncollectible because the people exiting the criminal justice system were indigent and could not afford to pay.⁹⁵

A January 2023 survey of New Mexicans found that 80% of individuals who had court debt in New Mexico, or who helped someone pay off their fees and fines in New Mexico, had to choose between paying those court-

which eliminated 17 fees. *See* ASSEMB. B. 177, 2021 Gen. Assemb., Reg. Sess. (Cal. 2021). In both these enactments, the California legislature found and declared that approximately 80% of Californians in jail are indigent and disproportionately Black or Latinx. People exiting jail or prison face high rates of unemployment and homelessness, and their inability to meet basic needs contributes to higher rates of recidivism and is a barrier to family unification. As a result, the families of the incarcerated bear the burden of paying these fees. Over 80% of those family members are women. These fees have no formal punitive or public safety function and may push individuals into the underground economy or criminal activity. Finally, these fees are difficult to collect and typically cost more to collect than the revenue produced. *See* ASSEMB. B. 177, 2021 Gen. Assemb., Reg. Sess. (Cal. 2021).

85. CAL. VEH. CODE § 70373 (West 2024) (\$30 for each misdemeanor and felony conviction and \$35 for each infraction conviction involving the Vehicle Code).

86. CAL. PENAL CODE § 1202.4(b)–(e) (West 2024) (setting a restitution fine of \$300 to \$10,000 for felony convictions and \$150 to \$1,000 for misdemeanor convictions). Although denominated a “restitution fine,” this is not victim restitution which is generally payable to a crime victim pursuant to CAL. PENAL CODE § 1202.4(f) (West 2024) as authorized by CAL. CONST. art. 1 § 28(b)(13). Although victim restitution is considered a form of LFO by some, it is not a fee or fine that is addressed herein but is reduced to a civil judgment that compounds the financial impact on a criminal defendant.

87. CAL. PENAL CODE §§ 1202.44–45 (West 2024) (authorizing an additional fine if probation or parole is revoked).

88. CAL. PENAL CODE § 1465.8 (West 2024) (assessment of \$40 for court operations on every criminal conviction except parking).

89. CAL. VEH. CODE § 70372 (West 2024) (court construction penalty of \$5 added for every \$10 of fines, penalty, or forfeiture imposed).

90. CAL. GOV’T CODE § 76000 (a)(1) (West 2024) (penalty assessment of \$7 for every \$10 on certain criminal fines or penalties).

91. CAL. GOV’T. CODE § 76000.5 (West 2024) (setting a penalty assessment for emergency medical services of \$2 for every \$10 on certain criminal fines or penalties).

92. CAL. PENAL CODE § 1464 (West 2024) (assessing a penalty of \$10 for every \$10 on certain criminal fines or penalties).

93. CAL. PENAL CODE § 1465.7 (West 2024) (surcharge of 20% on certain fines or penalties).

94. Office of the Public Defender, *California Becomes the First State in the Nation to End Collection of Fees in the Criminal Legal System*, S.F. PUB. DEF. (Sept. 24, 2020), <https://sfpublicdefender.org/news/2020/09/california-becomes-the-first-state-in-the-nation-to-end-collection-of-fees-in-the-criminal-legal-system/>.

95. *Id.*

imposed fees and fines or going without basic needs such as food, rent, and utilities at some point in their lives.⁹⁶ As a result, the New Mexico Legislature quickly passed legislation in April 2023 to eliminate all post-adjudication fees for adults in criminal courts as well as bench warrant fees.⁹⁷

In 2022 and 2023, the legislatures of six states—Arkansas, Hawaii, Kansas, North Dakota, Utah, and Virginia—enacted bills that required the state to study the role and impact of fees and fines in the state and in the court system.⁹⁸ Arkansas is requiring a study of the fees and fines assessed on defendants and whether they have “little or nothing to do with the operations” of the courts.⁹⁹ Hawaii is reviewing the harmful impact of fees and fines on minors and their families, as well as the disproportionate impact on Native Hawaiian, Pacific Islander, and Black youth.¹⁰⁰ Kansas is studying the administration of justice, including fees and fines, and making recommendations for improvements.¹⁰¹ North Dakota is studying the laws and procedures of how municipal courts and judges operate, including the roles of fees and fines.¹⁰² Utah is requiring a study of the judiciary and the types of fees and fines it collects, methodology determining the amount, reasons for the fees and fines, fee waivers granted, and any judicial requests to modify a fee or fine.¹⁰³ Finally, Virginia is requiring its Department of Corrections to study the reduction or elimination of fees and fines charged to inmates in state facilities.¹⁰⁴

Outside the United States, in Europe and Latin America, the amount of a fine is determined by a “day fine” formula, in which a fee or fine is calculated by multiplying the assessed severity of conduct with the defendant’s daily income.¹⁰⁵ Such a system based on a defendant’s income ensures that the burden for offenders would be proportionally equal.¹⁰⁶ Such

96. *Interim Survey Results: The Impact of New Mexico’s Fines and Fees*, FINES & FEES JUST. CTR. (Jan. 2023), https://finesandfeesjusticecenter.org/content/uploads/2023/01/New-Mexico-Survey-DIGITAL_2023.pdf.

97. H.B. 139, 2023 Reg. Sess. (N.M. 2023); Nazish Dholakia, *In Win for Criminal Legal System Reform, New Mexico Eliminates Criminal Court Fees for Adults*, VERA INST., (June 1, 2023), <https://www.vera.org/news/in-win-for-criminal-legal-system-reform-new-mexico-eliminates-criminal-court-fees-for-adults>.

98. Mitchell, *supra* note 28.

99. H.B. 1245, 2023 Leg., 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

100. S.R. 202, 32nd Leg., Reg. Sess. (Haw. 2023).

101. H.B. 2131, 2023 Leg., Reg. Sess. (Kan. 2023).

102. S.B. 2278, 68th Leg. Assemb. (N.D. 2023).

103. H.B. 531, 65th Leg., 2023 Gen. Sess. (Utah 2023).

104. H.B. 665, 2022 Acts of Assemb., Reg. Sess. (Va. 2022).

105. See Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1874–75 (2018); Lollar, *supra* note 31, at 435–36.

106. ERNEST VAN DEN HAAG, PUNISHING CRIMINALS 233 (Basic Books, Inc., 1975).

a system appears to increase the fine collection rate and reduce the nonpayment costs.¹⁰⁷ While some United States jurisdictions in the late 1980s and early 1990s utilized such procedures, most of these efforts have been terminated.¹⁰⁸ Such a system, if enacted, may address some of the concerns regarding a defendant's ability to pay fees and fines.

IV. ALTERNATIVES TO UNNECESSARY FEES AND FINES: A CALIFORNIA CASE STUDY

California counties have been at the forefront of eliminating administrative criminal legal fees and fines.¹⁰⁹ In November 2016, the City and County of San Francisco launched a Financial Justice Project to investigate and reform how fees and fines impact low-income residents and communities of color.¹¹⁰ In January 2018, San Francisco amended its Transportation Code to allow low-income individuals to apply to reduce their traffic court fees and fines by 80% or more.¹¹¹ San Francisco also provides alternatives, including low-income discounted payment plans and community service hours, to pay parking and public transportation fines.¹¹² Alternatives such as fine waivers, receiving social service assistance, financial hardship programs, and fee eliminations are provided for towed and booted cars, "Quality of Life" citations, suspended driver licenses, and other related criminal justice system fees and fines in San Francisco.¹¹³

The Judicial Council of California now provides an online web tool, the MyCitations: Ability to Pay, for people who are struggling with traffic court fees and fines to submit their information and request the court to reduce the amount owed.¹¹⁴ As of June 30, 2024, this service is available in all trial courts in the 58 California counties.¹¹⁵

107. Schierenbeck, *supra* note 105, at 1875.

108. *Id.* at 1875–76.

109. SFMTA, *Item 16 Community Service and Payment Plan Transportation Code Amendment* (Jan. 8, 2018), https://www.sfmta.com/sites/default/files/reports-and-documents/2018/01/1-16-18_item_16_community_service_and_payment_plan_tc_amendment.pdf; Erica Kato, *Do You Have SFMTA Citations You Can't Afford?*, SFMTA (May 15, 2018), <https://www.sfmta.com/blog/do-you-have-sfmta-citations-you-cant-afford>.

110. Overview, FIN. JUST. PROJECT, <https://sfgov.org/financialjustice/advancing-financial-justice-san-francisco> (last visited Dec. 10, 2024).

111. *Can't Afford to Pay Your Fine, Fee, or Ticket in San Francisco? San Francisco Fine and Fee Discounts for Low-Income People*, FIN. JUST. PROJECT S.F., https://www.sfhfa.org/sites/default/files/Flyer_Discounted%20Fines%20_11.3.2020.pdf.

112. *Id.*

113. *Id.*

114. *MyCitations – Can't Afford to Pay Your Ticket?*, CAL. COURTS, <https://www.courts.ca.gov/abilitytopay.htm> (last visited Dec. 10, 2024).

115. *Id.*

Because, we—the authors of this Article—are based in the San Francisco Bay Area, we would like to highlight a Bay Area story from a study conducted on the relationship between legal financial obligations and housing instability.¹¹⁶ A 22-year veteran prosecutor described this courtroom interaction as follows:

[A] young man was ordered to pay restitution for a theft. . . . It was Safeway who was the victim, and it was about \$300. He was engaged in a shoplifting and had broken a window in attempt to get away. Comes in, the judge says, “Are you prepared to make a payment today? I noticed you haven’t made a payment.” And he says, “Yes, I have a payment to make.” Judge directs him to pay his \$20 to the court officer.

[The judge asks,] “Okay. Um, can you continue to make \$20 payments?” The defendant said, “I don’t know.” “Well, why don’t you know? Are you employed?” “No, not really.” “Where do you live?” . . . “I live behind the church.” “Okay, so you’re saying you’re effectively homeless.” “Yes.” “Where’d you get the \$20 for today?” “I don’t wanna say.” “I need you to say. Tell me where you got the \$20.” “Well, I did something for it.” “What do you mean you did something? Did you steal it?” “No, ma’am. I didn’t steal it.” “How’d you get it?” “I sold myself.”

Judge says, “You sold yourself to someone else to get \$20 to pay restitution?” He said, “Yes.” “How’d you get here today?” “I took BART.”¹¹⁷ “Did you pay for BART?” “No, ma’am.” “How’d you get here?” “I jumped the turnstile.” “So, you sold yourself and you committed an infraction to come here and pay me \$20?” “Yes, ma’am.” “And you don’t have a place to live tonight?” “No, ma’am.” “Give him his money back,” the judge told the financial officer. And [the defendant] says, “I don’t want it.” And [the judge] says, “What do you mean you don’t want it? You need the money.” And he says, “Your Honor, I don’t want it. I don’t like what I had to do to get it. I don’t want that money.”

And the Judge started crying and said, “I’m taking a recess.” And nearly brought us all to tears in the room

116. Pattillo et al., *supra* note 46, at 64–65.

117. BART is the Bay Area Rapid Transit, which serves the San Francisco Bay Area in California.

[S]o, I asked the judge to advance the case back on the record, and I said, “Your Honor, would the court consider terminating probation today and we’ll prepare paperwork for a 1203.4 petition [to dismiss the case] and get him off of probation and have this expunged from his record?” And the judge said she would. I felt that was the least we could do, as a society. But in the end, when he walked out, I knew [we] hadn’t fixed anything for him, really. I hadn’t given him a place to stay. I hadn’t provided any opportunity, other than to ensure that he didn’t have to jump a turnstile or turn any more tricks to come back and pay restitution.¹¹⁸

This all-too-common story illustrates the revolving cycle of debt caused by mandatory fees and fines for indigent defendants and how it impacts their ability to meet basic needs like housing, food, and utilities.¹¹⁹

States, localities, and courts nationwide should consider the impact of fees and fines on indigent defendants and offer alternatives, such as removal of fees and fines, fee and fine waivers, or community service credit. The one-two punch of regressive court-imposed fees and fines not only cost more than the fees and fines themselves to collect, but also has a far more substantial price of homelessness, lost employment, family disruption, and negative health impacts on indigent defendants.¹²⁰

V. CONSTITUTIONAL CHALLENGES TO FEES AND FINES FOR INDIGENT DEFENDANTS

To the extent that legislative bodies fail to address this problem, constitutional challenges can be made. Since legal financial obligations (LFOs) are generally creatures of statute, their validity can only be challenged under the Constitution of the United States or under the state constitution where the statute was enacted,¹²¹ unless preempted by federal

118. Pattillo et al., *supra* note 46, at 64–65. *See also* City of Whitefish v. Curran, 531 P.3d 547, 554 (Mont. 2023) (McKinnon, J., dissenting).

119. Pattillo et al., *supra* note 46, at 63–65.

120. Andrew Boardman, *States and Localities Are Making Progress on Curbing Unjust Fees and Fines*, INST. ON TAX’N & ECON. POL’Y (July 18, 2023), <https://itep.org/states-and-localities-are-making-progress-on-curbing-unjust-fees-and-fines/>.

121. The power of the judiciary to review the constitutionality of legislation is not derived from any specific provision in the United States Constitution, but was declared to be a necessary consequence of our system of government. *Marbury v. Madison*, 5 U.S. 137 (1803). *See* Keith Whittington & Amanda Rinderle, *Making a Mountain out of a Molehill? Marbury and the Construction of the Constitutional Canon*, 39 HASTINGS CONST. L. Q. 823, 858 (2012) (“*Marbury* is now firmly entrenched

law.¹²² State statutes, however, are presumed constitutional.¹²³ The justifications for statutorily imposed LFOs are not identical; some LFOs are designed to raise revenue, while others seek to compensate victims and others are merely designed to punish.¹²⁴ These categories are not rigid; “what constitutes punishment varies depending upon the context in which the question arises.”¹²⁵ While fines are designed to punish, they also fund court and related operations of the criminal justice infrastructure,¹²⁶ and fees, while designed to raise revenues, can also be considered penalties.¹²⁷

The type of punishment for a crime is generally entrusted to the legislature, subject only to restrictions based on either the federal or applicable state constitutions.¹²⁸ Constitutional challenges can be raised against LFOs that are imposed without establishing the defendant’s ability to pay and imposing LFOs in a particular case. While imposing an ability to pay requirement for fees and fines is a step forward, such a condition is only one step toward addressing a dysfunctional, biased, and inequitable criminal justice system.¹²⁹

in the constitutional canon, and it stands most preeminently for the power of courts to authoritatively interpret constitutions and nullify laws that they believe violate constitutional requirements.”).

122. The Washington Supreme Court reversed an order that required a disabled, homeless defendant, whose sole source of income was social security disability payments, to pay \$15 per month towards her outstanding court costs. *City of Richland v. Wakefield*, 380 P.3d 459, 465 (Wash. 2016). A court cannot order a juvenile to pay costs from future supplemental security income benefits. *In re Michael S.*, 524 S.E. 2d 443, 446 (W. Va. 1999). A court cannot order payment if the restitution comes from social security benefits. *In re Lampart*, 856 N.W.2d 192, 203 (Mich. Ct. App. 2014). Any attempt by Congress through legislation to limit the authority of states to impose criminal fees and fines may be beyond the scope of congressional authority under the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598, 598 (2000) (holding that the federal Violence Against Women Act was an unconstitutional exercise of congressional power).

123. *Lockyer v. City of San Francisco*, 33 Cal. 4th 1055, 1086 (2004); *Heller v. Doe*, 509 U.S. 312, 320 (1993).

124. *People v. Vega*, 29 Cal. Rptr. 3d 700, 709 (Cal. Ct. App. 2005); *see People v. Watts*, 206 Cal. Rptr. 3d 202, 203–13 (2016) (discussing whether a crime lab fee is subject to penalty assessment).

125. *People v. Ruiz*, 4 Cal. 5th 1100, 1108 (2018) (quoting *People v. Castellanos*, 21 Cal. 4th 785, 795 (1999) (plurality opinion)) (holding a statutory LFO denominated as a fee can also be deemed a penalty designed to punish).

126. Mike Maciag, *Addicted to Fines: A Special Report*, GOVERNING (Aug. 16, 2019), <https://www.governing.com/archive/fine-fee-revenues-special-report.html> (discussing government’s reliance on revenue from fees and fines).

127. *Ruiz*, 4 Cal. 5th at 1108; *Austin v. United States*, 509 U.S. 602, 624 (1993) (Scalia, J., concurring in part and concurring in the judgment).

128. *In re Palmer*, 10 Cal. 5th 959, 965 (2021).

129. Some have correctly suggested that even a system requiring a determination of ability to pay does not consider the history of racism and poverty, and is not a real solution to the problems created by fees and fines in criminal cases. Theresa Zhen, (*Color*) *Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 175 (2019). While the authors recognize that the history of systemic racism in the United States criminal justice system requires broader solutions, this Article’s focus is more limited.

In *Tate v. Short*, the Supreme Court ruled that converting an indigent petitioner's unpaid fines to jail time violated the Equal Protection Clause.¹³⁰ In *Tate*, the indigent petitioner was unable to pay \$425 in accumulated fines on traffic offense convictions in municipal court in Houston, Texas.¹³¹ The municipal court committed the petitioner to a municipal prison farm in accordance with the municipal ordinance, which required that he remain there for 85 days at a rate of \$5 per day to satisfy the accumulated fines.¹³² The Supreme Court held that such a practice was unconstitutional, as there are alternative methods for the state to enforce fine payment.¹³³ The inability to incarcerate a defendant due to the inability to pay an LFO does not eliminate the disparate burden on the indigent. Thus, as a matter of federal constitutional law, a criminal defendant cannot be imprisoned for failure to pay an LFO; however, this does not prevent the defendant from suffering the civil consequences of such LFOs.

There are two types of constitutional challenges: facial and applied. While it is not always clear whether a challenge is facial or applied, a facial challenge is a claim that the law at issue is unconstitutional in all its applications regardless of how it is applied in any factual scenario. In contrast, an applied challenge is generally limited to the circumstances in an individual case.¹³⁴ While fees are of relatively recent origins, fines have been a long-standing tool in the criminal justice system to punish and deter.¹³⁵ Fines, however, may not deter the rich who find it easy to pay to avoid imprisonment.¹³⁶ Thus, the United States Department of Justice recently advised state courts and other agencies to impose fees and fines in a constitutional and nondiscriminatory manner.¹³⁷

A. Recent Constitutional Challenges in California and Montana

In 2019, a three-judge panel of the California Court of Appeal's Second Appellate District, deciding *People v. Dueñas*, broke new ground in holding

130. 401 U.S. 395, 399 (1971).

131. *Id.* at 396–97.

132. *Id.*

133. *Id.* at 399.

134. *Bucklew v. Precythe*, 587 U.S. 119, 138–39 (2019).

135. LAWRENCE M. FRIEDMAN, *HISTORY OF AMERICAN LAW* 595 (Simon & Shuster 2d ed., 1985) (noting fines have been the most common form of punishment since colonial times). Fees, on the other hand, are of recent vintage. See Menendez et al., *supra* note 22.

136. ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* 234–35 (Basic Books, Inc., 1975).

137. Office of Public Affairs, *Just. Dep't Issues Dear Colleague Letter to Courts Regarding Fines and Fees for Youth and Adults*, U.S. DEP'T OF JUST., (Apr. 20, 2023), <https://www.justice.gov/opa/pr/justice-department-issues-dear-colleague-letter-courts-regarding-fines-and-fees-youth-and>.

that due process under the federal and California constitutions required that a statutory fee or fine could not be imposed without establishing a criminal defendant's ability to pay.¹³⁸ However, other panels of California appellate justices have rejected the result in *Dueñas*,¹³⁹ others have suggested different constitutional analyses to reach similar results,¹⁴⁰ and still others have reached different results depending on whether the LFO is a fee or a fine.¹⁴¹ The California Supreme Court is currently reviewing whether a criminal defendant's ability to pay must be established before a trial; whether a court can impose a fee or fine, and if so; which party bears the burden of proof regarding the defendant's ability to pay.¹⁴²

While the California Supreme Court has yet to decide this issue, the Montana Supreme Court has done so. In *City of Whitefish v. Curran*, a defendant pled guilty to driving under the influence and agreed to the minimum \$600 fine, believing the trial court would consider his ability to pay the fine.¹⁴³ The defendant was indigent and unable to work due to an injury, and his rent and medical expenses exceeded his social security payments. However, he had received a COVID-19 stimulus check and conceded he may receive another in the future.¹⁴⁴ The trial court was sympathetic to the defendant's situation, but did not believe it possessed the authority to do anything other than impose the fine.¹⁴⁵ In 2023, the Montana Supreme Court, in a 4-3 decision, held that the fine was lawful because the lower court did not explicitly require the defendant to use his COVID-19 stimulus check to pay the fine, but also held the trial court abused its discretion by failing to realize it had the ability to consider and offer alternatives to the fine.¹⁴⁶ The fine's constitutionality as applied to indigent defendants was not addressed as the defendant had not properly raised the issue at the appellate level.¹⁴⁷ Justice Laurie McKinnon, in dissent, wrote that

138. Compare *People v. Castellano*, 245 Cal. Rptr. 3d 138, 141 (Cal. Ct. App. 2019) (*Dueñas* announced a new "constitutional principle that could not reasonably have been anticipated"), with *Commonwealth v. Lopez*, 280 A.3d 887, 891 (Pa. 2022) (holding imposition of court costs mandated by statute does not require ability to pay).

139. *People v. Petri*, 258 Cal. Rptr. 3d 466, 471–74 (Cal. Ct. App. 2020).

140. See *People v. Cowan*, 260 Cal. Rptr. 3d at 523 (Streeter, J., concurring) (criticizing *Dueñas*'s sole reliance on due process rather than other sources of constitutional protection).

141. *People v. Son*, 262 Cal. Rptr. 3d 824 (Cal. Ct. App. 2020).

142. *People v. Kopp*, 250 Cal. Rptr. 3d 852 (Cal. Ct. App. 2019), cert. granted, 254 Cal. Rptr. 3d 637 (2019).

143. 531 P.3d 547, 549–50 (Mont. 2023).

144. *Id.* at 550.

145. *Id.*

146. *Id.* at 554.

147. *Id.* But see *id.* (Shea, J., concurring) (predicting that the constitutionality issue would be presented before the court in the future).

a court that does not consider an indigent defendant's ability to pay when imposing monetary sanctions may be unfair and result in unequal treatment for certain defendants.¹⁴⁸ Justice McKinnon also compared the need for individualized analysis of the ability to pay with the current system of individualized sentencing.¹⁴⁹ Finally, Justice McKinnon emphasized that monetary sanctions in the criminal legal system reflect the historical racial and ethnic discrimination in this country.¹⁵⁰

A year later, in March 2024, Justice McKinnon wrote the majority opinion in *State v. Gibbons*, holding that Montana's statute requiring a minimum \$5,000 fine for a fifth or subsequent offense of driving under the influence was facially unconstitutional.¹⁵¹ The defendant in *Gibbons* was a 77-year-old homeless man in poor health, unemployed, who was receiving \$1,300 in social security benefits and had \$9,000 in debt.¹⁵² The mandatory fine statute required imposing a minimum fine without regard to a defendant's ability to pay, their resources, the nature of the crime committed, and the burden of the fine.¹⁵³ The court held that this fine violated the Eighth Amendment's right against excessive fines and the Montana State Constitution's excessive sanctions clause.¹⁵⁴ As a result, sentencing courts cannot impose a fine or fee unless the defendant is able to pay and require the sentencing judge to consider the nature of the crime, their financial resources, and the possible burden of the fine.¹⁵⁵ In reaching this result, the court noted the social impacts of fees and fines on indigent defendants and their disproportionate impact on poorer defendants compared to wealthier defendants.¹⁵⁶

B. How Courts Should Analyze the Constitutionality of LFOs

Now that the Montana Supreme Court has acted and California's Supreme Court is likely to act soon, other courts are anticipated to address constitutional challenges to mandatory fees and fines. Federal constitution challenges to state LFOs fall under the Fourteenth Amendment. The Fourteenth Amendment prohibits depriving anyone of property without due

148. *Id.* at 557 (McKinnon J., dissenting).

149. *Id.* at 556–57.

150. *Id.* at 559.

151. 545 P.3d 686, 691 (Mont. 2024).

152. *Id.* at 703.

153. *Id.* at 699.

154. *Id.*

155. *Id.* at 699–700.

156. *Id.* at 702.

process or denying equal protection under the law.¹⁵⁷ The Eighth Amendment, which prohibits excessive fines, applies to the states through the Fourteenth Amendment.¹⁵⁸ In addition, each state has its own constitution, which generally includes due process, equal protection, and excessive fines clauses.¹⁵⁹ State constitutions are documents of independent force that can provide more expansive protection than the minimum guarantees of their federal counterpart.¹⁶⁰ Legislatures are afforded considerable deference in defining and setting the consequences for criminal offenses.¹⁶¹ Various arguments, however, can be made under both the federal and applicable state constitutional provisions to attack fees and fines imposed without establishing a defendant's ability to pay.¹⁶²

First, due process "concerns the fairness of relations between the criminal defendant and the state."¹⁶³ The touchstone of due process is fundamental fairness.¹⁶⁴ Under due process clauses, all criminal defendants "stand on an equality before the bar of justice," and there can be no equal justice when a defendant is treated differently depending "on the amount of money he has."¹⁶⁵ Due process has both a procedural and substantive component.¹⁶⁶ Procedural due process refers to procedures the government must follow when it takes away a person's life, liberty, or property.¹⁶⁷ Substantive due process protects individuals from offensive government acts, regardless of the fairness of the procedures used to implement them.¹⁶⁸

157. U.S. CONST. amend. XIV, § 1.

158. *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

159. See, e.g., CAL. CONST. art. I, § 7(a).

160. *People v. Buza*, 4 Cal. 5th 658, 684 (2018) (stating California Constitution is an "independent force"); *State v. Yang*, 452 P.3d 897, 901–02 (Mont. 2019) (discussing protections of the Montana Constitution). See *Serrano v. Priest*, 18 Cal. 3d 728, 764 (1976) (holding California Constitution is more protective of right to education); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 (1980) (interpreting state constitution to allow the distribution of pamphlets and petitions in private shopping centers as contrary to the Federal Constitution). See also *Cowan*, 260 Cal. Rptr. 3d at 540–42 (Streeter, J., concurring) (suggesting challengers to fees and fines are better made under the California Constitution).

161. *Johnson v. Dep't of Just.*, 60 Cal. 4th 871, 887 (2015).

162. Constitutional challenges may be made on more than one ground. *Soldal v. Cook Cnty.*, 506 U.S. 56, 70 (1992).

163. *People v. Dueñas*, 242 Cal. Rptr. 3d at 276 n.4. *Dueñas* was a watershed case holding that due process requires a criminal defendant to have the ability to pay before a fee or fine can be assessed. See *Wilson*, *supra* note 71, at 2704.

164. *Bearden v. Georgia*, 461 U.S. 660, 673 (1983).

165. *Griffin v. Illinois*, 351 U.S. 12, 17, 19 (1956) (plurality opinion).

166. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 557–59 (4th ed. 2011).

167. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

168. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

Unless a fundamental right is involved,¹⁶⁹ substantive due process is generally not violated if there is a rational basis for the enactment.¹⁷⁰

Second, equal protection applies to classifications created under a law.¹⁷¹ Generally, classifications articulated under a statute will be valid if they are rationally related to a legitimate state interest.¹⁷² Under an equal protection analysis, there must be a rational reason for a difference in treatment “when those who appear similarly situated are nevertheless treated differently.”¹⁷³ “[A] law nondiscriminatory on its face may be grossly discriminatory in its operation.”¹⁷⁴ Like due process, a heightened level of justification is required if a fundamental right or suspect classification is involved.¹⁷⁵

Finally, the constitutional prohibition against excessive fines contained in the Eighth Amendment, made applicable to the states through the Fourteenth Amendment or through individual state constitutions, is a fundamental right.¹⁷⁶ Under the excessive fines clauses, “ability to pay becomes a critical factor.”¹⁷⁷ The touchstone of the excessive fine prohibition is the principle of proportionality.¹⁷⁸ Excessive fines clauses are rooted in the Magna Carta’s requirement that fines “be proportioned to the wrong” and “not be so large as to deprive an offender of his livelihood.”¹⁷⁹ As former Supreme Court Justices Sandra Day O’Connor and John Paul Stevens noted,

169. Originally, substantive due process was used to invalidate government regulations of business. *See, e.g., Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). Beginning in 1937, the Supreme Court has generally rejected such economic regulations against due process challenges and thereafter began to protect fundamental personal rights. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4. (1938). Over the past thirty years, the Supreme Court has significantly narrowed the scope of what constitutes a fundamental right under the Federal Constitution. *See, e.g., Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246–48 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), which held abortion to be a fundamental right).

170. *Duarte Nursery, Inc. v. Cal. Grape Rootstock Improvement Com.*, 191 Cal. Rptr. 3d 776, 784–85 (2015).

171. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 602 (2008).

172. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

173. *Engquist*, 553 U.S. at 602.

174. *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956).

175. *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982).

176. *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019) (holding constitutional protection against excessive fines is “fundamental to our scheme of ordered liberty,” with “dee[p] root[s] in [our] history and tradition.”) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)).

177. *People v. Cowan*, 260 Cal. Rptr. 3d at 520 (2020) (quoting *United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996)).

178. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). *See also Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728 (2005).

179. *See Timbs*, 139 S.Ct. at 687–88 (2019) (quoting *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 271 (1989)). *See also* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 837 (2013) (stating original meaning of excessive fines clause was sensitive to plight of the indigent).

after the Magna Carta, civil fines—which were the precursor of criminal fines—were reduced in accordance with a party’s ability to pay.¹⁸⁰ Excessive fines clauses can also be applied to fees if the fee is partially punitive.¹⁸¹ One may argue that the Excessive Fines Clause prohibits any statute from mandating fees and fines that are not based on a defendant’s ability to pay.¹⁸² Where excessive fine clauses are violated, the appropriate remedy is not to impose the fine if doing so would be unconstitutional as applied.¹⁸³

For constitutional challenges, fees and fines have been treated differently as each purportedly has a different legislative purpose. Although the constitutional challenges are similar, challenges to fees and fines differ because of the different state interests.

C. Constitutional Challenges to Fees

Under either equal protection or due process analyses, where fundamental rights are implicated, a statute mandating fees must satisfy strict scrutiny review.¹⁸⁴ Courts have recognized that access to the courts is a fundamental right.¹⁸⁵ Although fees are assessed after a defendant is found guilty at trial, convicted defendants eventually have to pay the costs of going to trial.¹⁸⁶ Second, to the extent fees are designed as a form of “user fee” for fundraising, imposing fees on an indigent defendant who lacks the ability to pay constitutes a form of improper punishment and is fundamentally unfair.¹⁸⁷ Finally, as noted above, freedom from excessive fines is a fundamental right warranting heightened scrutiny.

An equal protection analysis of a law may be subject to strict scrutiny if unequal treatment is based on a suspect classification, such as race.¹⁸⁸ Wealth

180. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 287 (1989) (O’Connor, J., dissenting).

181. *Austin v. United States*, 509 U.S. 602, 609–10 (1993); *Cowan*, 260 Cal. Rptr. 3d at 530.

182. See Tia Lee Kerkhof, *Small Fines and Fees, Large Impacts: Ability to Pay Hearings*, 95 S. CALIF. L. REV. 447, 466–72 (setting forth excessive fine clause arguments against LFOs).

183. *Cowan*, 260 Cal. Rptr. 3d at 522.

184. *People v. Chatman*, 4 Cal. 5th 277, 288 (2018); *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982).

185. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110–12 (1996).

186. *People v. Son*, 262 Cal. Rptr. 3d at 835–837. See also *Wilson*, *supra* note 71, at 2715–19 (discussing why the right to access to courts is infringed where fees are imposed after trial and conviction).

187. *Son*, 262 Cal. Rptr. 3d at 832–33 (stating universal application of fees has punitive consequences for the indigent and thus is fundamentally unfair). It is unconstitutional, however, to incarcerate a defendant whose failure to pay a fine is due to an inability to pay. *Bearden v. Georgia*, 461 U.S. 660, 674 (1983).

188. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (discussing the levels of scrutiny). See also *Plyler*, 457 U.S. at 223–24 (holding right to education for undocumented children is subject to intermediate scrutiny).

is generally not a suspect classification¹⁸⁹ unless coupled with a fundamental right,¹⁹⁰ because wealth is a relative term rather than a classification.¹⁹¹ Because people of color are disproportionately affected by this revenue extraction, a race-based claim could be made if a sufficient factual record was developed.¹⁹² In most states, indigent criminal defendants are treated differently than their civil counterparts, who can receive a court costs fee waiver.¹⁹³ In addition, assessing fees on a wealthy criminal defendant has little impact on their life. This is not the case for an indigent criminal defendant.

A statute mandating a fee must be narrowly tailored to satisfy a compelling state interest, and there must be no alternative means of satisfying that compelling interest to satisfy strict scrutiny review.¹⁹⁴ It is unlikely that these mandatory fee statutes could survive strict scrutiny. While solvent defendants can pay these fees relatively painlessly, indigent defendants cannot.¹⁹⁵ Similarly, while a state's interest in funding its courts and related services may be compelling, the funding mechanisms are not narrowly tailored to meet this interest.¹⁹⁶

Even if these rights are not deemed fundamental, the Supreme Court has developed a hybrid due process and equal protection test.¹⁹⁷ Under this test, a court must determine "whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process."¹⁹⁸ In reaching such a result, courts need to balance the following four factors: (1) the nature of the individual interest affected, (2) the extent to which it is affected, (3) the rationality of the connection between legislative means and purpose, and (4) the existence of alternative means for effectuating the purpose.¹⁹⁹

189. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 27–28 (holding wealth is not a suspect classification under the United States Constitution).

190. *Serrano v. Priest*, 18 Cal. 3d 728, 765 (1976) (deciding case under the California Constitution).

191. *Bearden*, 461 U.S. at 666 n.8.

192. *See Diller et al.*, *supra* note 27, at 270.

193. *See James v. Strange*, 407 U.S. 128, 138–39 (1972) for an example of a case where the Supreme Court found a state statute that allowed indigent civil defendants exemptions from judgment debt—but did not allow criminal defendants the same exemptions for fees incurred for appointed counsel—violated equal protection.

194. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

195. *People v. Son*, 262 Cal. Rptr. 3d at 830.

196. *Id.*

197. *Bearden v. Georgia*, 461 U.S. 660, 665–67 (1983). *See also People v. Cowan*, 260 Cal. Rptr. 3d at 529 (Streeter, J., concurring).

198. *Bearden*, 461 U.S. at 666 n.8.

199. *Id.* at 666–67.

Applying this test to statutes mandating fees, the first two factors weigh heavily in favor of requiring an ability-to-pay hearing because unpayable fees implicate both economic and liberty interests with government debt, resulting in “cascading consequences” for the indigent.²⁰⁰ For the latter two factors, imposing a funding burden on those unable to pay is futile, and there are alternative methods to fund these services through general tax revenue or by imposing fees only upon those defendants who can afford them.²⁰¹ Thus, under this four-factor test, imposing fees without regard to a defendant’s ability to pay constitutes a fundamentally unfair and futile attempt to fund the courts on the backs of poor people, as well as an ineffective system for punishing defendants under this test’s heightened scrutiny.

Finally, with respect to fees, courts have found that even under the deferential rational basis test, mandatory fees are not rationally related to a legitimate governmental purpose.²⁰² Simply put, it is irrational to impose a financial burden on criminal defendants who cannot pay mandated fees because such a mandate does not serve the statutory purpose of raising revenues.²⁰³ Moreover, unlike civil parties who can waive their fees, criminal defendants who lack the same ability to pay are not afforded this right.²⁰⁴

Apart from the foregoing, the Excessive Fines Clause of the Eighth Amendment applies to the states.²⁰⁵ Courts have applied the Excessive Fines Clause to exactions that are not technically fines, such as civil forfeitures.²⁰⁶ Some courts have suggested that the Excessive Fines Clause applies to fees if the fee is partially punitive.²⁰⁷ Therefore, one may argue that the Excessive Fines Clause prohibits statutes from mandating fees and assessments that are not based on ability to pay.²⁰⁸ In addition, an applied challenge may also be available to assess a fee in a particular case and a particular defendant.²⁰⁹

200. *Cowan*, 260 Cal. Rptr. 3d at 530 (Streeter, J., concurring). See Kerkhof, *supra* note 182, at 463–64.

201. See Kerkhof, *supra* note 182, at 464–65.

202. *People v. Kopp*, 250 Cal. Rptr. 3d 892–93, *cert. granted*, 254 Cal. Rptr. 3d 637 (2019). While review is still pending before the California Supreme Court, the Attorney General has conceded that imposition of statutory fees on those who lack an ability to pay is not supported by a rational basis. See Answering Brief on the Merits at 37–41, *People v. Kopp*, 254 Cal. Rptr. 3d 637 (2019) (No. S257844).

203. *People v. Dueñas*, 242 Cal. Rptr. 3d at 275–76. See also *Kopp*, 250 Cal. Rptr. 3d 892–93.

204. *Fee Waiver*, SUPER. CT. OF CAL., CNTY. OF ORANGE, <https://www.occourts.org/self-help/self-help-services/self-help-fee-waiver> (last visited Dec. 10, 2024).

205. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

206. See *Austin v. United States*, 509 U.S. 602, 627 (1993) (Scalia, J., concurring in part and concurring in the judgment) (discussing civil forfeitures).

207. See, e.g., *People v. Cowan*, 260 Cal. Rptr. 3d at 530.

208. See Kerkhof, *supra* note 182, at 466–72 (setting forth excessive fines clause arguments against fees and assessments). See also *infra* Part V.D, for a discussion on the elements of the excessive fines clause as applied to fines.

209. See *infra* notes 218–20.

D. Constitutional Challenges to Fines

As set forth by the Montana Supreme Court in *Gibbons*, a facial challenge can succeed where statutorily mandated minimum fines are required without establishing a defendant's ability to pay violates the Excessive Fines Clause.²¹⁰

One could argue that under due process, a fine imposed regardless of a defendant's ability to pay is neither procedurally fair nor related to any proper legislative goal. This is because a state does not have a legitimate goal of making inescapable debt traps for someone unable to pay.²¹¹ Unlike fees, the primary purpose of fines is punishment. As a result, such facial challenges under due process may not be successful, as mandatory fines imposed without an ability to pay are designed to punish.²¹² One could claim, however, that under due process, mandatory fines do not satisfy an equal retributory purpose because their effects are grossly disproportionate, as a defendant who has the ability to pay is less penalized than one who is indigent, and they are therefore fundamentally unfair.²¹³

An argument under equal protection is harder to make as mandatory fines may not create a classification as all defendants are treated similarly.²¹⁴ While such statutes, on their face, purport to treat everyone the same, the effect, when applied, is not the same because of the dramatically different impact on those who have the ability to pay and those who do not.²¹⁵ Moreover, to the extent that people of color are within this group, there is a disparate impact based on race, which is a suspect classification.²¹⁶ Wealth, however, is not a suspect class.²¹⁷ However, one could argue that the right to

210. *State v. Gibbons*, 545 P.3d 686, 691 (Mont. 2024).

211. *People v. Dueñas*, 242 Cal. Rptr. 3d at 279 n.8 (.

212. *See People v. Son*, 49 Cal. Rptr. 3d 565, 577 (Ct. App. 2020) (invalidating mandatory fees imposed without establishing ability to pay, but upholding imposition of mandatory fines without establishing ability to pay).

213. *People v. Cowan*, 260 Cal. Rptr. 3d at 537–38 (Streeter, J., concurring) (stating mandatory fine statute in California “has expressly withdrawn a defense to the imposition of a minimum fine for only group of people who need it—those lacking the ability to pay” and thus “discriminates based on impecuniousness . . . on its face” under equal protection).

214. *See People v. Valencia*, 3 Cal. 5th 347, 376 (2017) (stating an equal protection claim requires “a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner”).

215. *See supra* Part II.

216. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–76 (1977).

217. *See Maher v. Roe*, 432 U.S. 464, 471 (1977) (finding financial need alone does not identify a suspect class for equal protection analysis).

be free from excessive fines constitutes a fundamental right subject to heightened scrutiny under equal protection.²¹⁸

While constitutional principles can be used to make a facial challenge to such statutes, they can also be used to make an applied challenge to a particular fine that is imposed or attempted to be imposed on a particular defendant in a particular case. To determine whether such a financial obligation in a particular case is grossly disproportionate to the underlying offense under the Excessive Fines Clause, courts have looked at the following four factors: “(1) the defendant’s culpability, (2) the relationship between the harm and the penalty, (3) the penalties imposed in other similar statutes, and (4) the defendant’s ability to pay.”²¹⁹ While no particular weight is assigned to each factor, given the Clause’s origins, the ability to pay should be a prominent, if not a controlling, factor.²²⁰

Similarly, the Due Process Clause can be used to challenge a particular fine as being arbitrary.²²¹ Considerations similar to those under the Excessive Fines Clause apply in making this determination.²²²

CONCLUSION

Fees and fines can constitute an important part of the sanctions available to punish and deter those found guilty of crimes, particularly as an alternative to incarceration, when the defendant has the ability to pay them. Such monetary sanctions, however, should not be used to create disparate burdens on those unable to pay. We need to move to a restorative justice system that seeks to rehabilitate offenders while protecting victims. Imposing unpayable fees and fines on indigent defendants serves neither purpose nor makes it any

218. See *Timbs v. Indiana*, 139 S.Ct. 682, 686–87 (2019).

219. *Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728 (2005). See also *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (“The amount of forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”).

220. See *Timbs*, 139 S. Ct. at 687–88 (discussing Magna Carta’s requirements that economic sanctions be proportional and not deprive an offender of their livelihood). See also *S. Union Co. v. United States*, 567 U.S. 343, 370 (2012) (Breyer, J., dissenting) (discussing that the Magna Carta prevented a court from imposing a fine that would deprive an offender of means of livelihood); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 330–35 (2014) (“[T]he idea of saving defendants from persistent impoverishment was a guiding principle reaching back to the days of the Magna Carta and the English Bill of Rights, and enduring through the ratification of the Eighth Amendment.”).

221. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (reversing punitive damage award). See also *Hale v. Morgan*, 22 Cal. 3d 388, 399, 404 (1978) (examining whether statutory penalties were arbitrary and oppressive as applied).

222. *R.J. Reynolds Tobacco Co.*, 37 Cal. 4th at 728–29 (citing *Bajakajian*, 524 U.S. at 337–38) (applying the four *Bajakajian* considerations for excessive fines clause challenge to due process challenge).

less likely that victims will be compensated without creating a financial benefit to the state from uncollectible debt.