THE RECORDER

THE JOURNAL OF TEXAS MUNICIPAL COURTS

June 2023

INSIDE THIS ISSUE

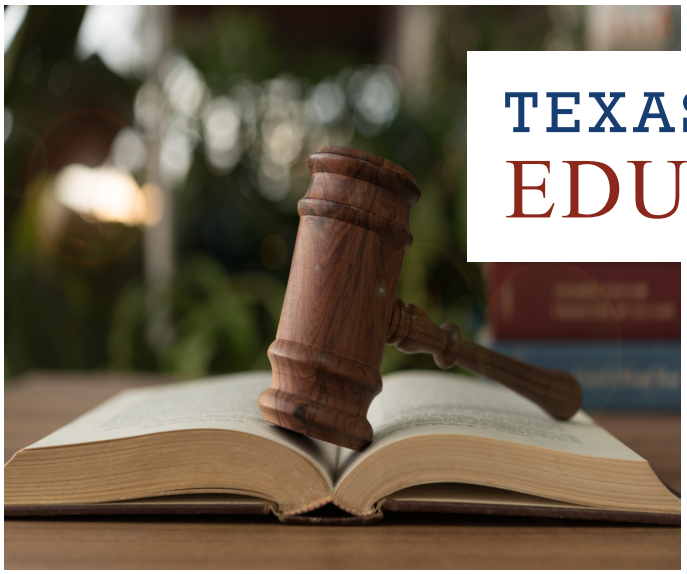
Constitutional Issues in Forming a Jury

Part Two: Peremptory Challenges

Hon. Eric Bayne Page 4

Recent Justice Department "Dear Colleague" Letter to Courts Regarding Fines and Fees

Details on Page 21



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AROUND THE STATE

Statewide Judicial Summit on Mental Health

The 6th annual statewide Judicial Summit on Mental Health will be held October 18-20, 2023 at Moody Gardens in Galveston. This event is hosted by the Judicial Commission on Mental Health, a joint commission of the Supreme Court of Texas and the Court of Criminal Appeals. The summit will include opportunities to connect with colleagues around the state, establish new relationships, and engage in sessions designed to be inspiring and practical. Participants will receive tools to navigate the complex mental health laws in Texas. Registration is open now at https://web.cvent.com/event/e1ad6888-49b7-4e87-b075-a4c85560aca8/summary.

88th Texas Legislative Session

The 88th Texas Legislature convened January 10, 2023. Regular session ends May 29, 2023. Following the session, TMCEC is hosting four Legislative Updates in Lubbock (August 8th), Dallas (August 15th), Houston (August 18th), and Austin (August 22nd). Each event counts toward judicial education, clerk certification, and CLE credit. Registration is $150. See the 2022-2023 TMCEC Spring-Summer Bulletin for details, available on the TMCEC website (tmcec.com) under the Conferences & Events tab.
To register, visit /register.tmcec.com.

In Memoriam

Hon. Joni Haldeman passed away on May 7, 2023, at her home in De Kalb, Texas. She was 67. Joni had a deep love for her hometown, serving not only as judge, but also as a board member for the De Kalb Chamber of Commerce, Trustee and Historian for the Old De Kalb Cemetery, and founder of the Friends of the Williams House Museum. She will be missed greatly by her family, friends, and beloved community. Joni is survived by her husband, mother, son and daughter-in-law, stepdaughter, and six grandchildren.

Hon. Kevin M. Kolb, age 56, passed away on March 28, 2023. He served as municipal judge for the City of Seguin, where he graduated from high school. He graduated from the University of Texas at Austin with a degree in accounting in 1988. Kevin received his Juris Doctorate in 1993 from St. Mary's University School of Law and his LL.M. in 1994 from the University of Denver College of Law. Kevin also practiced law at the firm Kolb and Murray, P.C. in Seguin. He is survived by his wife of thirty years, stepson and his wife, grandson, mother, sisters and brothers-in-law, nieces, nephews, great nieces and nephews, numerous cousins, other loving family members, and many friends.

Hon. Eric Bayne

Constitutional Issues in Forming a Jury

Part 2: Peremptory Challenges

Part One of this series[1] discussed, among other things, challenges for cause based on the Sixth Amendment right to a fair and impartial jury. This installment will take up the thorny and often contentious role of the peremptory challenge (also called peremptory strike) and the now-ubiquitous *Batson* challenge. While the challenges for cause discussed in the previous installment are essentially objections based on the (somewhat subjective) characteristics of the jurors sought to be struck, here the challenge arises not to the inclusion of a juror, but to their exclusion. The success of a *Batson* challenge will be determined by the intent of the party exercising its peremptory strikes. Only certain objective characteristics of a juror are relevant to the analysis.

Peremptory strikes may be exercised for any reason, except for an impermissible reason. The impermissible reasons are few: a person may not be struck solely on account of their race, gender, or ethnicity. You might expect that list to be longer, but it is not. The number of strikes depends on the type of case and the possible punishment. In municipal courts both the State and the defendant may exercise up to three strikes.[2]

Definitions

pe·remp·to·ry
\ pə-ˈrem(p)-t(ə-)rē \

b : admitting of no contradiction

Texas law defines a "peremptory" challenge as one made without assigning a reason therefor.[3] One literal definition of "peremptory" is "admitting of no contradiction."[4] Each of those is a solid starting point for our analysis, but neither definition will carry us all the way home.

Before launching into the body of the article, certain other definitions outlined in the previous article bear repeating here.

"Array" The group of jurors from the venire assigned to a particular courtroom for the purposes of selecting a trial jury

"Bias" "[A]n inclination toward one side of an issue rather than to the other"[5]

"Juror" The term "juror" is often used loosely in statutes, opinions, and scholarship. Depending upon the context, a "juror" may be a member of

the venire that is one or more of the following:

- Eligible to serve
- Selected to report
- Qualified or Disqualified
- Challenged
- Serving

Grounded in State Law, but Subject to Constitutional Limitations

Peremptory strikes themselves are creatures of state law—there is no constitutional right (U.S. or Texas) to make a peremptory challenge.[6] However, peremptory strikes can be challenged on constitutional grounds, because once created by statute, they are subject to the Equal Protection Clause of the Fourteenth Amendment. Though some debate the constitutionality of peremptory strikes in general, at least for now they are legal in Texas and most of the United States. Instead, we will focus on whether individual strikes, exercised against a particular person, violate the Fourteenth Amendment rights of one of the parties.

...whether and when to make any objection is a matter of trial strategy and judges should not second-guess the parties or their counsel.

The Role of the Judge

Because the grounds for objection to a peremptory strike are so narrow, most will pass constitutional muster. As such, peremptory strikes are mostly sacrosanct—the judge has no voice unless an objection is raised. Judges must wait for an objection. Unless there is an objection, it is improper for judges to comment on the strikes or inquire as to the rationale. It should go without saying that judges must disregard their personal beliefs regarding whether a jury strike might be impermissible if challenged—whether and when to make any objection is a matter of trial strategy and judges should not second-guess the parties or their counsel.[7]

Intent vs. Effect

When it comes to challenging peremptory strikes, the important aspect is the intent of the person exercising the strike. Although judges can consider whether a party's strike disproportionately impacts one or more protected class or classes, that unequal impact alone does not settle the question. It may happen that a series of legitimately exercised peremptory challenges may cause an unequal impact on jurors in otherwise protected categories without creating a constitutional violation.[8] Put another way, judges can *begin* by looking at whether a particular cognizable group seems disproportionately affected by the exercise of peremptory strikes, but judges can't *end* there.

Impermissable Peremptory Strikes: *Batson v. Kentucky*

The leading case on impermissibly discriminatory peremptory strikes is *Batson v. Kentucky*.[9] If you think you might have heard of *Batson* before, you have. For a not-so-old opinion, it has been cited an astounding 40,000+ times nationwide, including 2,300+ cases originating in Texas.

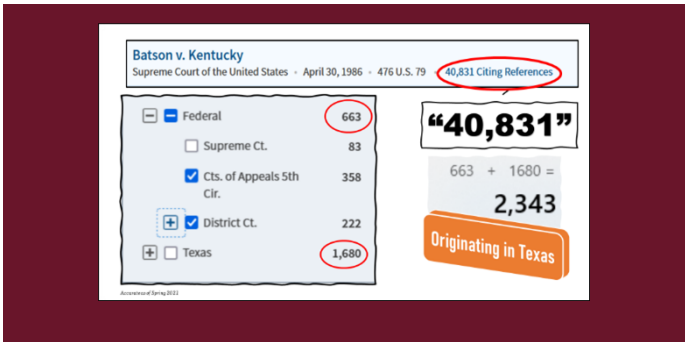
Batson eliminated any doubt that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection

because it denies him the protection that a trial by jury is intended to secure."[10]

Constitutional Basis

Any invitation to argue the contra would get few takers today, but in 1986 the issues examined were very much in question. Nobody thought racially motivated strikes were proper, but the legal basis for the objection was murky, so what a successful challenger needed to prove was unclear. At that time, the Court was not far removed from an earlier holding that the issue of racially motivated peremptory strikes should be examined as a Sixth Amendment issue—delving, for instance, into the common practices of a particular prosecutor over time. Even Mr. Batson himself didn't frame the issue in Fourteenth Amendment terms, but rather as a Sixth Amendment question. There is an argument to be made (as evidenced by the dissenting opinions) that the Court took the unusual step of deciding the case by answering a question that was never asked.[11]

"History is written by the victors,"[12] so some 40,000 citations later it is now well-settled that judges must discern the motivations of a questionable strike according to Fourteenth Amendment Equal Protection standards.



Batson: The Original Rule

The original ruling in *Batson* was narrow. It applied only to the State, in criminal matters, and restricted

only those peremptory strikes exercised to intentionally exclude jurors based solely on race—and even then, only if the State struck jurors of the defendant's race.[13]

Batson: Clarified and Extended

Over time, and unsurprisingly given the multitude of opinions considering it, *Batson* was clarified and extended, and in many instances distinguished or NOT extended. The extensions of *Batson* are most noticeable by their paucity. Although appellate courts still consider points of error related to *Batson*, the protected groups have increased only twice, to include ethnicity and gender. Together, race, gender, and ethnicity make up the only groups that are "cognizable" in a *Batson* objection. These "cognizable groups" should not be confused with the Sixth Amendment "distinctive groups" that are in play when considering a Challenge to the Array. Part three of this series will take up that topic, but for now, it is enough to know that whether a particular group is "distinctive" for Sixth Amendment purposes is tied to its demographics; thus, a group that might be "distinctive" in one municipality might not be in another, which allows some subjectivity. Not so for *Batson* purposes: race, ethnicity, and gender are "cognizable groups" everywhere, all the time.

Clarifications Following *Batson*

In the first several years following its opinion in *Batson*, the U.S. Supreme Court authored three major opinions that clarified the availability of *Batson* challenges. In *Powers v. Ohio,*[14] it held that the race of the defendant was irrelevant in a *Batson* inquiry. Powers, who was White, successfully argued

...for *Batson* purposes: race, ethnicity, and gender are "cognizable groups" everywhere, all the time.

that he had standing to object to the exclusion of seven Black jurors. Also in 1991, the Court clarified that *Batson* challenges can be exercised in civil cases, declaring that "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal."[15] Finally, in 1992 the U.S. Supreme Court further clarified that *Batson* challenges are available to the State to object to purposeful discrimination by a defendant.[16] [17]

Extension: Gender

In 1994, gender was specifically added as a protected cognizable group in *J.E.B. v. Alabama.*[18] As of yet, gender has not been definitively expanded beyond the traditional binary sexes. To date, no Texas appellate court, nor the U.S. Supreme Court, has recognized any such further expansion.

Extension: Ethnicity

Ethnicity is a far more complex concept than race, which has traditionally been based on skin color (of course even that is a gross oversimplification.)[19] As with gender identity and sexual orientation, discussed previously, it is tempting, but not especially productive, to jump down a fascinating philosophical rabbit hole here, so for our purposes it is sufficient to know that, at least in the relevant jurisprudence, ethnicity is treated as a surrogate for race.[20] It can be broadly construed to incorporate, for instance, a common language other than English.[21] And in any event, Hispanic ethnicity is unequivocally a protected group in Texas.[22]

Anatomy of a *Batson* Challenge

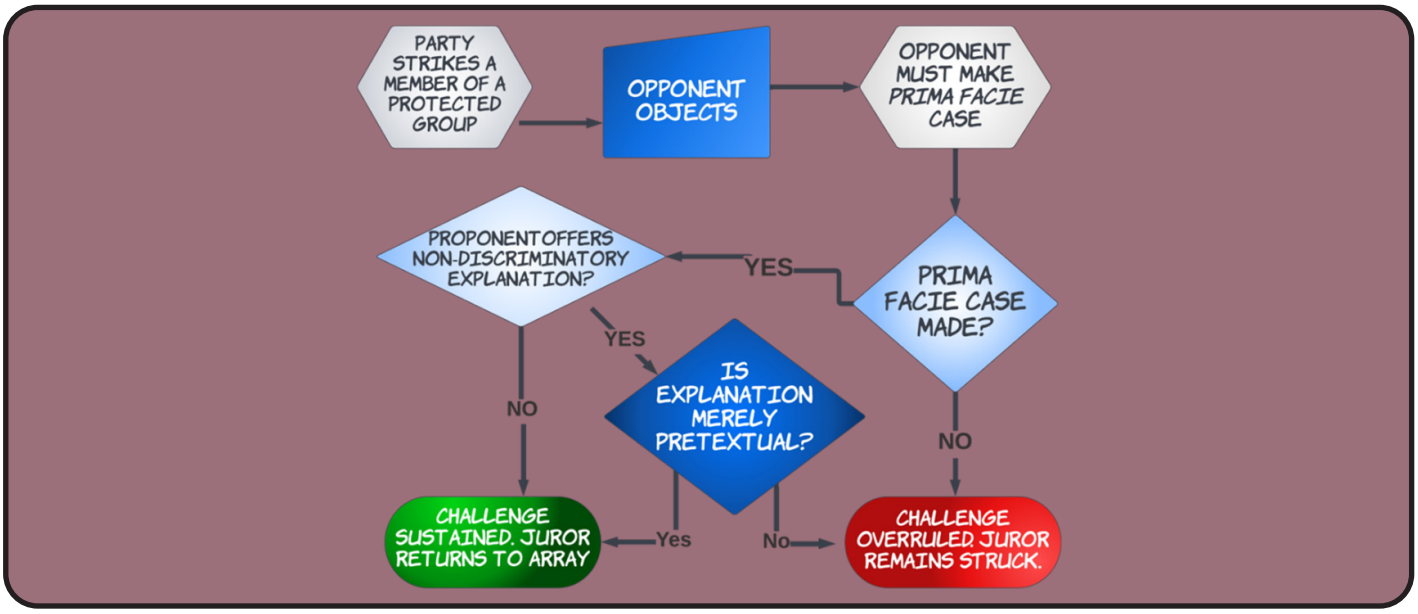
Batson itself lays out the framework for making an equal protection challenge to an excluded juror. In discussing the *Batson* challenge process below, I will call the party who makes the questioned strike "Proponent Smith" (the prosecutor in this instance) and the party raising the objection "Opponent Jones." Because these objections are made after all the peremptory strikes have been announced, there may be several *Batson* challenges made at once and the same person could be the subject of multiple challenges if they belong to more than one cognizable group.

Burdens and Presumptions

A *Batson* inquiry is a dance of shifting burdens and presumptions. We begin with the presumption that Proponent Smith's jury strike is permissible and need not be explained. After all, that's the essence of "peremptory." But, if Opponent Jones believes that the strike is impermissibly discriminatory, Opponent Jones may object, and then bears the burden of establishing a prima facie case for discrimination.

If that prima facie case is made, the strike is presumed to be impermissible, and the burden of going forward shifts to Proponent Smith, who bears the burden of offering a neutral, non-discriminatory

Figure 1: *Batson* Flowchart



reason for the strike. Unless that explanation itself demonstrates discriminatory intent, the reason is presumed to be neutral, and the inquiry continues.

If the judge finds that Proponent Smith's offered explanation is not supported, and thus merely "pretextual," he or she must sustain the objection and return the juror to the array. Although the burden of going forward shifts back and forth, the ultimate burden of proving purposeful, impermissible discrimination never shifts from Opponent Jones.

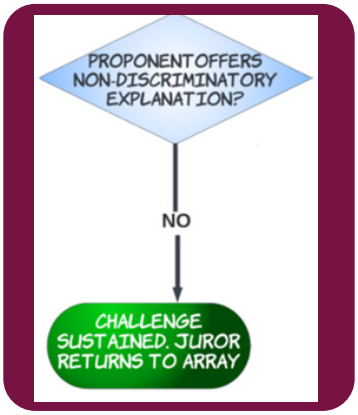
Step 1: The Objection and the "Prima Facie Case"

Opponent Jones may only object to a strike of a member of a "cognizable group." After making the objection, Opponent Jones must show three things:

1. The juror struck is a member of a protected "cognizable" group,
2. Proponent Smith exercised a peremptory challenge to remove that person from the jury, and
3. "All relevant circumstances" raise an inference that the peremptory strike is impermissibly discriminatory.

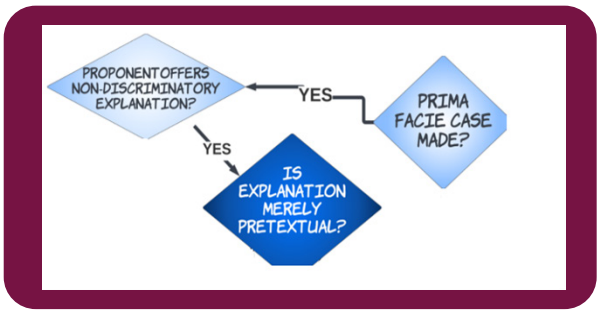
Note that this is not the stage at which the judge's final analysis occurs. It is also crucial to note that Opponent Jones, although bearing the ultimate burden of proof, need not do so at the prima facie stage; "inference" is a pretty low bar. If there is one consistent theme running through the jurisprudence, it is that there is no prescribed set of facts that must, or must not, raise the inference.[23] However, it is not uncommon for a party to assert a *Batson* challenge based on a non-cognizable group characteristic. If the objection isn't based on the excluded juror's race, ethnicity, or gender, thats easy—there is no prima facie case, and the juror remains struck unless they become the subject of another objection ("if at first you don't succeed…"[24]).

Step 2: Neutral Explanation



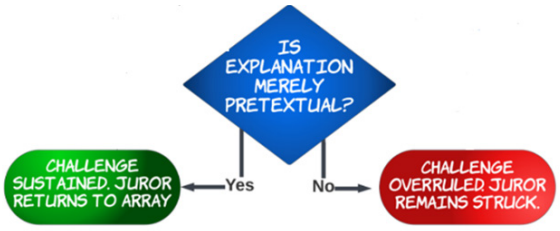
Once Opponent Jones has made out a prima facie case, the burden shifts to Proponent Smith to give a neutral reason for the strike. In the rare event that a party doesn't even try to offer a facially neutral explanation the juror is immediately returned to the array.

In a more likely scenario, Proponent Smith will attempt to offer a facially neutral explanation. That explanation must be clear and reasonably specific.[25] At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed "race neutral."[26]



Step 3: Analysis and Ruling

The final stage in a *Batson* inquiry, assuming both Opponent Jones and Proponent Smith have met the burden for going forward, is for the judge to evaluate the evidence. Usually, the primary object of the analysis is the proponent's "facially neutral" argument. The second stage of the *Batson* inquiry is concerned with prima facie arguments, but here in the third stage trial judges finally get to critically examine the "facially neutral" argument. This step is based purely on the credibility of the argument[27] and judges should not, in the third stage, merely accept what they are told.[28] If the judge rules that Proponent Smith's argument is pretextual, the juror is returned to the array; if the judge accepts the neutral explanation, the juror remains struck.



In assessing the credibility of an argument, the judge may use any reasonable criteria; he or she is not limited to assessing the objective merits found within the four corners of the parties' textual arguments (i.e., what they say about the particular challenge), but considering both objectively and subjectively the entirety of the voir dire process.[29] In fact, appelate courts have recognized that sometimes the most persuasive evidence is non-verbal, or at least non-textual: the demeanor of the proponent may be the best evidence there is that their argument is merely pretextual and the strike impermissible.[30] [31]

If the judge questions his or her own intuition, fear not; courts have enumerated some objective criteria that might be used, although there is no particular test. The following is a non-exhaustive list of some of the verbal/textual criteria a trial judge might consider:[32]

- The reason given for the challenge is unrelated to the facts of the case;
- An explanation based on a group bias where the group trait is not shown to apply specifically to the challenged juror;
- No examination, or only a perfunctory examination, of the challenged juror;

Disparate examination of the challenged juror, i.e., questioning challenged juror to evoke a certain response without asking the same question of other jurors;

- Disparate treatment where there is no difference between responses given and unchallenged jurors;
- Evidence that the jurors in question shared only this one characteristic—their membership in the group—and that in all other respects they were as heterogeneous as the community as a whole (For instance, if the persons challenged, although all Black, include both men and women and are a variety of ages, occupations, and social or economic conditions, indicating that race was the deciding factor)[33];
- A pattern of strikes against Black jurors on the particular venire, e.g., four of six peremptory challenges were used to strike Black jurors;
- The past conduct of the State's attorney in using peremptory challenges to strike all Black people from the jury venire;
- The type and manner of the proponent's questions and statements during voir dire in general: did the questions by their nature or pattern seem purposeful, or did the questions seem disjointed, random, or irrelevant;
- The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions;
- Disparate treatment of jurors with the same characteristics, or who answer a question in the same or similar manner;
- The proponent used all his or her peremptory challenges to strike members of a cognizable group, or all members of a cognizable group were struck.[34]

An Illustration

To illustrate, let's start with the following fact pattern (but don't get hung up on "death-qualified juries;" this is just a simplified example):

Two Hispanic Catholic females are struck by the State in a capital murder case with a Hispanic defendant. Defense objects on the grounds that the jurors were struck because of their ethnicity and/or gender. The prosecutor counters that they were struck only because they are Catholic, on the basis that the Pope has spoken out against the death penalty.

Keeping in mind (believe it or not) that religion is a perfectly permissible reason for a peremptory strike, the judge might be looking for things like:

- Were all the Hispanic jurors struck, or were all the jurors struck Hispanic?
- Were any White Catholics struck?
- Were any male Catholics struck?
- Were female jurors questioned differently?
- Were Hispanic jurors questioned differently about religion than other races or ethnicities?
- Were jurors who gave the same answers treated differently?

Mixed Reasons

When pressed, Proponent Smith might give a mix of reasons. So, continuing the hypothetical, if Proponent Smith says, "yeah ok, they are all Hispanic, and yes they're all female, and maybe that was part of my reasoning, but the MAIN reason is that they are all Catholic," then at that point he must convince the judge that he would have struck them regardless of their ethnicity or gender.[35]

A Short Detour: Article 35.261(b) of the Code of Criminal Procedure

Article 35.261(b) of the Code of Criminal Procedure is problematic. Passed within a year of *Batson*, it mandates the appropriate judicial response if the court sustains a *Batson* challenge. The statute unambiguously states that the court shall call a new array. No court has expressly invalidated 35.261(b), but as the Texas Court of Criminal Appeals explained in 1993, it has declined to enforce calling a new array as a mandatory or exclusive ruling. It held that Article 35.261(b) is at best an outdated legislative response that does not reflect the evolution of *Batson* jurisprudence and may in fact be unconstitutionally restrictive.[36] Needless to say, although a judge might very well decide to call a new array, it isn't a requirement. I think I can safely conclude from the procedural history of the dozens of *Batson* cases I read in preparing this article that calling a new array is an uncommon (now perhaps unheard of) reaction to the circumstances described in 35.261(b). It is not my place to tell other judges whether to ignore the mandate of 35.216(b), but I do, and I'm in good company.

Conclusion

It is likely during a judge's career that they will someday be called upon to rule on a *Batson* challenge. Given the noise surrounding peremptory strikes, it can be intimidating to know exactly what to look for. But despite that noise, as of this writing there are still only three cognizable groups, only the intent of the proponent (the jury striker) is at issue, and the burden never completely shifts from the opponent (opposing counsel). As with almost every decision judges make, intuition is a powerful tool, and such decisions will be given great deference in any appeal decided on the record.

The third in this series of articles will discuss challenges to the array. We can expect that the boundaries of *Batson* will continue to be explored, and the fourth will identify and offer additional resources for further examination of some of the continuing and emerging controversies regarding *Batson* challenges and other jury selection practices. Stay tuned!

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[1] Eric Bayne, "Constitutional Issues in Forming a Jury, Excuses, Exemptions & Challenges for Cause," *The Recorder* (March 2023) at 5.
[2] Tex. Crim. Proc. Code Ann. § 45.029.
[3] Tex. Crim. Proc. Code Ann. § 35.14.
[4] *Peremptory*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/peremptory, 2023 (accessed May 9, 2023).
[5] *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963).
[6] Even in federal courts they are created by statute: Fed. R. Crim. P. 24 for criminal cases; Fed. R. Civ. P. 47 and 28 U.S.C.A. § 1870 for civil cases.
[7] *Ex parte Ewing*, 570 S.W.2d 941, 945 (Tex. Crim. App. 1978).
[8] "An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent [but] the disproportionate effects of state action are not sufficient to establish such a violation." *Hernandez v. N.Y.*, 500 U.S. 352, 372–73, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (O'Connor, J., concurring).
[9] *Batson v. Ky*., 476 U.S. 79 (1986).
[10] *Id*. at 86.

[11] "We have not made an equal protection claim.... We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such." *Batson*, 476 U.S. at 112, (dissent) ref. Tr. of Oral Arg. 6-7.

[12] Price, Capt. John, Endgame mission, Call of Duty: Modern Warfare 2, Windows PC (Activision 2009). This is what you get for reading endnotes.

[13] *Batson*, 476 U.S. at 94.

[14] *Powers v. Ohio*, 499 U.S. 400 (1991).

[15] *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991).

[16] *Ga. v. McCollum*, 505 U.S.42 (1992).

[17] The *McCollum* Court also recognized the State's third-party standing to appeal an adverse *Batson* ruling on behalf of the improperly excluded juror, opining that "the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial." (*Id*. at 56). There are even some opinions that cast all *Batson* challenges as third-party challenges exercised on behalf excluded jurors.

[18] *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994).

[19] For example, the Texas Labor Code lists "race" and "color" as separate and distinct bases for discrimination claims. "An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age. . ." Tex. Labor Code Ann. § 21.051.

[20] *Saint Francis Coll. v. Al-Khazraji,* 481 U.S. 604, (1987); *Hernandez v. N.Y.,* 500 U.S. 352 (1991).

[21] "It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." *Hernandez*, 500 U.S. at 371.

[22] *Salazar v. State*, 795 S.W.2d 187 (Tex. Crim. App. 1990).

[23] "We did not intend the first step to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty. . . Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. *Johnson v. Cal.*, 545 U.S. 162 (2005). The *Johnson* Court also soundly rejected a California statute that required an opponent's prima facie case to satisfy a preponderance standard, i.e., that the evidence raised in the prima facie stage must establish that the proponent more likely than not had engaged in purposeful discrimination.

[24] My mom, probably yours too, usually on the way to the Emergency Room.

[25] *Batson*, 475 U.S. at 98.

[26] *Hernandez*, 500 U.S. at 360.

[27] *Hall v. State,* No. AP-77,062, 2021 WL 5823345, at *17 (Tex. Crim. App. Dec. 8, 2021).

[28] "We do not believe, however, that *Batson* is satisfied by 'neutral explanations' which are no more than facially legitimate, reasonably specific, and clear. Were facially neutral explanations sufficient without more, *Batson* would be meaningless. It would take little effort for prosecutors who are of such a mind to adopt rote 'neutral explanations' which bear facial legitimacy but conceal a discriminatory motive. We do not believe the Supreme Court intended a charade when it announced *Batson*." *Keeton v. State*, 749 S.W.2d 861, 866 (Tex. Crim. App. 1988), holding modified by *Whitsey v. State*, 796 S.W.2d 707 (Tex. Crim. App. 1989).

[29] *Id*.

[30] "The decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province. *Hernandez*, 500 U.S. at 365 (internal punctuation omitted for clarity).

[31] *Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dir*e, 38 Ariz. L. Rev. 739 (1996) is a fascinating treatment of nonverbal cues in a Batson context.

[32] *Keeton*, 749 S.W.2d at 866–67.

[33] internal punctuation omitted

[34] The San Antonio Court of Appeals believes that the factors listed in *Keeton* have been supplanted by the holding in *Purkett*. *Carson v. State*, 986 S.W.2d 24, 29 n.1 (Tex. App.—San Antonio 1998), rev'd on other grounds, 6 S.W.3d 536 (Tex. Crim. App. 1999). I respectfully disagree. *Keeton* makes plain that factors it relays from opinions in other jurisdictions are not exhaustive, merely illustrative. The *Keeton* Court never intended to propound a test; it simply provided some shape to the analysis of facially neutral explanations. I believe that *Keeton* and *Purkett* are easily harmonized. Your mileage may vary, especially if your court is subordinate to the Fourth Court of Appeals (like mine is.) It is my opinion that, because at most *Purkett* merely subsumes the *Keeton* factors, if you base your decision on one of the *Keeton* factors you will have conformed to the *Purkett* standard anyway. Note that other courts of appeal, such as the First Court of Appeals, do not read *Purkett* as supplanting *Keeton*. *Stewart v. State*, 176 S.W.3d 856, 859 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

[35] Professor Russell D. Covey, in his article *The Unbearable Likeness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 Md. L. Rev. 279 (2007) argues that Title VII (from which the *Batson* court extensively borrowed) offers a framework for evaluating mixed motives.

[36] *State ex rel. Curry v. Bowman*, 885 S.W.2d 421 (Tex. Crim. App. 1993).

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Full Court Press

The Blog of the Texas Municipal Courts Education Center

tmcecblog.com

AY 23 TMCEC Academic Schedule

Seminar	Date(s)	City	Venue
Juvenile Case Managers Conference	June 7-9, 2023	Pflugerville	Courtyard by Marriott Austin Pflugerville and Pflugerville Conference Center
Court Administrators Seminar	June 20-22, 2023	Dallas	Hilton Dallas Lincoln Centre
Prosecutors Seminar	June 20-22, 2023	Dallas	Hilton Dallas Lincoln Centre
West Texas Regional Judges Seminar	June 27-29, 2023	El Paso	Wyndham El Paso Airport Hotel
West Texas Regional Clerks Seminar	June 27-29, 2023	El Paso	Wyndham El Paso Airport Hotel
New Judges Seminar	July 10-14, 2023	Austin	Austin Southpark Hotel
New Clerks Seminar	July 10-14, 2023	Austin	Austin Southpark Hotel
Impaired Driving Symposium	July 31-Aug 1, 2023	Odessa	Odessa Marriot Hotel & Conference Center
Legislative Update	August 8, 2023	Lubbock	Overton Hotel
Legislative Update	August 15, 2023	Dallas	Hilton Dallas Lincoln Centre
Legislative Update	August 18, 2023	Houston	Hilton Houston Post Oak by the Galleria
Legislative Update	August 22, 2023	Austin	Austin Southpark Hotel

Traffic Safety Corner

Local Government's Key Role in Promoting Traffic Safety

Ned Minevitz, Program Attorney & Senior TxDOT Grant Administrator, TMCEC

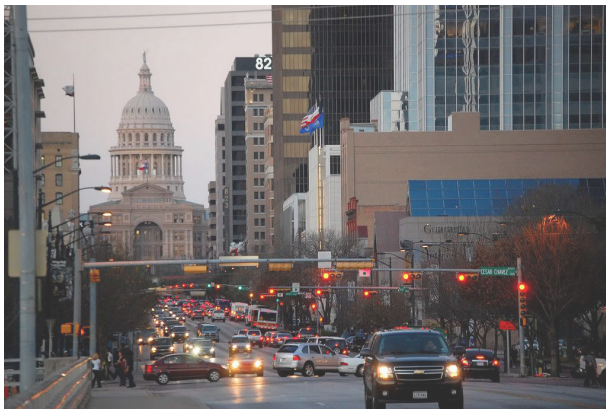
An Alarming Statistical Trend in the Lone Star State

Statistics show that in recent years, driving in Texas has become more dangerous. In 2019, 3,623 people died in Texas traffic fatalities. In 2020, although fewer people were driving, the number increased to 3,896. In 2021, the number of traffic fatalities increased again to 4,489. From 2019 to 2021, Texas pedestrian fatalities jumped from 662 to 841. In 2020, a staggering 149 children aged 14 or younger perished on Texas roads. The next highest total was California (100) and fifteen states had five or fewer such fatalities.[1]

What Can be Done to Reverse these Trends?

National and statewide campaigns help bring awareness to these issues. Television commercials, billboards, and public service announcements expose the public to traffic safety messages such as "Click It or Ticket" and "Drink. Drive. Go To Jail." While this type of community education is undoubtedly effective, it is generally not tailored to a specific location or demographic. Filling this void is where local governments and municipal courts can really shine. Traffic safety messages resonate when they are part of the local conversation in each of our hometowns.

TMCEC's Municipal Traffic Safety Initiatives grant was born with the belief that every Texas city has a "dead man's curve"—a local roadway where the most serious crashes occur. Furthermore, residents of every city collectively have a unique identity, way of life, and lexicon. Because of this, a city's governing body is in an ideal position to convey information to its residents that will prevent traffic incidents. Local governments can tailor their messages to be understandable and relatable in a way that statewide and national campaigns generally cannot. For example, perhaps there is a disproportionate number of texting while driving citations and fatalities at a particular intersection near a school in the hour following dismissal. The local government can focus its traffic safety outreach efforts on combating this specific, localized problem. It can also inject relatable, jurisdiction specific flair to drive the message home in ways that a billboard erected on the interstate cannot (e.g., "Don't Let a Texting While Driving Ticket Wreck Prom Next



Week"). This message could be displayed at the intersection in the earlier hypothetical example in the weeks leading up to prom. It is critical that local governments complement statewide and national campaigns to reverse the negative traffic safety trends Texas is currently facing.

Local Leadership and Local Strategies Can Reduce Injuries, Save Lives, and Make Our Cities Safer

What about local governments further tailoring life-saving traffic safety education to the individuals that need it most? It is indisputable that some drivers are less law-abiding and safe than others. This is not to say that the safest drivers do not need traffic safety education (they do), but strategies that focus on higher risk drivers are vital. One way to identify higher risk drivers is through the court system—and specifically the issuance of misdemeanor traffic tickets and subsequent case filings. To be sure, all defendants facing misdemeanor traffic charges are innocent unless proven guilty. Receiving a citation does not necessarily mean that a person is a bad driver or that he or she broke the law. With this caveat in mind, there are various tools available to Texas municipal courts that can help effect driving behavior improvements among those that are charged with or convicted of traffic offenses. Statutory mechanisms such as teen court, driving safety courses, and traffic safety related conditions of deferred disposition are three oft-utilized examples. Juvenile case managers can engage in a potentially life-saving dialogue with juvenile traffic defendants. It may sound morbid, but municipal court defendants charged with traffic offenses are still alive. Whatever they did on the road to wind up in court did not claim their life, but it potentially could have. There is a fine line between a speeding ticket and a speeding fatality. These defendants' driving behaviors can—and must—undergo positive changes. Local governments and municipal courts are ideally situated to achieve this.

For information on how your municipal court can make a difference, visit https://www.tmcec.com/mtsi/.

[1] Traffic statistics in this article are from the National Highway Traffic Safety Administration and the Texas Department of Transportation.

2023 Impaired Driving Symposium!

July 31-August 1, 2023
Odessa Marriott Hotel & Conference Center

This special 8-hour conference gives judges the opportunity to learn about roles and responsibilities in impaired driving cases alongside judges from all levels of the judiciary!

The Symposium will count for an estimated 8 hours of judicial education and 6 hours of CLE. For the most current conference information, visit https://www.tmcec.com/mtsi/impaired-driving-symposium/. Registration fees are $150, CLE reporting is $100. There is NO CHARGE for one night of lodging as long as your court is at least 30 miles from the Odessa Marriott Hotel & Conference Center.

Topics include:

- Commercial Driver's License Masking
- Legislative and Case Law Updates
- S.B. 6 (2021)
- Facilitated Scenarios, and more!

Questions? Contact Ned Minevitz at ned@tmcec.com.

Elizabeth De La Garza
TxDOT Grant Administrator, TMCEC

Characters in the Courtroom

Teaching Students about Who Is Who in Your Courtroom

This article and lesson were created using TxDOT traffic safety education funding

Driving on the Right Side of the Road (DRSR), a traffic safety education grant administered through TMCEC, encourages courts to reach out to their community's schools to help teach the rule of law and show the proactive side of justice. Municipal courts can accomplish this outreach through school visits or by having students visit their facility to see for themselves how an active court can help save lives and keep their communities safe! DRSR has created lessons and other traffic safety education materials to help in this outreach. And all these materials are free to courts, schools, and community groups thanks to our generous TxDOT grant.

Some of these outreach materials are lessons and curriculum that court personnel can use with student visitors. The "Characters in the Courtroom" lesson is timely, with students and class trips beginning to happen this spring. While the lesson was written by teachers for use by educators in the classroom, parts or all the lesson can be used by court personnel to share with visiting students how the municipal (and other) courts work and how they enforce the rule of law. This lesson is suggested for 3rd grade through high school ages (although the TEKS – Texas Essential Knowledge and Skills indicators are only for 5th grade through high School).

Before beginning the "Characters in the Courtroom" lesson post the Learning Stations one through ten on the walls of the area that is being used for the presentation. To begin the lesson, the person representing the court for the student visit will talk to the students about how various people who work in the courthouse have special responsibilities. These individuals make sure everyone involved in the legal process receives fair and equal treatment under the law. Students then will receive a copy of the "Diagram of the Courtroom" handout. Students will use this handout while touring the Learning Stations. Using the information from the Learning Station placards, students will identify each person

in the courtroom (students below 5th grade may need assistance with this). Students may work in pairs so that students can share ideas, although with high school students, teachers (facilitators) may choose to do this section individually and without students conversating with one another. After students have completed this part of the lesson, debrief the activity by going over the correct answers and discussing the importance of each courtroom character.

For the next part of the lesson, have Post-It notes prepared with each of the court room jobs ready (one for each student) and affix them to the back of each student (have tape ready for this as Post-It notes sometimes won't stick sufficiently to adhere to clothing). Students SHOULD NOT see which job they have affixed to their back. Tell the students they are going to play "Who Am I?". Students should walk around and interact with each other and attempt to determine which character they are by asking classmates questions about their job. These questions can only be answered with a "YES" or "NO" and can only be about their jobs. Students are NOT allowed to ask questions such as "Am I the judge?" Students can only ask each classmate two questions before moving on to another person. Once students think they know who they are, they should sit down. Ask each student about who they are and have them describe their job. Ask them how many questions they had to ask to determine the answer.

Court personnel that have a longer time can continue the lesson and use the Extension Activity for in-depth talks about what the court does and its ultimate responsibility of saving lives and keeping people safe. Students can also produce a help wanted ad or poster for their position. To do this, courts will need to provide paper and colors/markers and a clear area for students to work.

Before using the lesson, please send a copy to the visiting teacher(s) first. This way the teacher can scan it for issues they might have as a school with the subject matter. Teachers will also want to note the TEKS (Texas Essential Knowledge and Skills) number for their records. Teachers are required to cover certain TEKS for their important spring tests. By covering this objective, court personnel will help educators in their goal to cover all needed educational standards before the STAAR (State of Texas Assessments of Academic Readiness) test.

After reviewing the lesson, if you or other court staff would like to discuss how best to prepare for your student visit or your courts visit to the school, please do not hesitate to contact TMCEC. DRSR would love to help with any outreach your court is planning! Helping make your student outreach as painless as possible is what DRSR does!

Having a student outreach event saves lives and DRSR would love to help your court in this effort!

To access the Characters in the Courtroom Lesson, visit https://www.tmcec.com/drsr/

C3 Spotlight

What Municipal Courts Need to Know about the Texas Open Meetings Act

Benjamin Gibbs, Program Attorney and Deputy Counsel, TMCEC

Courts and councils exist in different spheres most of the time. Sometimes, though, court staff must cross the barrier and enter the other world. Once a year, during budget season, a court administrator may be called on to present the city with the realities of where the staffing money goes. Court staff may be called upon to deliver quarterly or monthly budgeting or financial updates to the council. If the council considers changing to or from a court of record, expanding or restricting enabling ordinances' supplemental jurisdiction, or the processes adopted for administrative hearings and appeals, the court has an interest in, and may be called upon to discuss, the effects and realities.

Realistically, a year or more could elapse between these appearances, and a quick refresher on some pitfalls for the unwary may be in order. Staff may be tempted to rush in and address the council just like any resident of the city. These appearances can be uncomfortable and awkward, but by keeping a few rules in mind, they can at least be productive.

As an example, put yourself in the shoes of a hard-working court administrator. Your court is in desperate need of a part-time employee. You feel you have the case volume, the backlog, the room in the budget, and the blessing of the judge. You have spent uncounted hours in council chambers, because that is where the municipal court meets, but you have never attended a city council meeting. Long experience has taught you that you should do some research. Where to begin?

The Texas Open Meetings Act

The Texas Open Meetings Act (the Act) is codified in Chapter 551 of the Texas Government Code. Like so many important acts, there are just a few basic rules, followed by a list of exceptions and convolutions many times longer. The rule that guides the Act is very short and very direct.

"Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter." Tex. Gov't Code Ann. § 551.002.

As with any simple rule, the first complication comes in the definitions. Generally, the definitions we need to understand the Act are in Section 551.001. A "governmental body" is an extremely broad category, including entities within the executive and legislative branches of the state, commissioners courts, municipal governing bodies, school boards, and any rulemaking or quasi-judicial body of a county or municipality. Municipal courts fall outside this definition. Municipal courts are neither executive nor legislative bodies. They are part of the state judiciary hosted by municipalities, not city departments exercising quasi-judicial power (like Zoning Boards of Adjustment, which do fall under the Act).

The Act covers meetings, not people. Although municipal court staff are part of a body that is not covered, when appearing at an open meeting, the rules still apply. Those rules may frustrate the purpose of an address to the council if they are not followed diligently, sometimes days in advance.

The Agenda

Generally, everything that happens at an open meeting must be placed on the agenda. Because the agenda is paramount to the process, there are unalterable rules provided in the Act.

The governmental body must give written notice of the date, hour, place, and subject of each meeting held. Tex. Gov't Code Ann. § 551.041. The requirement that a notice include the "subject" means that the notice must give the public advance notice of each topic that will be considered at the meeting. *Cox Enters. Inc. v. Bd. Of Trs.*, 706 S.W.2d 956, 958 (Tex. 1986). Notice must be posted in a place readily accessible to the general public, including on the Internet, for at least 72 hours before the scheduled time of the meeting. Tex. Gov't Code Ann. § 551.043.

This means that every subject to be discussed must be known to the city at least 72 hours before the meeting begins. Although the city council may be honored by the unannounced presence of the august body of the court, if the matter in question is not on the agenda, it cannot be discussed at the meeting.

There is a provision for public comment. Tex. Gov't Code Ann. § 551.007. A city council must allow members of the public who wish to address an item on the agenda at the meeting before or during the body's consideration of the item. *Id.* Many cities apply this to allow a period for general public comment at the beginning of the meeting, allowing members of the public to address whatever concerns they may have.

However, this is not blank authority to discuss anything pertinent to the moment. There is a hard rule governing off-topic discussions.

If, at a meeting, a member of the public or of the council inquires about a subject that is not on the agenda, the council members are authorized to respond in one of three ways. Tex. Gov't Code Ann. § 551.042. The member may respond with a statement of specific factual information given in response to the inquiry. The member may recite existing policy in response to the inquiry. The council may deliberate whether to put the matter on a future agenda. *Id*.

It is easy to go down wrong paths in this statute. Attempting to give a statement of specific factual information or a recitation of existing policy without degenerating into argument and debate can be impossible. Many city councils have policies to absolutely limit these procedures to specific, acceptable statements. "We are aware of the situation," or "we were not aware of this situation" are almost always safe statements of specific factual information. A brief statement of the rules under Section 551.042 as to number of minutes allotted for each commenter is generally always a safe recitation of existing policy. The situation described in the opening paragraphs is typical of this kind of approach.

Back to our court administrator example. It is late July, and the budget notices have started cropping up across city rights of way. The budget will soon be due, and you would like to be considered. You look over your presentation, and you feel prepared. With vim and fire, you present your case, sure no civil servant could hear your plea unmoved. That's when the mayor says, "Thank you for your input. We were not aware of this issue. The next person on the list for public comment is Grady Smith. You have seven minutes."

You stand, hollow and dejected. Why was your plea rejected without debate? Where was the public discourse? What should you have done?

The Anticlimax

First, contact the City Secretary more than 72 hours before the meeting. Ask if the relevant topic has been added to the agenda. A city will have policies, often set by ordinance, resolution, or charter, as to who may add items to an agenda. This is often restricted to council members and mayors. If the item you intend to address is not on the agenda, it cannot be discussed and any action taken may be voidable. Tex. Gov't Code Ann. § 551.041.

Even if the topic does not require action or debate from the council, such as delivery of the results of a study or survey, the delivery of information should be on the agenda. The danger of presenting such a report off-agenda is that future action taken on that information may be voidable. *Ferris v. Tex. Bd. of Chiropractic Exam'rs,* 808 S.W.2d 514, 518 (Tex. App.—Austin 1991, writ denied); see *Porth v. Morgan*, 622 S.W.2d 470, 473, 475-76 (Tex. App.—Tyler 1981, writ ref'd n.r.e.).

If you are addressing the council and making a request, make sure the request is on the agenda. If you deliver your entreaty without first placing it on the agenda, and the council begins a spirited debate on the subject, that could spell disaster. If the council later acts and provides you with the new employee, a citizen could sue to have the action voided and the position removed.

The Amended Answer

Let us suppose again. You contact the City Secretary well in advance of the meeting. The secretary, following protocol, asks you the details of the item to be added to the agenda. You do not wish to improperly limit the discussion, so you settle on "Municipal Court Business." That item is added to the agenda, and you address the council with your particular issue. The council prepares for a vote, when the City Attorney leans in and says, no, this will have to be pushed off until a later agenda, with an updated description.

The reality sets in. You will have to return and convince them yet again. What have you done this time?

A notice in the agenda is not a box to be checked, but a hurdle to be jumped. The notice must be sufficiently specific to apprise the general public of what will be considered during the meeting. *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762 (Tex. 1991). The notice must lay down, in terms comprehensible to the laity, the nature of what will be discussed, and what action may be taken.

Notice must specifically disclose the subjects to be considered at the meeting. *Cox Enters., Inc. v. Bd. of Trs. Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 959 (Tex. 1986). As public interest increases, the Act requires correspondingly more detailed descriptions of the subject to be discussed. *Id; Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 180 (Tex. App.—Corpus Christi 1990, writ denied). How your city will view adding a part-time employee to your court will dictate how much notice is required.

Generally, it is a best practice to be open and clear about what will be requested. Depending upon your city's practice, this may mean anything from a few sentences to a short memo describing the request and any action expected or requested.

The Afterword

Courts and cities are engaged in a partnership. Cities host municipal courts. Municipal courts enforce city ordinances. Effective communication between the two is as essential as effective separation between them. In order to maintain that separation while communicating, remember the rules. The Open Meetings Act is designed to facilitate public discourse, but the heavy-handed rules can also stymy it. With a little preparation and care, you can maximize the impact of your interactions and minimize their number.

U.S. Justice Department Issues "Dear Colleague" Letter to Courts Regarding Fines and Fees for Youth and Adults

TMCEC Summary: On April 20, 2023, the Justice Department issued a Dear Colleague Letter for state and local courts and juvenile justice agencies regarding the imposition and enforcement of fines and fees for adults and youth. The letter addresses common court-imposed fines and fees practices, and cautions against those practices that may be unlawful, unfairly penalize individuals who are unable to pay, or otherwise have a discriminatory effect. The department provides this letter as part of its ongoing commitment to fairness, economic justice and combating the policies that disproportionately contribute to justice system involvement for low-income communities.

The letter highlights a number of key issues regarding fines and fees, such as the importance of conducting a meaningful ability-to-pay assessment before imposing adverse consequences for failure to pay, considering alternatives to fines and fees, guarding against excessive penalties and ensuring due process protections, including the assistance of counsel when appropriate.

The letter reminds court systems and other federal financial assistance recipients of their ongoing obligations not to discriminate on the basis of race, color, national origin, religion, sex and disability; to provide meaningful access to individuals with limited English proficiency; and to ensure that appropriate recordkeeping can help identify and avoid potential violations of federal nondiscrimination laws. The department will also follow up on this letter by building a best practices guide, highlighting innovative work by states and court leaders in this area.

"Justice in the United States should not depend on one's income or background," said Associate Attorney General Vanita Gupta. "The Justice Department's updated guidance addresses practices that disproportionately affect low-income communities and people of color, can trap individuals and their families in patterns of poverty and punishment and may violate the civil rights of adults and youth alike.

Many jurisdictions have innovated to reduce reliance on fines and fees, and the Justice Department is building on that momentum to advance equal justice and public safety for all."

"The unfettered imposition of fines and fees across the country has entrapped poor people, too many of whom are people of color, in a cycle of escalating debt, unnecessary incarceration and debilitating entanglement in our justice system," said Assistant Attorney General Kristen Clarke of the Justice Department's Civil Rights Division. "By confronting the harms that can result from aggressive imposition of fines and fees, we can bring an end to debtors' prisons and promote equal justice under law for all. The Justice Department stands ready to help courts and juvenile justice agencies put in place reforms and practices that address public safety needs while protecting civil and constitutional rights."

"Obligations to satisfy fines and fees have a devastating effect on adults and youth who are experiencing poverty and other economic adversities, trapping many in an unending cycle of poverty and debt," said Director Rachel Rossi of the Office for Access to Justice. "These obligations can also interfere with full and fair access to our justice system. For these reasons, we must remain vigilant to prevent harmful practices that do not serve the interests of justice. This letter is an important step in that ongoing process."

"Fees and fines practices in the criminal and juvenile justice systems impose the heaviest burden on those who are least able to pay, drawing them deeper into the justice system," said Principal Deputy Assistant Attorney General Amy L. Solomon of the Office of Justice Programs. "We will be working with jurisdictions across the country to end or limit these unfair practices, so that adults and youth in the justice system have the opportunity they need to move forward in their lives."

In the coming weeks, the Bureau of Justice Assistance will also release a solicitation seeking a training and technical assistance provider to work with a select number of jurisdictions interested in understanding and reforming their fines and fees policies and practices. The ultimate goal is to help these jurisdictions reduce the use of unjust fines and fees and redirect the resources used in these systems into activities with a greater return on public safety.

The letter is grounded in constitutional principles, including the Sixth, Eighth and Fourteenth Amendments, as well as federal nondiscrimination statutes, including Title VI of the Civil Rights Act of 1964 (Title VI) and the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act). The April 20, 2023 letter in its entirety is provided on the following pages. Additional information about the Civil Rights Division's work to uphold and protect civil and constitutional rights is available online at www.justice.gov/crt. Complaints about discriminatory practices may be reported to the Civil Rights Division through its internet reporting portal at civilrights.justice.gov.

Adapted from a press release by the Department of Justice's Office of Public Affairs on April 20, 2023: available at https://www.justice.gov/opa/pr/justice-department-issues-dear-colleague-letter-courts-regarding-fines-and-fees-youth-and-adults.

U.S. Department of Justice

Office of the Associate Attorney General

Associate Attorney General *Washington, D.C. 20530*

April 20, 2023

Dear Colleague:

The U.S. Department of Justice (Department) is committed to working with state and local courts and juvenile justice agencies to ensure that their assessment of fines and fees is constitutional and nondiscriminatory. To advance that goal, the Department has revised and updated a letter it previously issued in 2016 that focused on the assessment of fines and fees against adults, as well as a 2017 advisory addressing the assessment of fines and fees against juveniles. The letter, issued today by the Civil Rights Division, Office of Justice Programs, and Office for Access to Justice, addresses in detail the assessment of fines and fees against both adults and juveniles. The letter includes an updated discussion of the relevant case law on the assessments of fines and fees, cautions against discriminatory enforcement of fines and fees, and details the obligations of federal funding recipients to comply with federal statutory prohibitions against discrimination in the imposition and collection of fines and fees.

The letter outlines circumstances where unjust imposition and enforcement of fines and fees violate the civil rights of adults and youth accused of felonies, misdemeanors, juvenile offenses, quasi-criminal ordinance violations, and civil infractions, as well as circumstances that raise significant public policy concerns. In particular, the letter outlines the below seven constitutional principles:

(1) The Eighth Amendment prohibits the imposition of fines and fees that are grossly disproportionate to the severity of the offense;

(2) The Fourteenth Amendment prohibits incarceration for nonpayment of fines and fees without first conducting an ability-to-pay determination and establishing that the failure to pay is willful;

(3) The Fourteenth Amendment requires the consideration of alternatives before incarcerating individuals who are unable to pay fines and fees;

(4) The Fourteenth Amendment prohibits the imposition of fines and fees that create conflicts of interest;

(5) The Fourteenth Amendment prohibits conditioning access to the judicial process on the payment of fees by individuals who are unable to pay;

(6) The Sixth and Fourteenth Amendments require due process protections, such as access to counsel in appropriate cases, as well as notice, when imposing and enforcing fines and fees; and

(7) The Fourteenth Amendment prohibits the imposition of fines and fees in a manner that intentionally discriminates against a protected class.

In addition to constitutional responsibilities and related public policy concerns, the letter outlines the obligations of recipients of federal financial assistance (including courts) under Title VI of the Civil

Rights Act of 1964 (Title VI), the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), and other statutes with nondiscrimination provisions. Collectively, these statutes, and their implementing regulations, prohibit recipients of federal financial assistance from discriminating on the basis of race, color, national origin, religion, and sex. For example, under Title VI and the Safe Streets Act, which both prohibit national origin discrimination, state court systems and other federal funding recipients are required to take reasonable steps to provide meaningful access to people who have limited proficiency in English.

As noted in the letter, imposition of fines and fees that do not comply with constitutional and statutory requirements, or that fail to take account of other public policy concerns, may erode trust between local governments and their constituents, increase recidivism, undermine rehabilitation and successful reentry, and generate little or no net revenue. The letter further notes that the detrimental effects of unjust fines and fees (including escalating debt, being subjected to changes in immigration status, and loss of one's employment, driver's license, voting rights, or home, among others) fall disproportionately on low-income communities and people of color, who are overrepresented in the criminal legal system and may already face economic obstacles arising from discrimination, bias, or systemic inequities. Moreover, the letter emphasizes the negative impact of imposing fines and fees on youth, which may also fall on families in low-income communities and people of color, because youth are unlikely to be able to afford to pay fines or fees without familial support.

The letter also identifies best practices and recommendations that courts can consider and adopt related to each principle. The letter acknowledges that many states, municipalities, and court leaders have adopted innovative approaches to reduce their reliance on fines and fees. The Department's Office for Access to Justice is developing a best practices guide, which will highlight work and efforts by states, municipalities, and court leaders in this area.

The Department remains committed to collaborating with court leaders and stakeholders in the criminal legal system to develop and share solutions. The Department is open to serve as a resource, collaborate and promote solutions, and provide grant funding and technical assistance to state, county, local, and tribal courts to improve the functioning and fairness of the justice system.

To that end, in the coming weeks, the Department's Office of Justice Programs, Bureau of Justice Assistance will release a solicitation ("The Price of Justice: Rethinking the Consequences of Fines and Fees") seeking a training and technical assistance provider to work with a select number of jurisdictions interested in understanding and reforming their fines and fees policies and practices, and ultimately seeking to reduce the use of unjust fines and fees and redirect the resources used in these systems into activities with a greater return on public safety. The Department of Justice supports wide dissemination of the letter.

Sincerely,

Vanita Gupta
Associate Attorney General

U.S. Department of Justice

Civil Rights Division

Office of Justice Programs

Office for Access to Justice

Washington, D.C. 20530

April 20, 2023

Dear Colleague:

The U.S. Department of Justice (Department) is committed to working with state and local courts and juvenile justice agencies to ensure that their assessment of fines and fees is constitutional and nondiscriminatory.[1] Court leaders, court administrators, lawmakers, advocates, and other stakeholders have urged the Department to provide greater clarity to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices.[2]

This letter revises and updates a similar letter issued by the Department in March 2016[3] regarding the imposition and enforcement of fines and fees on adults in the criminal justice system, and a January 2017 advisory[4] setting forth the constitutional and statutory responsibilities regarding imposing and enforcing fines and fees on youth involved in the juvenile or criminal justice systems. This letter addresses some of the most common court-imposed fines and fees practices—applicable to adults and youth—with potential to run afoul of the U.S. Constitution.[5] This letter also describes relevant constitutional and statutory protections against discrimination and explains how they apply to fines and fees. Finally, many states, municipalities, and court leaders are adopting innovative approaches to reduce their reliance on fines and fees, and this letter

[1] This document does not bind the public. Rather, it advises the public of how the Department understands, and is likely to apply, binding laws and regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion) (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015)).

[2] As used in this letter, "courts" include state or local courts and the juvenile justice system applicable to youth, including juvenile courts and juvenile justice agencies. "Fines" are monetary punishments for infractions, misdemeanors, or felonies that may be imposed to deter crime or punish people convicted of an offense. "Fees" are 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. *See generally* Council of Econ. Advisers, *Issue Brief: Fines, Fees, and Bail* 1 (Dec. 2015), https://perma.cc/K88Z-8L8X. The Department notes that any non-Departmental studies or external resources cited or linked to in this letter are provided for informational purposes only and do not necessarily represent the views of the Department.

[3] This letter updates and supersedes the March 2016 Dear Colleague Letter, which was rescinded in December 2017.

[4] This letter also updates and supersedes the January 2017 Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Youth Involved with the Juvenile Justice System, which was rescinded in December 2017.

[5] This letter addresses only fines and fees levied against individuals. Fines and fees levied against corporations do not raise the same concerns. Likewise, this letter does not address the imposition or enforcement orders relating to restitution for crime victims.

identifies some best practices, recommendations, and policy considerations that courts can consider and adopt.

There are circumstances in which assessment of fines and fees may be lawful, and many jurisdictions, lacking other dedicated sources of funding, rely on some of the revenue generated by fines and fees for important purposes. For example, some jurisdictions use some of the revenue generated by fines and fees to support crime victim services, including to reimburse victims for a wide variety of crime-related expenses, such as medical costs, mental health counseling, lost wages, as well as funeral and burial expenses.

But as this letter describes, in certain circumstances, unjust imposition and enforcement of fines and fees violate the civil rights of adults and youth accused of felonies, misdemeanors, quasi-criminal ordinance violations, and civil infractions.[6] The unjust imposition of fines and fees also raises significant public policy concerns. Imposing and enforcing fines and fees on individuals who cannot afford to pay them has been shown to cause profound harm. Individuals confront escalating debt; face repeated, unnecessary incarceration for nonpayment of fines and fees; experience extended periods of probation and parole; are subjected to changes in immigration status; and lose their employment, driver's license, voting rights, or home. This practice far too often traps individuals and their families in a cycle of poverty and punishment that can be nearly impossible to escape.[7] The detrimental effects of unjust fines and fees fall disproportionately on low-income communities and people of color, who are overrepresented in the criminal justice system and already may face economic obstacles arising from discrimination, bias, or systemic inequities.[8]

Fines and fees can be particularly burdensome for youth, who may be unable to pay court-issued fines and fees themselves, burdening parents and guardians who may face untenable choices between paying court debts or paying for the entire family unit's basic necessities, like food, clothing, and shelter.[9] Children subjected to unaffordable fines and fees often suffer escalating negative consequences from the justice system that may follow them into adulthood.[10]

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[6] *See, e.g.*, C.R. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* (Mar. 4, 2015), https://perma.cc/7QR3-BRLD (finding that the Ferguson, Missouri municipal court routinely deprived people of their constitutional rights to due process and equal protection and other federal protections); Brennan Ctr. for Just., *Criminal Justice Debt: A Barrier to Reentry* (2010), https://perma.cc/L7JA-RKXY (reporting on fine and fee practices in fifteen states); Am. C.L. Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (Oct. 2010), https://perma.cc/Y7BU-SK85 (discussing practices in several states); Dick M. Carpenter II et al., Institute for Justice, *The Price of Taxation by Citation: Case Studies of Three Georgia Cities That Rely Heavily on Fines and Fees* (2019), https://perma.cc/7XK4-HLQ8.

[7] *See* Council of Econ. Advisers, *supra* note 2, at 1 (describing the impact on the poor of fixed monetary penalties, which "can lead to high levels of debt and even incarceration for failure to fulfil a payment" and create "barriers to successful re-entry after an offense"); Ala. Appleseed Ctr. for Law and Just., *Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama's Wealth Divide* (2018), https://perma.cc/A8Z9-Y3U4.

[8] *See, e.g.*, Tex. Fair Def. Project & Tex. Appleseed, *Driven by Debt: The Failure of the OmniBase Program* (2021), https://perma.cc/2AJK-VEX3; Maria Rafael, Vera Inst. of Just., *The High Price of Using Justice Fines and Fees to Fund Government in Washington State* 5 (2021), https://perma.cc/26G3-7BNS.

[9] Leslie Paik & Chiara Packard, Juv. Law Ctr., *Impact of Juvenile Justice Fines and Fees on Family Life: Case Study in Dane County, WI* 12-14 (2019), https://perma.cc/T837-T6TY.

[10] Jessica Feierman, Juv. Law Ctr., *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System* (2016), https://perma.cc/C78Z-Z6KR. Recognizing these concerns, many states have eliminated or significantly reduced the number of fines and fees in their juvenile systems since the Department issued the 2017 advisory. These states include California, Louisiana, Maryland, Nevada, New Mexico, New Hampshire, New Jersey,

Notably, in addition to raising serious legal and practical concerns, assessment of unaffordable fines and fees often does not achieve the fines' and fees' stated purposes. In many cases, unaffordable fines and fees undermine rehabilitation and successful reentry and increase recidivism for adults and minors.[11] And to the extent that such practices are geared toward raising general revenue and not toward addressing public safety, they can erode trust in the justice system.[12]

The legal discussion below is intended to serve as a guide to constitutional protections related to assessing fines and fees and additional legal protections against the discriminatory imposition of fines and fees. Whether a particular policy regarding fines and fees complies with or violates these constitutional principles or federal statutory obligations requires a fact-specific analysis. This letter also identifies recommended policy considerations relevant to determinations about the circumstances in which fines and fees should and should not be imposed.

As court leaders and criminal justice stakeholders, your leadership on fines and fees is critical to ensure equal access to justice. Accordingly, as you review and reflect on this information, we strongly encourage you to consider alternative ways to obtain resources other than through the assessment of fines and fees. We also recommend that you review your jurisdiction's rules and procedures to ensure that they comply with the U.S. Constitution and federal law and promote sound public policy. We support wide dissemination of this letter, and welcome collaboration with you to develop and share solutions. We encourage you to forward this letter to every judge in your jurisdiction; to provide appropriate training for judges, prosecutors, and

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Oregon, Texas, Utah, and Virginia as well as individual localities such as Chatham County, Georgia; Dane County, Wisconsin; Johnson County, Kansas; Macomb County, Michigan; Philadelphia, Pennsylvania; and Shelby County, Tennessee. *See* Cristina Mendez, Jeffrey Selbin & Gus Tupper, *Blood from a Turnip: Money as Punishment in Idaho*, 57 Idaho L. Rev. 767 (2021) (listing the states and localities that have reduced or eliminated juvenile fees to date), https://perma.cc/N29P-PFLE; Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. Rev. 401 (2020) (describing the growing national movement to repeal juvenile fines and fees), https://perma.cc/T5K6-UQ2S.

[11] Berkeley Law Pol'y Advoc. Clinic, *Making Families Pay* 18 (2017), https://perma.cc/RQK9-JQFG (reporting that, in fiscal year 2014-15, Orange County spent "over $1.7 million to employ 23 individuals to collect just over $2 million" in juvenile administration fees, and ultimately netted only $371,347, which represents less than .0068% of its annual budget); Matthew Menendez et al., Brennan Ctr. for Just., *The Steep Costs of Criminal Justice Fines and Fees* 9 (2019), https://perma.cc/7MQS-32KE (describing the high costs of fines and fees enforcement, including in-court proceedings, jail costs, warrant enforcement, and probation supervision, and estimating that collecting revenue through fines and fees consumes almost 100 times more resources than collecting it through general taxation); Alexandra Bastien, *Ending the Debt Trap: Strategies to Stop the Abuse of Court-Imposed Fines and Fees* 4-7 (2017), https://perma.cc/FZ2R-TP2M (describing the inefficiency and consequences of raising revenue through fines and fees); Alex R. Piquero & Wesley G. Jennings, *Justice System-Imposed Financial Penalties Increase Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 Youth Violence & Juv. Just. 325 (2017), https://journals.sagepub.com/doi/10.1177/1541204016669213 (finding a strong positive correlation between monetary sanctions and youth recidivism); *see also* Council of Econ. Advisers, *supra* note 2.

[12] *See* Conf. of State Ct. Adm'rs, *2011-2012 Policy Paper: Courts Are Not Revenue Centers* (2012), https://perma.cc/75FU-BS5C. In some jurisdictions, the revenue may even be lower than the cost to incarcerate people for the failure to pay fines and fees. Mathilde Laisne et al., Vera Inst. of Just., *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans* 24 (2017), https://perma.cc/VYW5-LPWS (determining that pretrial fines and fees enforcement costs New Orleans $1.9 million more in jail costs than the revenue it generates for criminal justice agencies). Critically, many jurisdictions do not track the costs of collecting fines and fees; it is therefore difficult to assess whether it effectively generates revenue at all. *See* Menendez et al., *supra* note 11, at 9 (describing the high costs of fines and fees). Thus, jurisdictions are encouraged to closely track these costs to determine whether fines and fees generate revenue.

probation officials regarding fines and fees; and to develop resources, such as bench books, to assist judges in performing their duties lawfully and effectively.

A. Constitutional Principles Relevant to the Assessment and Enforcement of Fines and Fees

The basic constitutional principles relevant to the imposition and enforcement of fines and fees by state and local courts, which apply to both adults and youth,[13] are grounded in the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. These principles, explained in subsequent sections below, are:

(1) The Eighth Amendment prohibits the imposition of fines and fees that are grossly disproportionate to the severity of the offense;

(2) The Fourteenth Amendment prohibits incarceration for nonpayment of fines and fees without first conducting an ability-to-pay determination and establishing that the failure to pay is willful;

(3) The Fourteenth Amendment requires the consideration of alternatives before incarcerating individuals who are unable to pay fines and fees;

(4) The Fourteenth Amendment prohibits the imposition of fines and fees that create conflicts of interest;

(5) The Fourteenth Amendment prohibits conditioning access to the judicial process on the payment of fees by individuals who are unable to pay;

(6) The Sixth and Fourteenth Amendments require due process protections, such as access to counsel in appropriate cases, as well as notice, when imposing and enforcing fines and fees; and

(7) The Fourteenth Amendment prohibits the imposition of fines and fees in a manner that intentionally discriminates against a protected class.

1. The Eighth Amendment prohibits the imposition of fines and fees that are grossly disproportionate to the severity of the offense.

The Eighth Amendment prohibits imposing excessive fines. A fine is unconstitutionally excessive under the Eighth Amendment when it "is grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998). In *Timbs v. Indiana*, the U.S. Supreme Court unanimously held that the Excessive Fines Clause is incorporated by the Fourteenth Amendment's Due Process Clause and is therefore applicable to the states. 139 S. Ct. 682, 687 (2019). The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin v. United States*,

[13] As the U.S. Supreme Court has clearly held, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967).

509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

When assessing fines and fees that are at least in part punitive, courts are required to consider the severity of the offense. *Bajakajian*, 524 U.S. at 336-37; *Austin*, 509 U.S. at 609-10. As part of this broader analysis, we recommend that courts also consider individuals' economic circumstances when assessing fines and fees. The U.S. Supreme Court in *Timbs* noted that the Magna Carta "required that economic sanctions . . . 'not be so large as to deprive [an offender] of his livelihood.'" 139 S. Ct. at 688 (second alteration in original) (quoting *Browning-Ferris*, 492 U.S. at 271). Some courts have required consideration of an individual's economic circumstances as part of the proportionality assessment.[14]

Regardless of whether it is constitutionally required, consideration of an individual's economic circumstances is a logical approach because fines and fees will affect individuals differently depending on their resources. When a person already cannot afford a basic need, such as housing, a fine or fee of any amount can be excessive in light of that person's circumstances, and thus may not be appropriate even if it were legally permitted.[15]

In addition, there are practical realities that weigh substantially against imposing fines and fees against youth. For example, minors are generally unable to earn the money needed to pay fines and fees because many are too young to legally work, are of compulsory school age or full-time students, have great difficulty obtaining employment due to having a juvenile or criminal record, or simply do not yet have employable skills typically expected of adults. As such, the imposition of any fine or fee on youth has the potential to be an excessive and unreasonable burden.[16]

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[14] The Washington Supreme Court recently observed, "[a] number of modern state and federal courts have joined the chorus of legal scholars to conclude that the history of the clause and the reasoning of the Supreme Court strongly suggest that considering ability to pay is constitutionally required." *Seattle v. Long*, 493 P.3d 94, 112 (Wash. 2021); *see also, e.g.*, *Dep't of Labor & Emp't v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019) (History and precedent constitute "persuasive evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment."); *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 871 (Pa. 2014) ("[T]he excessive fines analysis . . . requires . . . a thorough examination of every property owner's circumstances . . . .").

[15] Fining a person who is unhoused can destabilize that person and can further obstruct their ability to satisfy basic needs. Moreover, fining a person in such circumstances is likely ineffective. Unhoused individuals—who are unable to afford a place to live or sleep—are unlikely to be able to pay any fine or fee. *See* Jessica Mogk et al., *Court-Imposed Fines as a Feature of the Homelessness-Incarceration Nexus: A Cross-Sectional Study of the Relationship Between Legal Debt and Duration of Homelessness in Seattle, Washington, USA*, 42 J. Pub. Health e107 (2019), https://perma.cc/SP6Y-ZLEL (finding that unhoused adults with unpaid fines and fees were unhoused for longer periods of time than those with no legal debt, that fewer than one in four unhoused adults with debt from legal fines had ever made a payment on them, and that more than half of sentences imposed included a fine); *see also Blake v. City of Grants Pass*, No. 1:18-cv-01823, 2020 WL 4209227, at *11 (D. Or. July 22, 2020) (observing that unhoused people "do not have enough money to obtain shelter, so they likely cannot pay . . . fines"), *aff'd in part, vacated in part on other grounds sub nom. Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022). Further, laws requiring the imposition of fines and fees against unhoused individuals for behaviors related to living unhoused—such as panhandling or sleeping in public—may violate the First Amendment or the Eighth Amendment's Cruel and Unusual Punishment Clause. *See Martin v. Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (holding that, "as long as there is no option of sleeping indoors, the government cannot [under the Cruel and Unusual Punishment Clause] criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter"); *Norton v. City of Springfield*, 806 F.3d 411, 412-13 (7th Cir. 2015) (invalidating on First Amendment grounds an ordinance that restricted panhandling in the "downtown historic district").

[16] The Supreme Court has not expressly held that the Eighth Amendment's prohibitions against excessive fines and

2. The Fourteenth Amendment prohibits incarceration for nonpayment of fines and fees without first conducting an ability-to-pay determination and establishing that the failure to pay is willful.

The due process and equal protection principles of the Fourteenth Amendment prohibit "punishing a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). Thus, the U.S. Supreme Court has repeatedly held that the government may not incarcerate individuals solely because of their inability to pay a fine or fee. In *Bearden*, the Court explained that cases about equal access to justice involve both equal protection and due process principles, and they therefore require courts to conduct a "careful inquiry" that balances the individual's interests against the state's interests. *Id.* at 666-67. After conducting this inquiry, the Court prohibited the incarceration of an indigent probationer for failing to pay a fine despite bona fide efforts to do so because "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine." *Id.* at 672-73. "Such a deprivation," the Court continued, "would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 673; *see also Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that the state could not convert defendant's unpaid fine for a fine-only offense to incarceration because that would subject him "to imprisonment solely because of his indigency"); *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) (holding that an indigent defendant could not be imprisoned longer than the statutory maximum for failing to pay his fine). The U.S. Supreme Court reaffirmed this principle in *Turner v. Rogers*, 564 U.S. 431 (2011), holding that a court cannot jail a parent for failure to pay child support without providing adequate procedural safeguards to ensure consideration of the parent's ability to pay. *Id.* at 445-48.[17]

State and local courts have an affirmative duty to determine an individual's ability to pay and whether any nonpayment was willful before imposing incarceration as a consequence. *See Bearden*, 461 U.S. at 672 (holding that in probation revocation proceedings "for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay").[18] State and local courts should conduct this analysis even if a defendant does not specifically raise the issue. *See id.*

When assessing whether nonpayment was willful, the key question is whether the individual has made "sufficient bona fide efforts legally to acquire the resources to pay." *Bearden*,

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fees apply with any greater force to youth. However, the Court has consistently recognized that, as a general matter, standards of culpability and punishment should apply differently in the juvenile context. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding the death penalty disproportionate when imposed on youth); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (sentencing a young person who committed a non-homicide offense to life without parole violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (sentencing a young person to mandatory life imprisonment without parole violates the Eighth Amendment). Accordingly, and particularly in light of the policy considerations referenced above, the Department encourages state and local courts to seek alternatives to fines and fees when engaging youth.

[17] Based on these principles, the Department has determined that bail practices that result in pretrial incarceration based on poverty violate the Fourteenth Amendment. U.S. Amicus Br. at 16-19, *Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022) (No. 18-11368); U.S. Amicus Br. at 18-20, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) (No. 16-10521-HH); U.S. Amicus Br. at 17-21, *Walker v. City of Calhoun*, 682 F. App'x 721 (11th Cir. 2017) (No. 16-10521).

[18] Furthermore, Idaho's Supreme Court has held that, under *Bearden*, "a court must inquire into an individual's ability and efforts to pay a court-ordered fine before issuing a warrant . . . for failing to pay." *Beck v. Elmore Cnty. Magistrate Ct.*, 489 P.3d 820, 836 (Idaho 2021) (holding that magistrate court's failure to consider the defendant's ability to pay before issuing an arrest warrant for nonpayment of fines and fees violated the Fourteenth Amendment).

461 U.S. at 661-62, 672. In making ability-to-pay assessments, courts should rely on "criteria typically considered daily by sentencing courts throughout the land." *Id.* at 673 n.12. Historically, in undertaking this analysis, courts have not considered how an individual spends money, but have instead focused solely on whether the individual has sufficient income and financial resources to pay the fine at issue while still meeting basic needs. *See, e.g.*, *Tate*, 401 U.S. at 396 n.1 (considering evidence at sentencing hearing that petitioner and his family were "poverty stricken," that he earned limited income in "casual employment" and received monthly federal benefits, and that his family relied on him for support in finding that petitioner could not afford fees); *see also* U.S. Sent'g Guidelines Manual § 5E1.2(d)(2) (directing courts to consider "earning capacity and financial resources" when assessing a defendant's ability to pay a fine); Consent Decree at 9, *McNeil v. Comm. Prob. Servs.*, No. 1:18-cv-00033 (M.D. Tenn. Jan. 13, 2022) (requiring that neither an individual's expenses nor the financial resources of her friends and family members be considered in determining ability to pay).

A willfulness determination must be fair and accurate. Due process requires that courts uniformly and consistently apply standards for making such determinations, such as notifying the defendant that their ability to pay will be considered by the court and providing a meaningful opportunity for the defendant to be heard regarding their ability to pay. *See Turner*, 564 U.S. at 447-48 (holding that such procedures are adequate safeguards against unrepresented parties being jailed based on an inability to make child-support payments).

Even independent of legal considerations, jurisdictions may also benefit from creating presumptions of indigency for certain classes of defendants—for example, those who are eligible for public benefits, unhoused, living below a certain income level, or serving a term of confinement. *See, e.g.*, R.I. Gen. Laws § 12-20-10(a), (b) (2022) (listing conditions considered "prima facie evidence of the defendant's indigency" and limited ability to pay, including but not limited to "[q]ualification for and/or receipt of" public assistance, disability insurance, and food stamps); Consent Decree at 9, *McNeil v. Comm. Prob. Servs.*, No. 1:18-cv-00033 (M.D. Tenn. Jan. 13, 2022) (committing the parties to presume indigence for individuals whose net household income falls below 200% of the federal poverty guidelines; who were eligible for appointed counsel in a criminal case; who are eligible to receive or have dependents who are eligible to receive aid from any federal or state public assistance program based on financial hardship; and/or who are unhoused). This approach is logical, as individuals who cannot afford to pay for their basic needs also cannot afford to pay fines and fees out of their already insufficient incomes. It also conserves court resources by removing the obligation to conduct duplicative ability to pay assessments. Similarly, jurisdictions should presume that children and youth are indigent and unable to pay fines and fees.[19] States are increasingly passing legislation or changing court rules to codify a presumption of indigence for minors.[20]

[19] *See, e.g.*, C.R. Div., U.S. Dep't of Just., Mem. of Agreement Regarding the Juv. Cts. of Memphis & Shelby Cnty. 9 (Dec. 17, 2012), https://perma.cc/MM49-G9GE (Under that agreement, children must be presumed indigent unless information to the contrary is provided to the juvenile court.).

[20] *See, e.g.*, Del. Code Ann. Tit. 29, § 4602(c) (West 2016) ("Any person under the age of 18 arrested or charged with a crime or act of delinquency shall be automatically eligible for representation by the Office of Defense Services."); La. Child. Code Ann. Art. 320(a) (2022) ("For purposes of the appointment of counsel, children are presumed to be indigent."); Mass. S.J.C. Rule 3:10(h)(iv) (2016) (defining as indigent "a juvenile, a child who is in the care or custody of the Department of Children and Families, or a young adult"); Mont. Code Ann. § 47-1-104 (4)(b)(ii)-(iii) (West 2013) (providing that every youth charged in delinquency proceedings "is entitled by law to the assistance of counsel at

Furthermore, we recommend that courts conduct a willfulness analysis and apply *Bearden*'s balancing framework before imposing other adverse consequences that implicate liberty or property interests on an indigent criminal defendant for nonpayment. As the U.S. Supreme Court has recognized, non-carceral penalties "may bear as heavily on an indigent accused as forced confinement." *See Mayer v. Chicago*, 404 U.S. 189, 197 (1971) (stressing that "[t]he collateral consequences of conviction may be even more serious"); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that driver's licenses "may become essential in the pursuit of a livelihood"). Although some courts have declined to apply *Bearden* itself outside of the incarceration context, extending the *Bearden* guarantees to other serious adverse consequences will avoid depriving people of their liberty and property interests based on no fault of their own. *See Mendoza v. Strickler*, 51 F.4th 346, 357 (9th Cir. 2022) (observing that *Bearden* and related cases "address[] only the limitations on imposing subsequent or additional *incarceration* on those unable to pay their fines"); *Jones v. Governor of Florida*, 975 F.3d 1016, 1032 (11th Cir. 2020) (en banc) ("The Supreme Court has never extended *Bearden* beyond the context of poverty-based *imprisonment.*"). In addition, some courts have held that individuals should not be required to complete extended terms or more burdensome conditions of supervision solely because of their inability to pay fees.[21] Other courts have similarly held that individuals should not be barred from participating in or completing a diversion program, be subjected to more onerous conditions for participating in a diversion program, or have a diversion program extended because they cannot pay fees.[22]

public expense regardless of the person's financial ability to retain private counsel"); N.C. Gen. Stat. Ann. § 7b-2000(b) (West 2001) ("All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency."); Ohio Admin. Code 120-1-03(B)(4) (2017) ("An applicant is presumed indigent and thus entitled to the appointment of counsel at state expense [when] [t]he applicant is a child . . . . In determining the eligibility of a child for appointed counsel, the income of the child's parent, guardian, or custodian shall not be considered."); 42 Pa. Stat. and Cons. Stat. Ann. § 6337.1(b)(1) (West 2012) ("In delinquency cases, all children shall be presumed indigent."); Vt. Stat. Ann. Tit. 13, § 5238(g) (West 2016) (While nearly all potential defendants are evaluated to determine whether they should pay a co-payment or reimburse the state for publicly-funded legal counsel, the statute provides that "[a] juvenile shall not be ordered to pay any part of the cost of representation."); Wash. Rev. Code Ann. § 13.40.140(2) (West 2022) (While a youth's family's ability to pay will be assessed, "[t]he ability to pay part of the cost of counsel does not preclude assignment [and] [i]n no case may a juvenile be deprived of counsel because of a parent, guardian, or custodian refusing to pay."); Wis. Stat. Ann. § 938.23(1m)(a), (4) (West 2016) (providing a right to counsel to all youth charged with delinquency or held in detention, and providing that "[i]f a [child] has a right to be represented by counsel or is provided counsel at the discretion of the court under this section and counsel is not knowingly and voluntarily waived, the court shall refer the [child] to the state public defender and counsel shall be appointed by the state public defender . . . without a determination of indigency").

[21] *See, e.g.*, *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2021 WL 366776, at *28 (M.D. Tenn. Feb. 3, 2021) ("In the Court's view, *Bearden* applies to the restrictions on the liberty interests identified by Plaintiffs for those on supervised probation, including the requirement that they report regularly to [Community Probation Services], submit to drug tests (for which they are charged), refrain from traveling or moving freely, and the risk they will be arrested and/or jailed for alleged violations of conditions. This loss of liberty allegedly is not imposed (at least to the same extent) on those who are moved to unsupervised probation because they have the means to pay off the amounts owed."); *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 775, 775-76 (M.D. Tenn. 2016) (applying *Bearden* to the imposition of onerous requirements and extended supervision terms on probationers).

[22] *See, e.g.*, *Briggs v. Montgomery*, No. CV-18-02684-PHX-EJM, 2019 WL 2515950, at *10-13 (D. Ariz. June 18, 2019) (applying *Bearden*'s principles to the imposition of longer supervision terms and more onerous conditions on diversion participants who cannot afford to pay fees); *Mueller v. State*, 837 N.E.2d 198, 201-05 (Ind. Ct. App. 2005) (applying the *Bearden* framework to find that a criminal defendant's exclusion from a diversion program because she could not pay a fee violated the Fourteenth Amendment).

3. The Fourteenth Amendment requires the consideration of alternatives before incarcerating individuals who are unable to pay fines and fees.

Before an individual is incarcerated for a non-willful failure to pay a financial obligation, the Fourteenth Amendment requires a careful inquiry into factors such as the individual interest at stake, the extent to which the consequence imposes upon that interest, the rationality of the connection between the consequence and the state's interests, and whether "alternate measures" are "adequate to meet the State's interests." *See Bearden*, 461 U.S. at 666-67, 672.

We further recommend that, in the context of nonpayment of fines or fees due to inability to pay, state and local courts consider alternatives before imposing adverse consequences that implicate liberty or property interests. It is the position of the United States that imposing certain serious adverse consequences for failure to pay an unaffordable fine or fee, where alternative approaches could serve the government's interests, violates the Fourteenth Amendment. *See, e.g.*, U.S. Statement of Interest at 17-18, *Stinnie v. Holcomb*, No. 3:16-CV-00044 (W.D. Va. Nov. 7, 2016), U.S. Statement of Interest (Doc. 27) at 17-18 (arguing that automatically suspending drivers' licenses for unpaid fines was unconstitutional because there were alternative means of serving the state's interests); *see also* Section A.2, *supra*; *cf.* U.S. Amicus Br. at 19, *Daves*, *supra* (No. 18-11368) (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc)) (concluding that the government cannot detain individuals for failure to pay an unaffordable bail amount absent a finding that alternatives would not adequately protect the government's interests in public safety and ensuring appearance at trial). States and localities should consider—at least as a best practice—requiring a factfinder to reach a reasoned determination that alternatives to a contemplated adverse consequence are inadequate to meet the State's interests in securing payment before penalizing individuals for their inability to pay.

As a best practice, jurisdictions should consider collecting fines and fees by, for instance, adopting penalty-free payment plans, offering amnesty periods during which individuals can have warrants cancelled and fees waived, or connecting individuals who cannot afford to pay fines and fees with workforce development and financial counseling programs.[23] These alternatives are likely to serve a jurisdiction's interest in ensuring payment of fines and fees better than incarceration or other adverse consequences. As the Court in *Bearden* observed,

> given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine . . . a sentencing court can often establish a reduced fine or alternative public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence . . . .

461 U.S. at 672. Further, where appropriate, jurisdictions may also consider waiving or reducing the debt of a person unable to pay the debt. Jurisdictions can also consider alternatives to imposing punitive financial obligations in the first place. Alternatives could include, for example, requiring an individual to attend traffic or public safety classes, or imposing community service. Indeed, a

[23] *See, e.g.*, City of Montgomery, *Amnesty Days*, https://perma.cc/VS6T-B8K7 (last visited Apr. 18, 2023); *see also* Justin Ove, *City of Atlanta Municipal Court Announces Warrant Amnesty Program*, Patch.com (Feb. 10, 2015), https://perma.cc/UBX8-67KT.

number of jurisdictions have codified consideration of alternatives as a requirement into state law.[24]

Importantly, however, states and local governments should be mindful that these alternatives can, under certain circumstances, inadvertently impose greater penalties on those who are economically disadvantaged. For example, a payment plan might still unnecessarily penalize a low-income person for their poverty if the plan imposes onerous user fees or interest. Debts that are sold to third-party debt collectors can have a significant impact on credit scores, in turn affecting employment and housing opportunities. In addition, individuals' financial circumstances may change over the duration of a payment plan. Providing a mechanism for individuals to seek reductions in their monthly obligations in light of changed circumstances helps to protect against violations of individuals' Fourteenth Amendment rights.[25]

As a practical matter, the imposition of seemingly non-financial obligations may still result in indirect financial obligations. For example, while community service could be an alternative to payment for adults or youth, it could nevertheless exact a financial consequence if individuals are required to pay costs for participation, take unpaid leave from their jobs, pay for childcare, or miss educational opportunities to fulfill it. The same may be true for alternatives to adverse consequences that involve education, substance abuse and mental health counseling, and other programs. Public policy considerations counsel in favor of courts recognizing such obligations, particularly in considering whether an individual has an inability versus an unwillingness to comply. In the case of minors, any community-service obligations should be designed to avoid undermining treatment, services, fulfillment of other court-ordered conditions, compulsory school attendance, or educational and vocational attainment.

4. The Fourteenth Amendment prohibits the imposition of fines and fees that create conflicts of interest.

The Due Process Clause of the Fourteenth Amendment "entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Accordingly, in *Tumey v. Ohio*, 273 U.S. 510 (1927), the U.S. Supreme Court held that a defendant is denied due process if the judge deciding the case has a "direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523. Based on that standard, the Court in *Tumey* held that a mayor who also served as a judge was not a neutral decisionmaker because fines that he imposed supplemented his salary and generated revenue for his town. *Id.* at 531-32. Similarly, in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Court held that a mayor who also served as judge was not a neutral decisionmaker because fines and fees

[24] *See, e.g.*, Ga. Code Ann. § 42-8-102(f)(4)(A) (2021) (providing that for "failure to report to probation or failure to pay fines, statutory surcharges, or probation supervision fees, the court shall consider the use of alternatives to confinement, including community service"); Tex. Code Crim. Proc. Ann. 42.15 (West 2021) (When the court determines that "the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs" the court can determine whether the fine and costs should be "paid at some later date or in a specified portion at designated intervals; . . . discharged by performing community service . . . ; waived in full or in part . . . ."); *see also Tate*, 401 U.S. at 400 n.5 (discussing ineffectiveness of fine payment plans and citing examples from several states).

[25] *See* Fines and Fees Just. Ctr., *First Steps Toward More Equitable Fines and Fees Practices: Policy Guidance on Ability to Pay Assessments, Payment Plans and Community Service* (2020), https://perma.cc/W4BH-RJUX.

that he assessed accounted for a major portion of the village's revenue and he was personally and solely accountable to the village council for the village budget. *Id.* at 58, 60.

Due process also bars conflicts where an institutional financial interest in the outcome of a case gives rise to a significant personal interest for the judge, even when there is no prospect of personal financial gain. For example, in *Cain v. White*, 937 F.3d 446, 451 (5th Cir. 2019), the court held that parish judges were not neutral decisionmakers because they oversaw collection of fines and fees that funded a substantial portion of a judicial expense fund they administered and that supported the salaries of judicial staff and other court expenses. Similarly, in *Caliste v. Cantrell*, 937 F.3d 525, 531-32 (5th Cir. 2019), the court held that a judge violated the defendants' due process right to a neutral decisionmaker by both setting bail and administering a similar judicial expense fund financed in substantial part by fees assessed on commercial security bonds typically used by the defendants to make bail.[26]

Fines and fees collected by courts or other officials who enforce the law generally do not raise conflict-of-interest concerns, however, if those fines and fees are not paid directly to the officials in question. In *Dugan v. Ohio*, 277 U.S. 61, 65 (1928), the U.S. Supreme Court found permissible a mayor's participation on a judicial commission when the fines assessed by the commission were deposited into the same general fund from which the mayor's salary was paid, but where the mayor's salary was not dependent on a conviction in any specific commission matter. A key factor in the Court's analysis was the remoteness of the effect of any individual commission decision on the mayor's salary. *See also Mobility Workx, LLC v. Unified Pats., LLC*, 15 F.4th 1146, 1154 (Fed. Cir. 2021); *Del. Riverkeeper Network v. Fed. Energy Regul. Comm'n*, 895 F.3d 102, 112 (D.C. Cir. 2018).

As the Department has previously observed, "[c]ourts, prosecutors, and police should be driven by justice—not revenue." U.S. Statement of Interest (Doc. 56) at 1, *Coleman v. Town of Brookside*, No. 2:22-cv-00423-RDP (N.D. Ala. July 26, 2022). It may interfere with an official's neutrality, raising due process concerns, if the official's imposition of fines or fees affects the amount of his or her compensation. The cases cited above establish that the Fourteenth Amendment bars judges from deciding cases where their decision-making may be distorted by direct, personal, substantial pecuniary interests. The Department has taken the position that due process protections also apply when the disposition of fines creates a personal interest in the outcome of an enforcement proceeding for other officials who enforce the law, including police, prosecutors, and probation officers. *See id.* at 10-11; *see also Marshall*, 446 U.S. at 249-50 (holding that the due process neutrality requirement applies to enforcement agents). Several courts have applied the neutrality requirement to private probation companies, individual probation officers, law enforcement officials, and county attorneys.[27]

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[26] *See also* Order Denying Mot. to Dismiss (Doc. 80) at 14-15, *Coleman v. Town of Brookside*, No. 2:22-cv-00423-AMM (N.D. Ala. Mar. 23, 2023) (explaining that both personal and institutional conflicts of interest may contravene the federal Constitution).

[27] *See Brucker v. City of Doraville*, 38 F.4th 876, 887-88 (11th Cir. 2020) (explaining that the Fourteenth Amendment's due process requirements for conflicts of interest apply to law enforcement officers and prosecutors); *Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236, 1244 (11th Cir. 2020) (holding that a private probation company "was not impartial because its revenue depended directly and materially on whether and how it made sentencing decisions"); *McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-CV-00033, 2021 WL 366776, at *18-25 (M.D. Tenn. Feb. 3, 2021) (denying a motion to dismiss due process claim where the plaintiffs alleged that the contract between a county and private

5. The Fourteenth Amendment prohibits conditioning access to the judicial process on the payment of fees by individuals who are unable to pay.

The Fourteenth Amendment prohibits conditioning access to the judicial process on the payment of fees such as court costs.[28] *See M.L.B. v. S.L.J.*, 519 U.S. 102, 119-24 (1996) (holding that Mississippi statutes that conditioned an indigent mother's right to appeal a judgment terminating her parental rights on prepayment of costs violated equal protection and due process); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that due process bars states from conditioning access to compulsory judicial process on the payment of court fees by those unable to pay); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion) ("There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."); *see also Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 502 (M.D. Ala. 1976) (holding that the conditioning of an appeal on payment of a bond violates indigent prisoners' equal protection rights and "has no place in our heritage of Equal Justice Under Law" (quoting *Burns v. Ohio*, 360 U.S. 252, 258 (1959))).[29]

Fines and fees assessed by courts are often incorrectly framed as a routine administrative matter. For example, a motorist who is arrested for driving with a suspended license may be told that the penalty for the citation is $300 and that a court date will be scheduled only upon the payment of $300 (sometimes referred to as a prehearing "bond" or "bail" payment). Courts most commonly impose these payment requirements on defendants who have failed to appear, depriving those defendants of the opportunity to establish good cause for missing court. However, regardless of the charge, predicating indigent individuals' access to a hearing, to counsel, or other judicial process on the payment of costs can deprive those without financial resources of access to justice and potentially violate their rights.[30]

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probation company provided that the company's sole compensation came from fines and fees it collected from probationers); *Flora v. Sw. Iowa Narcotics Enf't Task Force*, 292 F. Supp. 3d 875, 903-05 (S.D. Iowa 2018) (denying summary judgment on due process claim against a narcotics task force, law enforcement officers, and county attorneys whose departments were funded in part by assets seized for forfeiture); *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1195 (D.N.M. 2018) (finding "a realistic possibility that the forfeiture program prosecutors' judgment will be distorted, because in effect, the more revenues the prosecutor raises, the more money the forfeiture program can spend").

[28] Courts can, however, limit access to courts, including by requiring payment of fees, in many circumstances as a penalty for litigation conduct or to deter frivolous filings. *See, e.g.*, *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316-19 (3d Cir. 2001) (discussing Prison Litigation Reform Act's three-strikes rule); *Williams v. Adams*, 660 F.3d 263, 265-67 (7th Cir. 2011).

[29] The U.S. Supreme Court reaffirmed this principle in *Little v. Streater*, 452 U.S. 1, 16-17 (1981), when it prohibited conditioning indigent persons' access to blood tests in adversarial paternity actions on payment of a fee.

[30] Courts might also inappropriately impose fees that burden access to counsel. Depending on the jurisdiction, this can include fees for submitting an application for court-appointed counsel, fees for the court to process that application and appoint counsel, and fees for representation by the court-appointed counsel. As youth generally do not have financial resources independent from their parents or guardians, and cannot compel the adults to pay, predicating access to and services of counsel on payment of fees seriously risks youth being subjected to the unconstitutional denial of counsel. Nat'l Juv. Def. Ctr., *Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel* 22-23 (2017), https://perma.cc/85RZ-49T6; Fines and Fees Just. Ctr., *At What Cost? Findings from an Examination into the Imposition of Public Defense System Fees* (2022), https://perma.cc/6X33-YPD9.

6. The Sixth and Fourteenth Amendments require due process protections, such as access to counsel in appropriate cases, as well as notice, when imposing and enforcing fines and fees.

Defendants may have the right to be represented by counsel in certain fines and fees enforcement cases. Failing to appear or to pay outstanding fines or fees can result in incarceration, whether through criminal charges or criminal contempt, a suspended sentence, or civil contempt proceedings. The Sixth Amendment requires that a defendant be provided the right to counsel in at least any criminal proceeding that may result in incarceration, *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), and it forbids imposition of a suspended jail sentence on a probationer who was not afforded a right to counsel when originally convicted and sentenced, *Alabama v. Shelton*, 535 U.S. 654, 662 (2002). Under the Fourteenth Amendment, defendants likewise may be entitled to counsel in civil contempt proceedings for failure to pay fines or fees where incarceration is a possible penalty. *See Turner*, 564 U.S. at 446-48 (holding that, although there is no automatic right to counsel in civil contempt proceedings for nonpayment of child support, due process is violated when neither counsel nor adequate alternative procedural safeguards are provided to prevent incarceration for inability to pay).[31] The Fourteenth Amendment's Due Process Clause also guarantees youth the right to counsel in juvenile proceedings, irrespective of any affirmative request. *In re Gault*, 387 U.S. 1, 38-41 (1967). Where a right to counsel exists, that right cannot be conditioned on a defendant's payment of fines or fees that the defendant lacks the ability to pay. *Fuller v. Oregon*, 417 U.S. 40, 52-53 (1974).

Further, a cornerstone of the Fourteenth Amendment's Due Process Clause is constitutionally adequate notice. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314-15 (1950). As the Court noted in *Mullane*, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. This core constitutional principle has been applied in cases involving minor offenses. *See*, *e.g.*, *Remm v. Landrieu*, 418 F. Supp. 542, 548 (E.D. La. 1976) (finding city towing ordinance unconstitutional "insofar as it authorizes the assessment of towing fees and storage charges without notice and the opportunity for a hearing").[32]

As a best practice, courts should ensure that individuals are provided with access to counsel in appropriate cases involving fines and fees, including, as discussed above, in proceedings that may result in incarceration and in juvenile proceedings. We recommend that courts undertake measures to ensure that individuals actually receive the citations and summonses intended for them, and adequately inform individuals of the precise charges against them, the amount they owe or other possible penalties, the date of their court hearing, the availability of alternate means of

[31] The Supreme Court's ruling in *Turner* that the right to counsel is not automatic was limited to contempt proceedings arising from failure to pay child support to a custodial parent who is unrepresented by counsel. *See* 564 U.S. at 446-48. The Court explained that recognizing such an automatic right in that context "could create an asymmetry of representation." *Id.* at 447. The Court distinguished those circumstances from civil contempt proceedings to recover funds due to the government, which "more closely resemble debt-collection proceedings" in which "[t]he government is likely to have counsel or some other competent representative." *Id.* at 449.

[32] *But see Goichman v. City of Aspen*, 859 F.2d 1466, 1468-69 (10th Cir. 1988) (holding that no additional hearing beyond one to adjudicate underlying parking violation was required by due process to determine validity of local towing and impoundment procedures).

payment, the rules and procedures of court, their rights as a litigant, and whether they must appear in person. Gaps in this vital information can make it difficult, if not impossible, for individuals to fairly and expeditiously resolve their cases. Inadequate notice can have a cascading effect, resulting in the individual's failure to appear and leading to the imposition of significant penalties in possible violation of an individual's due process rights.

7. The Fourteenth Amendment prohibits the imposition of fines and fees in a manner that intentionally discriminates against a protected class.

The Fourteenth Amendment's Equal Protection Clause prohibits state action that results in a discriminatory effect against a protected class when that state action is motivated, in whole or part, by a discriminatory purpose. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976). Importantly, a consistent pattern of racial disparities can, itself, serve as evidence of discriminatory purpose. *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 487 (1997) ("[T]he impact of an official action is often probative of why the action was taken in the first place."). Thus, efforts to collect fines and fees that have a discriminatory effect on members of a particular race—yielding, for example, racially disproportionate stops and citations—may constitute evidence that, in combination with other evidence, could support a finding of intentional discrimination. *See, e.g.*, C.R. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* (Mar. 4, 2015), https://perma.cc/7QR3-BRLD (finding that Ferguson's failure to evaluate or correct its approach to raising revenue through fines and fees despite its disproportionate impact on Black residents constituted evidence of intentional discrimination in violation of the Fourteenth Amendment); *see also Nguyen v. La. State Bd. of Cosmetology*, 236 F. Supp. 3d 947, 953-56 (M.D. La. 2017) (denying defendants summary judgment on equal protection claims alleging fines imposed on nail salons discriminated on the basis of race). *Cf. Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citation omitted)).

Even in the absence of intentional discrimination, we recommend that courts and other state actors carefully consider whether their collection of fines and fees have disproportionate effects based on race or another protected characteristic. For example, courts should consider whether certain fines and fees practices, such as debt-based driver's license suspensions, disproportionately affect people of color.[33] Effective alternatives to these practices may better ensure that states and

[33] *See, e.g.*, C.R. Corps, *The Fiscal Impact of Debt-Based Driver's License Suspensions* (2021), https://perma.cc/M8DL-DW6X (summarizing research in numerous states and concluding that debt-based driver's license suspension is ineffective and counterproductive to debt collection); Stephanie Seguino et al., *Trends in Racial Disparities in Vermont Traffic Stops, 2014-19*, at 2-3 (Jan. 2021), https://perma.cc/FL4V-RC4Q; Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 Nature Human Behaviour 736 (2020), https://perma.cc/4W29-V7RN; N.Y. Law Sch. Racial Just. Project, *Driving While Black and Latinx: Stops, Fines, Fees, and Unjust Debts* 9 (Feb. 2020), https://perma.cc/HZ9Y-WBBH; Am. Bar Ass'n, *Unpaid Court Fees and Fines: License Suspensions Can't Be the Answer* (Jul. 27, 2020), https://perma.cc/BH9A-GDX4 (concluding that debt-based license suspensions are counterproductive because they often render individuals unable to work and place individuals at risk of incurring additional fines and fees that they cannot pay if they drive while their license is suspended); The Sent'g Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (Apr. 19, 2018), https://perma.cc/97LF-HV2U; Findings, Stanford Open Policing Project, https://perma.cc/W839-7NBD; *see also* William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 Duke L.J. 1585, 1606 (2020), https://perma.cc/V4SD-DKYM.

localities do not inequitably burden members of protected classes.[34]

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The Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12601 (Section 12601), makes it unlawful for law enforcement officers to engage in a pattern or practice of conduct that violates the U.S. Constitution or federal law, including, under certain circumstances, the unconstitutional or unlawful imposition and enforcement of fines and fees. Accordingly, failure by jurisdictions to comply with the constitutional and legal requirements described in this letter might expose them to civil enforcement actions by the Department. For example, under its Section 12601 authority, the Department entered into a consent decree with the City of Ferguson, Missouri, that required the City to rectify its allegedly unconstitutional fines and fees practices by, among other things: (1) considering ability to pay in assessing and enforcing fines and fees; and (2) implementing an amnesty program for individuals previously subjected to unconstitutional fines and fees practices.[35]

With respect to youth in particular, the Department has utilized its Section 12601 authority to enforce the rights of those involved in the juvenile justice system through a comprehensive settlement with Shelby County, Tennessee,[36] following the Department's findings of serious and systemic failures in the juvenile court that violated the due process and equal protection rights of system-involved youth.[37] Similarly, the Department has enforced the rights of minors in St. Louis County Family Court after finding systemic violations of their rights under the Due Process and Equal Protection Clauses. [38]

We also note that the courts' obligation to comply with these principles extends to activities carried out by court staff and private contractors on the courts' behalf. In many courts, especially those adjudicating strictly minor or local offenses, the judge or magistrate may preside for only a few hours or days per week, while most court business is conducted by clerks or probation officers (including private contractors) outside of court sessions. As a result, clerks and other court staff are sometimes tasked with conducting indigency inquiries, determining bond amounts, issuing arrest warrants, and other critical functions—often with only perfunctory review by a judicial officer or no review at all. Without adequate judicial oversight, there is no reliable means of ensuring that these tasks are performed consistent with due process and equal protection requirements. Regardless of the size of the docket or the limited hours of the court, judges must ensure that the law is followed by all staff and private contractors to preserve "both the appearance and reality of

[34] For example, the Policy Advocacy Clinic at the School of Law at the University of California at Berkeley analyzed data on the allocation of fines and fees on juveniles in Alameda County, California, and found that Black youth were overrepresented at each step in the juvenile justice system, exposing them to significantly higher fees. Jeffrey Selbin & Stephanie Campos, *High Pain, No Gain: How Juvenile Administrative Fees Harm Low-Income Families in Alameda County, California* (Mar. 2016), https://perma.cc/RBP4-Z8ZF. Other research has shown that having unpaid monetary sanctions after case closing led to higher recidivism, and that youth of color were more likely to have unpaid monetary sanctions than their white peers. Piquero & Jennings, *supra* note 11, using a sample of over 1,000 youth.

[35] Consent Decree (Doc. 41) at 79-80, 83-84, *United States v. City of Ferguson*, No. 4:16-cv-180 (E.D. Mo. Apr. 19, 2016).

[36] Mem. of Agreement Regarding the Juv. Ct. of Memphis & Shelby Cnty., *supra* note 19.

[37] C.R. Div., U.S. Dep't of Just., Investigation of the Shelby Cnty. Juv. Ct. (Apr. 26, 2012), https://perma.cc/ZQ46-Y3XQ.

[38] C.R. Div., U.S. Dep't of Just., Mem. of Agreement Between the U.S, Dep't of Just. and the St. Louis Cnty. Fam. Ct. (Dec. 14, 2016), https://perma.cc/ZCN6-JTKA.

fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall*, 446 U.S. at 242 (citation and internal quotation marks omitted); *see also* Model Code of Judicial Conduct, Canon 2, Rules 2.2, 2.5, 2.12 (Am. Bar Ass'n 2020).

B. Obligations Under Title VI of the Civil Rights Act of 1964 and the Omnibus Crime Control and Safe Streets Act of 1968

Recipients of federal financial assistance, including court systems, must also comply with statutory prohibitions against discrimination in the imposition of fines and fees.[39] In particular, courts must be cognizant of their obligations under Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, and its implementing regulations, 28 C.F.R. § 42.101 *et seq.*, as well as under the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), 34 U.S.C. § 10228(c)(1) (nondiscrimination provision); 28 C.F.R. pt. 42, subpt. D.[40] Title VI and its implementing regulations prohibit race, color, and national origin discrimination in the delivery of services or benefits by recipients of federal financial assistance.[41] Recipients of funds covered by the Safe Streets Act, which is modeled on Title VI, must not discriminate based on race, color, national origin, religion, or sex.[42]

For example, Title VI and the Safe Streets Act prohibit discrimination based on national origin, such that state court systems and other federal funding recipients are required to take reasonable steps to provide meaningful access to individuals who are limited English proficient (LEP), including youth and their families, in their programs or activities.[43] *See* U.S. Dep't of Just.,

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[39] For example, Title II of the Americans with Disabilities Act (ADA) and its implementing regulations prohibit state and local government entities, including court systems, from discriminating based on disability in their programs, services, and activities. 42 U.S.C. § 12132; 28 C.F.R. pt. 35. Among other things, covered entities must provide people with disabilities an equal opportunity to participate in or benefit from an aid, benefit, or service, and must make reasonable modifications to avoid discrimination based on disability unless the covered entity can demonstrate that making such modifications would fundamentally alter the nature of its service, program, or activity. 28 C.F.R. § 35.130(b)(1), (b)(7). Covered entities must also take appropriate steps to ensure that communications with people with disabilities are as effective as communications with others. 28 C.F.R. § 35.160(a)(1). Similarly, Section 504 of the Rehabilitation Act prohibits recipients of federal financial assistance from discriminating solely by reason of disability in their programs and activities. 29 U.S.C. § 794.

[40] Unlike Title VI, which generally applies to all recipients of federal financial assistance, the nondiscrimination provision of the Safe Streets Act only applies to recipients of certain federal financial assistance from the Department. Recipients of financial assistance from the Department should also be aware of their obligations to comply with the nondiscrimination provisions in certain Department program statutes. This includes (1) the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, and its implementing regulations, 34 U.S.C. § 11182(b), 28 C.F.R. pts. 31 & 42; (2) the Victims of Crime Act of 1984, as amended, and its implementing regulations, 34 U.S.C. § 20110(e), 28 C.F.R. § 94.114; and (3) the Violence Against Women Act of 1994, as amended 34 U.S.C. § 12291(b)(13).

[41] *See generally* C.R. Div., U.S. Dep't of Just., *Title VI Legal Manual*, https://perma.cc/XNC5-2HLL (hereinafter *Title VI Legal Manual*). In addition to prohibiting intentional discrimination, Title VI and the nondiscrimination provisions of the Safe Streets Act also bar recipients of federal financial assistance, including court systems, from implementing otherwise neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against individuals on the basis of race, color, or national origin. The legal framework for this type of discriminatory effects claim under Title VI and the Safe Streets Act is akin to the burden-shifting analysis of an employment discrimination claim under Title VII of the Civil Rights Act of 1964. *See, e.g.*, *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (per curiam). *See* 28 C.F.R. § 42.104(b)(2); *Title VI Legal Manual*, at sec. VII.

[42] 28 C.F.R. § 42.203(e).

[43] *See, e.g.*, *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974).

Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002) (hereinafter "DOJ LEP Guidance"); *see also* C.R. Div., U.S. Dep't of Just., "Communication with Courts Regarding Language Access" (Aug. 2008, republished 2018).[44]

In order to meet their statutory obligations, courts must, for instance, provide appropriate language assistance services to LEP individuals in connection with assessment and collection of fines and fees. Such assistance includes, but is not limited to, ensuring that court users with LEP have competent interpreting and translation services during all related hearings, trials, and motions, *see* DOJ LEP Guidance, 67 Fed. Reg. at 41471, provided at no cost. Meaningful language assistance is crucial, both within and beyond the fines and fees context.[45]

Title VI and the Safe Streets Act require recipients of federal funds, as a condition of receiving financial assistance, to contractually agree that they will comply with federal civil rights statutes.[46] Court systems receiving federal financial assistance that do not comply with Title VI or Safe Streets Act requirements might be subject to civil enforcement actions by the Department.[47] The Department has the authority to review and investigate recipients of its federal financial assistance.[48] The Department expects its funding recipients, including courts, to cooperate with investigations and, upon request, to provide records[49] that will enable the Department to ascertain

[44] U.S. Dep't of Just., *Communication with Courts Regarding Language Access*, https://perma.cc/5XN3-SNJE. Failure to provide meaningful language access in criminal proceedings also implicates constitutional rights. *See, e.g.*, *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) ("We hold that a defendant in a criminal proceeding is denied due process when: (1) what is told him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact."). Several circuits have held that a defendant whose fluency in English is so impaired that it interferes with his right to confrontation or his capacity, as a witness, to understand or respond to questions has a constitutional right to an interpreter. *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970); *see also United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) ("While these cases have often been concerned with the role of interpreters in helping a defendant to understand those who testify against him, and hence have focused on the Sixth Amendment right to confront witnesses, the withdrawal of an interpreter whose assistance has been enlisted in order that the defendant may deliver his own testimony clearly implicates the defendant's Fifth Amendment right to testify on his own behalf."); *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980) (per curiam); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (per curiam); *Ling v. State*, 702 S.E.2d 881, 884 (Ga. 2010).

[45] The Department has worked with state courts across the country to improve their language access services. *See* U.S. Dep't of Just., *State Courts*, https://perma.cc/747D-TUA7 (last visited Apr. 18, 2023).

[46] *See* 28 C.F.R. § 42.105 (describing assurances required of federal financial assistance recipients). The Department has the right to access pertinent records, personnel, and other information from its funding recipients. *See, e.g.*, Department of Justice Certified Standard Assurances ¶¶ 4, 7, https://perma.cc/GMS3-BR5Z; 34 U.S.C. § 10230; 28 C.F.R. § 42.106; 2 C.F.R. § 200.337(a); 28 C.F.R. § 42.105(a)(1) (requiring that every application for federal financial assistance from the Department include an assurance that the program will be conducted in compliance with all of the requirements of Title VI, as a condition of its approval).

[47] 28 C.F.R. § 42.101 *et seq*. (Title VI); 28 C.F.R. pt. 42, subpt. D (Safe Streets Act).

[48] Other federal agencies that administer federal financial assistance can also make referrals to the Department for administrative investigation and judicial enforcement regarding their programs or activities. *See, e.g.*, 28 C.F.R. § 50.3.

[49] *See* 28 C.F.R. § 42.106(b) ("Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with [the Title VI regulations]."). The Department's Safe Streets Act nondiscrimination regulations contain substantially similar recipient requirements. *See* 28 C.F.R.

whether the administration of fines and fees complies with Title VI and Safe Streets Act requirements.[50] If the Department finds that one of its funding recipients has violated federal law and has failed to voluntarily resolve those violations, the Department may suspend or terminate, or refuse to grant or continue, federal financial assistance.[51] The Department may also use civil litigation to enforce Title VI and the nondiscrimination provisions of the Safe Streets Act. Additionally, the Department may independently initiate compliance reviews (i.e., investigative audits) into its funding recipients to determine whether their administration of fines and fees violates applicable federal civil rights laws.[52]

In addition to the possibility of enforcement actions, the Department has specific resources available to courts, including juvenile courts and justice agencies, to help them comply with their civil rights obligations.[53]

C. Conclusion

Eliminating the unjust imposition of fines and fees is one of the most expeditious ways for jurisdictions to support the success of youth and low-income individuals, honor constitutional and statutory obligations, reduce racial disparities in the administration of justice, and ensure greater justice for all. We invite you to work with the Department to continue to develop and share solutions. The Department's Civil Rights Division is charged with protecting the civil and constitutional rights of all persons in the United States, and is available to provide technical assistance to courts, other recipients of federal financial assistance, and stakeholders, as appropriate. The Department's reinvigorated Office for Access to Justice (ATJ) works to mitigate economic barriers that prevent access to the promises and protections of our legal systems. ATJ will follow up on this letter by building a best practices guide, highlighting innovative work by states, municipalities, and court leaders in this area. ATJ welcomes the opportunity to serve as a

§ 42.207(a) (requiring recipients to "[p]ermit reasonable access" to "books, documents, papers, and records, to the extent necessary to determine whether the recipient is [in compliance]").

[50] Recordkeeping can help recipients identify potential disparities in the imposition of fines and fees and alert them to potential violations of federal nondiscrimination laws. Courts that receive federal funding should collect and analyze demographic data related to the imposition of fines and fees to ensure compliance with federal law. Such procedures are critical for evaluating the impact that fines and fees may have on a protected class over time.

[51] If a recipient has failed to comply with Title VI, and cannot correct this violation voluntarily, the Department "may suspend or terminate, or refuse to grant or continue, Federal financial assistance." 28 C.F.R. § 42.108(a), (b). The Department might also "use any other means authorized by law[] to induce compliance." *Id.* This might include enforcement proceedings under applicable federal, state, or local law. *Id.* Similarly, if the Department finds Safe Streets Act non-compliance, there is an administrative process by which the Department might suspend funding, as appropriate, to the specific program or activity in which the noncompliance was found. 28 C.F.R. § 42.210(a); *see also* 28 C.F.R. § 42.210(b) (providing for hearing procedures in the event of noncompliance).

[52] 28 C.F.R. § 42.206. For example, the Department's Office of Justice Programs, Office for Civil Rights examined whether Sacramento County, California and the Sacramento Superior Court discriminated on the basis of race, national origin, or age when assessing and collecting costs, fees, and fines against youth involved in the juvenile justice system. *See* Letter from the Office for Civil Rights to Judge Culhane and Supervisor Nottoli, Compliance Rev. of Sacramento Cnty., Cal. and the Sacramento Superior Ct. (16-OCR-2156) (May 15, 2017), https://perma.cc/29CY-Q3XB. In response, the Sacramento County Board of Supervisors directed that the assessment and collection of fines and fees from youth should cease, including fees associated with juvenile detention, supervision, drug testing, electronic monitoring, and representation in delinquency proceedings. The Board also directed the County to forgive over 23 million dollars of existing debt related to the juvenile justice system.

[53] The Civil Rights Division has created a webpage that highlights a number of resources designed to assist state courts in providing meaningful language access. *See State Courts*, *supra* note 45.

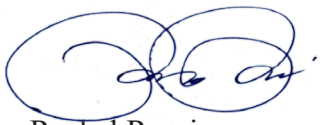
resource, and to collaborate and promote solutions. The Department's Office of Justice Programs (OJP)[54] provides grant funding and technical assistance to state, county, local, and tribal courts, which improves the functioning and fairness of the justice system, including by moving away from an overreliance on fines and fees to support government programs. In the spring of 2023, OJP's Bureau of Justice Assistance (BJA) plans to release a solicitation entitled "The Price of Justice: Rethinking Fines and Fees," which will seek a training and technical assistance provider to support jurisdictions seeking to examine, revise, and implement changes to policies and practices around both fines and fees. The goal of the solicitation is to support jurisdictions in implementing innovative approaches to address the common barriers to equitable systems of legal financial obligations.[55] We encourage you to visit OJP's website for a listing of available solicitations and opportunities from the OJP program offices.[56] BJA has a National Training and Technical Assistance Center that provides no-cost, on-demand training and technical assistance that may prove useful in thinking about new ways to address the needs of courts and the people they serve.[57]

The Department of Justice has a strong interest in ensuring that state and local courts provide everyone with the basic protections guaranteed by the U.S. Constitution, Title VI, the Safe Streets Act, and other federal laws, regardless of financial means. We are eager to build on the many reforms that jurisdictions have implemented over the past few years, and we look forward to working collaboratively to ensure that everyone receives equal, fair, and impartial access to justice.

Sincerely,

Kristen Clarke
Assistant Attorney General
Civil Rights Division

Amy L. Solomon
Principal Deputy Assistant
Attorney General
Office of Justice Programs



Rachel Rossi
Director
Office for Access to Justice

[54] The Office of Justice Programs provides federal leadership, grants, training, technical assistance and other resources to improve the nation's capacity to prevent and reduce crime, advance racial equity in the administration of justice, assist victims and enhance the rule of law. For more information about OJP and its program offices, funding opportunities, and other resources, see www.ojp.gov.

[55] For guidance in preparing and submitting applications for OJP funding, please visit OJP's Grant Application Resource Guide, which contains details about application reviews and federal award administration: Off. of Just. Programs, U.S. Dep't of Just., *OJP Grant Application Resource Guide*, https://perma.cc/K7LQ-WXB8 (last visited Apr. 18, 2023).

[56] Off. of Just. Programs, U.S. Dep't of Just., *Opportunities & Awards: Current Funding Opportunities*, https://www.ojp.gov/funding/explore/current-funding-opportunities (last visited Apr. 18, 2023).

[57] Nat'l Training and Tech. Assistance Ctr., Bureau of Just. Assistance, U.S. Dep't of Just., *Request TTA*, https://bjatta.bja.ojp.gov/working-with-nttac/requestors (last visited Apr. 18, 2023).

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