



RACIAL JUSTICE &
EQUAL ECONOMIC
OPPORTUNITY PROJECT

NATIONAL CONSUMER LAW CENTER

CRIMINAL JUSTICE
POLICY PROGRAM

H A R V A R D L A W S C H O O L

Ensuring that People Are Not Jailed Due to Poverty: Reforming Policies and Representing Clients in Criminal Justice Debt "Ability to Pay" Proceedings

May 22, 2018

Sharon Brett, Criminal Justice Policy Program

Brittany Stonesifer, Legal Services for Prisoners with Children

Karly Jo Dixon, Texas Fair Defense Project

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With Moderator

Abby Shafroth, National Consumer Law Center

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Moderator – Abby Shafroth

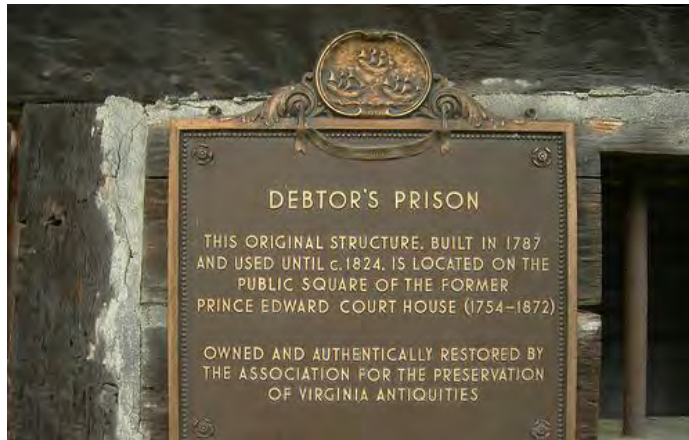
National Consumer Law Center

Abby Shafroth is a staff attorney at the National Consumer Law Center and focuses on the intersection of criminal and consumer law as well as student loan and for-profit school issues. She is the co-author of two reports in the *Confronting Criminal Justice Debt* series: *The Urgent Need for Reform* and *A Guide for Litigation*. She is also a contributing author of the National Consumer Law Center’s *Student Loan Law and Collection Actions* treatises.

Prior to joining NCLC, Abby litigated civil rights and employment class and collective actions at Cohen Milstein Sellers & Toll PLLC in Washington, D.C., and worked as an attorney at the Lawyers’ Committee for Civil Rights Under Law.



Confronting Criminal Justice Debt



Other Webinars in this Series

Prior webinars:

- Confronting Criminal Justice Debt: Introduction and Impact on Communities of Color
- The Advocacy Gap: Meeting the Urgent Need for Counsel to Represent Individuals in Criminal Justice Debt Proceedings
- Using Bankruptcy Law to Aid Criminal Justice Debtors
- Intro to Harvard Criminal Justice Policy Program's 50-State Criminal Justice Debt Law Web Tool
- Affirmative Litigation of Criminal Justice Debt Abuses: Theory and Practice

Download webinar recordings at:

<https://www.nclc.org/webinars.html>



Resources: Policy Reform Guide



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50 State Web Tool for Criminal Justice Debt

Criminal Justice Policy Program at Harvard Law School [Log In](#)
50-State Criminal Justice Debt Reform Builder

Home | [National Comparison](#) | [State Analysis](#) | [Law Explorer](#) | [Reform Builder](#) | [Contact Us](#)

Hover over a state on the map to see key criminal justice debt metrics. Currently the map is color-coded by the number of fees and surcharges. Click to navigate to a state summary page with additional statistics, queries in to the full law database, and details about our methodology.

North Carolina
66 total fees & surcharges
Mandatory driver's license revocation?
Yes
Has any mandatory fees or surcharges?
Yes
Has required fee for parole/probation?
No

Arizona
[See all AZ provisions](#)
Change state

[Relevant Provisions](#)
[Policy Recommendations](#)
[Add to board](#)

Methodology

Arizona Fees and Fines State Summary
Across the country, onerous fines and fees pose a fundamental challenge to a fair and effective criminal justice system.
[Additional policy background](#)
Explore the law in Arizona
[Data of all fees and surcharges](#)
[Data of all fines for misdemeanors and felonies](#)
[See all financial penalties in Arizona](#)

Arizona snapshot
Arizona has 25 fees and surcharges
[See policy recommendations](#)
[Explore the data](#)
Arizona has a required charge for parole or probation
[Explore the law in Arizona](#)

Arizona Poverty Penalties and Poverty Traps
Poverty traps such as incarceration and driver's license revocation constrain an individual's ability to earn a living and pay court costs. Poverty penalties attach cascading costs and penalties to the collection practices.
[Additional policy background](#)
[See all poverty penalty and poverty](#)

Arizona Ability to Pay
Sound policy considerations counsel in favor of robust procedures for conducting ability to pay determinations not only at the enforcement stage but also when financial obligations are imposed.
[Additional policy background](#)
[See all ability to pay policy recommendations in CJP's Policy Guide](#)

- Tool at cjdebtreform.org
- Webinar training on nclc.org

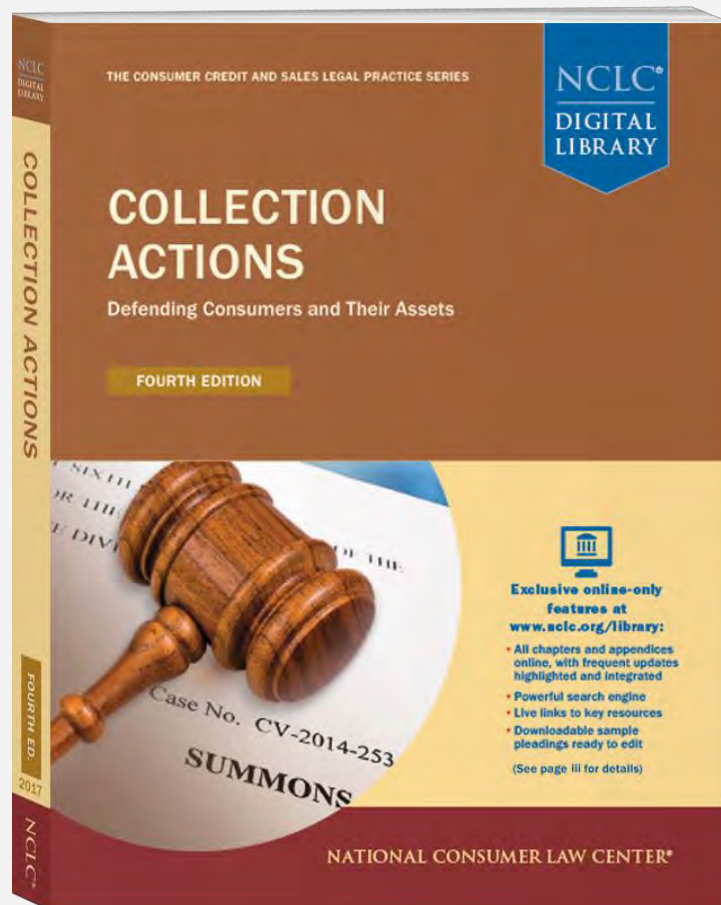
**CRIMINAL JUSTICE
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Resources:

Litigation Guide



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New chapter on criminal justice debt

Learn more about NCLC
treatises & read the first chapter
of each title at no cost at
www.nclc.org/library

More Resources

- National Legal Aid & Defender Association's [Court Debt Listserv](#) (*contact a.altman@nlada.org*)
- National Center for State Courts, [National Task Force on Fines, Fees and Bail Practices Resource Center](#)
- Fines & Fees Justice Center, [online clearinghouse](#) (*in development as of May 2018*)



Speaker-Sharon Brett

Criminal Justice Policy Program, Harvard Law School

Sharon Brett joins the Criminal Justice Policy Program with over thirteen years of experience working on a diverse array of criminal justice reform issues. Most recently, Sharon served as a Trial Attorney in the U.S. Department of Justice, Civil Rights Division, Special Litigation Section, where she focused on complex investigations and litigation regarding police misconduct and unlawful conditions in prisons and jails.

In addition to her investigation and enforcement work, Sharon also wrote several Statements of Interest articulating the Department of Justice's position regarding critical criminal justice issues. These briefs focused on a wide range of topics, including the unconstitutionality of blanket prohibitions on hormone therapy for transgender prisoners (*Diamond v. Owens*); enforcement of anti-camping ordinances against individuals experiencing homelessness where there are no shelter beds available (*Bell v. Boise*); and monetary bail schemes that fail to account for a defendant's ability to pay (*Varden v. City of Clanton*). Finally, Sharon contributed to the Department's 2015 report entitled *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*.



Speaker-Karly Jo Dixon

Texas Fair Defense Project

Karly Jo Dixon is a 2016-2018 Equal Justice Works Fellow, sponsored by the Friends and Family of Philip M. Stern. Her project focuses on TFDP's Criminal Justice Debt Initiative. Through direct representation, community education and advocacy, she works to stop jurisdictions from incarcerating people who cannot afford to pay their Class C tickets and related fees. Her past experiences include providing direct legal assistance to individuals facing criminal misdemeanor charges in Travis County, drafting federal and state habeas corpus claims for individuals on death row in Texas, and giving "Know Your Rights" trainings to community groups as a member and co-founder of the Austin People's Legal Collective.

Karly is a graduate of the University of Texas at Austin and the University of Texas School of Law. In law school, she was a member of the Capital Punishment Clinic, the Criminal Defense Clinic, served as the Executive Editor and Submissions Manager for the American Journal of Criminal Law, was the Treasurer for the Public Interest Law Association, and co-founded Getting Radical in the South (GRITS) a student-run conference on progressive lawyering in the South.



Speaker-Brittany Stonesifer

Legal Services for Prisoners with Children

As a Staff Attorney with Legal Services for Prisoners with Children (LSPC), Brittany advocates for criminal justice reform by lobbying for state and local legislation, serving as counsel in impact litigation, and coordinating public education and outreach. Brittany leads LSPC's campaign to overhaul the court-ordered debt systems that trap millions of Californians in poverty and unfairly penalize people of color. Representing LSPC in the Back on the Road Coalition—a group of civil rights and legal services organizations from across California—Brittany helped to make California the first state in the nation to stop suspending the licenses of drivers who fail to pay in traffic court.



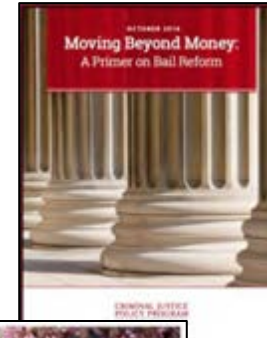
Ability to Pay Determinations:

Legal Requirements and Reform Principles

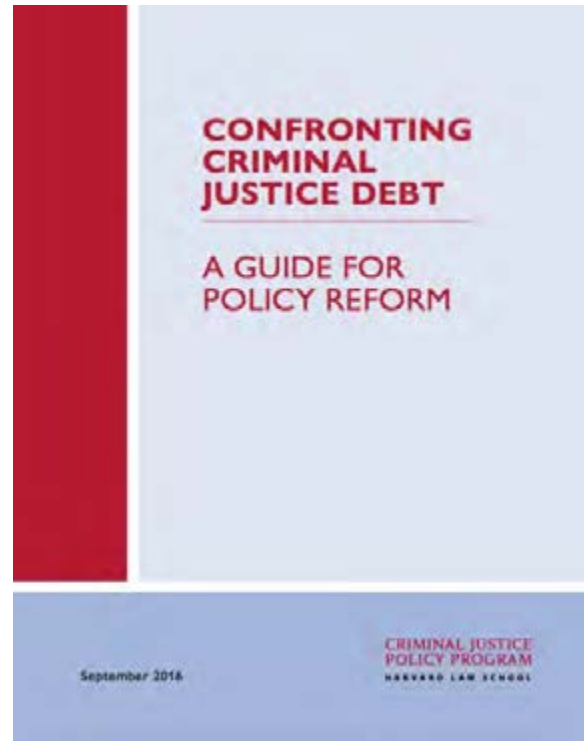
Sharon Brett, Staff Attorney, Criminal Justice Debt Initiative

Who We Are

- Legal and policy advisory to advocates or policy-makers throughout the country;
- Partnerships with government agencies to pilot and implement practical reforms;
- Convenings structured to diagnose problems and chart concrete reforms.



Confronting Criminal Justice Debt: A Guide for Policy Reform



Importance of Ability to Pay Determinations

- Harm reduction
- Ending cycle of debt
- Proportionality
- Fair and equal justice system
- Punishment must be tailored in order to be effective



Constitutional Implications

- *Tate v. Short*, 401 U.S. 395 (1971)
- *Bearden v. Georgia*, 461 U.S. 660 (1983)

Imprisoning debtor solely for failure to pay, without considering ability to pay, violates the Equal Protection Clause



Constitutional Implications

“If the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically.”

Certain enforcement mechanisms may be justified only when “probationer has willfully refused to pay the fine or restitution when he has the means to pay.”

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



Dear Colleague Letter

- March 2016
 - state and local courts that they must “inquire as to a person’s ability to pay prior to imposing incarceration for nonpayment.”
 - suggests an inquiry into ability to pay “at sentencing, when contemplating the assessment of fees and fines.”



Two Decision Points

(1) Front-end (pre-sentencing)

- Ability to pay determination at sentencing

(2) Back-end (pre-incarceration)

- Ability to pay determination after default



Two Decision Points

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Shifting Judges' Perspectives

- Mecklenburg County, NC



Guiding Principles

Based on the U.S. Constitution and North Carolina law, the Mecklenburg County District Court has adopted the following guidelines for imposing fines, costs, fees, and restitution ("legal financial obligations" or LFOs).

Excessive LFOs may be a barrier to reentry. Under North Carolina law, sentences should be commensurate with the offense and the individual's culpability, and should assist the defendant toward **rehabilitation** and **restoration** to the community. N.C.G.S. § 15A-1340.12.

The Supreme Court noted in **Bearden v. Georgia**, 461 U.S. 660, 671 (1983), a sentencing court should evaluate "the entire background of the defendant in order to tailor an appropriate sentence for the defendant and crime."

Imposition of LFOs

1. The Court shall consider an individual's ability to pay **before** imposing LFOs.

The Court can reduce and remit LFOs based on ability to pay.

- **Fines:** The court, "should" consider ability to pay. N.C.G.S. § 15A-1362(a).

Upfront Determinations: Presumptions

- Individuals meeting any of the following criteria should be presumed to be unable to pay in full:
 - Eligible for appointed counsel;
 - Income at or below 200% of the poverty guidelines
 - Full-time student;
 - Is, or within the last six months, has been homeless, incarcerated, or residing in a mental health or other treatment program; or
 - Receiving means-tested public assistance.



Upfront Determinations: Factors to Consider

- To determine what a defendant can afford to pay, consider concrete, numbers-based factors:
 - Resources of defendant
 - Employment status
 - Earning ability*
 - Any other concrete, objective matters that pertain to defendant's ability to make a payment



Upfront Determinations: Earning Ability

- Employment history and education
- Criminal justice history
- Homelessness
- Health or mental health issues, incl. disability
- Access to public transportation/driving privileges



Setting Payment Amounts: Case Study

- Mecklenburg County, NC Bench Card:
 - Guideline for judges: set monthly payment amount at 10% of net monthly income *after* basic living expenses.
 - Basic living expenses include:
 - Housing
 - Utilities
 - Food
 - Transportation (public transport or car)
 - Out-of-pocket health costs



Upfront Determinations: Payment Plan Considerations

- Payment plans should include:
 - the reasonable amount that can be paid each month, based on the factors listed; and
 - a reasonable length of time to complete payment, based on the severity of the offense.



Notice and Due Process

- Courts should provide defendants with robust notice of:
 - LFOs faced
 - Standards that will be applied
 - Information considered in determining ability to pay
 - Right to counsel
 - Documents they may be required to bring to hearing
- Ability to be heard



Notice and Due Process

- *Turner v. Rodgers*, 75 U.S. 431 (2011)
 - A court violates the Due Process Clause when it uses *civil* contempt authority to jail a person for nonpayment of child support to another private party, without first providing either appointed counsel or alternative procedural protections that consider ability to pay



Documentation of Inability to Pay

- Self-reporting of financial data should be sufficient
- Largely reliable; inaccuracies often tied to lack of knowledge about information requested
- Spot-checking accuracy may be all that is necessary



Transparency

- Findings regarding ability to pay should be made on the record
 - Ensures procedures followed
 - Clear determination
 - Aids in subsequent review
- Process and Results transparency



Two Decision Points

(1) Front-end (pre-sentencing)

- Ability to pay determination at sentencing

(2) Back-end (pre-incarceration)

- **Ability to pay determination after default**



Pre-Incarceration Ability to Pay Determinations

- Ability to pay determination after default
 - Should again rely on presumptions/factors
 - Concrete, objective criteria for judges to consider



Ability to Pay Determinations: Other Issues to Consider

- **Information protection:** limit use of financial information provided to ability to pay determinations
- **Encourage proactive communication:** create ways for defendants to approach court to discuss changed circumstances prior to default



Related Ongoing Litigation

- Drivers' License Suspensions
- Arrest Warrants



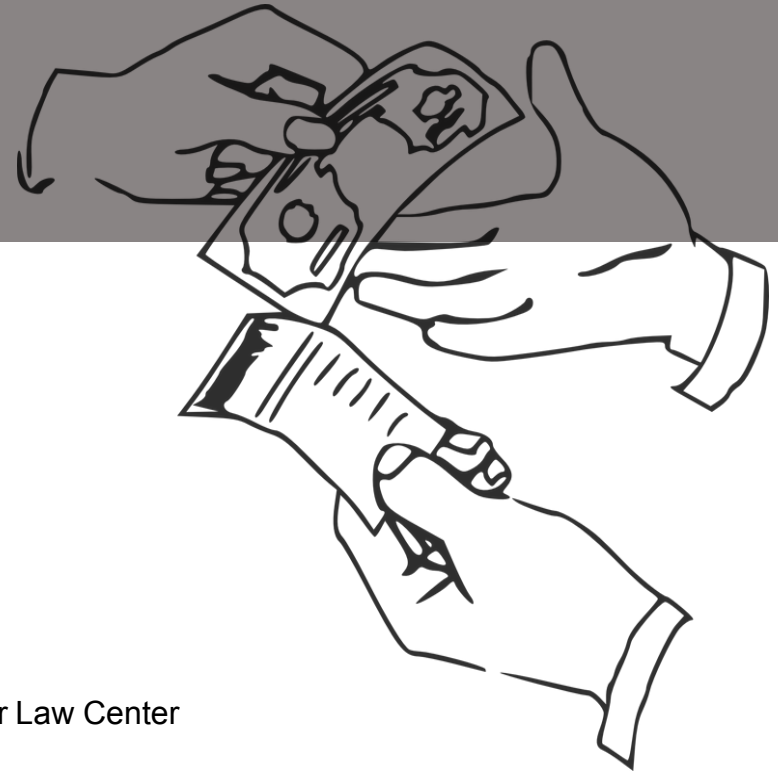
Reforming California Court Debt:

Ability to Pay Determinations and Beyond

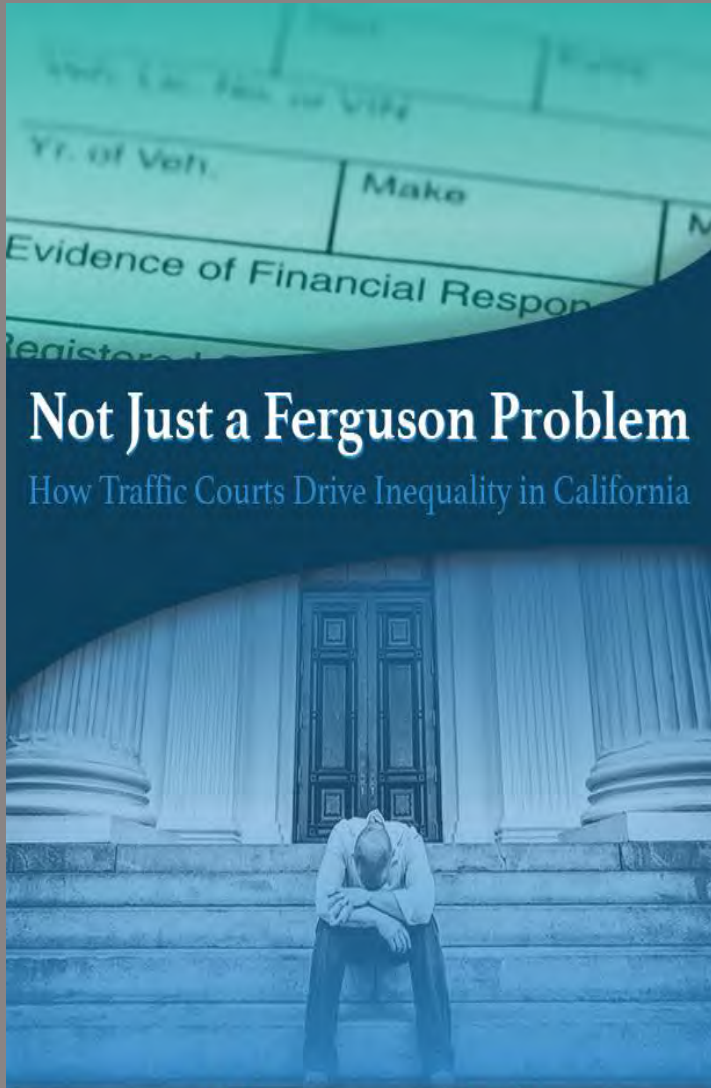
Brittany Stonesifer,
Legal Services for Prisoners with



Understanding and Exposing the Problem



2015



Not Just a Ferguson Problem

How Traffic Courts Drive Inequality in California



2016



STOPPED, FINED, ARRESTED

Racial Bias in Policing and Traffic Courts in California

April 2016 | www.ebcic.org/backontheroad

Why does traffic court matter?

- CA has some of highest traffic fines fees in the country.
 - Average CA ticket: \$490 – over 3x the national average!
- ⅔ of Americans don't have enough money for \$500 emergency.
- 60% of all court filings in CA are traffic court cases.

Cost of an Infraction Citation in California Traffic Court, 2015

	STATUTE	ASSESSMENT	AMOUNT OWED
	BASE FINE (example)	\$100	\$100
	State penalty assessment (Penal Code (PC) § 1464)	\$10 for every \$10 base fine	+\$100
	State criminal surcharge (PC § 1465.7)	20% surcharge on base fine	+\$20
	Court operations assessment (PC § 1465.8)	\$40 fee per fine	+\$40
	Court construction (Government Code (GC) § 70372)	\$5 for every \$10 in base fine	+\$50
	County fund (GC § 76000)	\$7 for every \$10 in base fine	+\$70
	DNA Fund (GC § 76104.6 and § 76104.7)	\$5 for every \$10 in base fine	+\$50
	Emergency Medical Air Trans. Fee (GC § 76000.010)	\$4 fee per fine	+\$4
	EMS Fund (GC § 76000.5)	\$2 for every \$10 in fine	+\$20
	Conviction assessment (GC § 703.73)	\$35 fee per fine	+\$35
	Night court assessment (GC § 42006)	\$1 per fine	+\$1
ACTUAL COST OF CITATION			\$490

Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California, Back on the Road, 2015.

STATUTE	ASSESSMENT	OWED
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Night court assessment (GC § 42006)	\$1 per fine	+\$1
ACTUAL COST OF CITATION		\$490
DMV warrant/hold assessment fee (Vehicle Code (VC) § 40508.6)	\$10 fee	+\$10
Fee for failing to appear (VC § 40508.5)	\$15 fee	+\$15
Civil assessment for failure to appear/pay (PC § 1214.1)	\$300 fee	+\$300
COST OF CITATION IF INITIAL DEADLINE IS MISSED		\$815

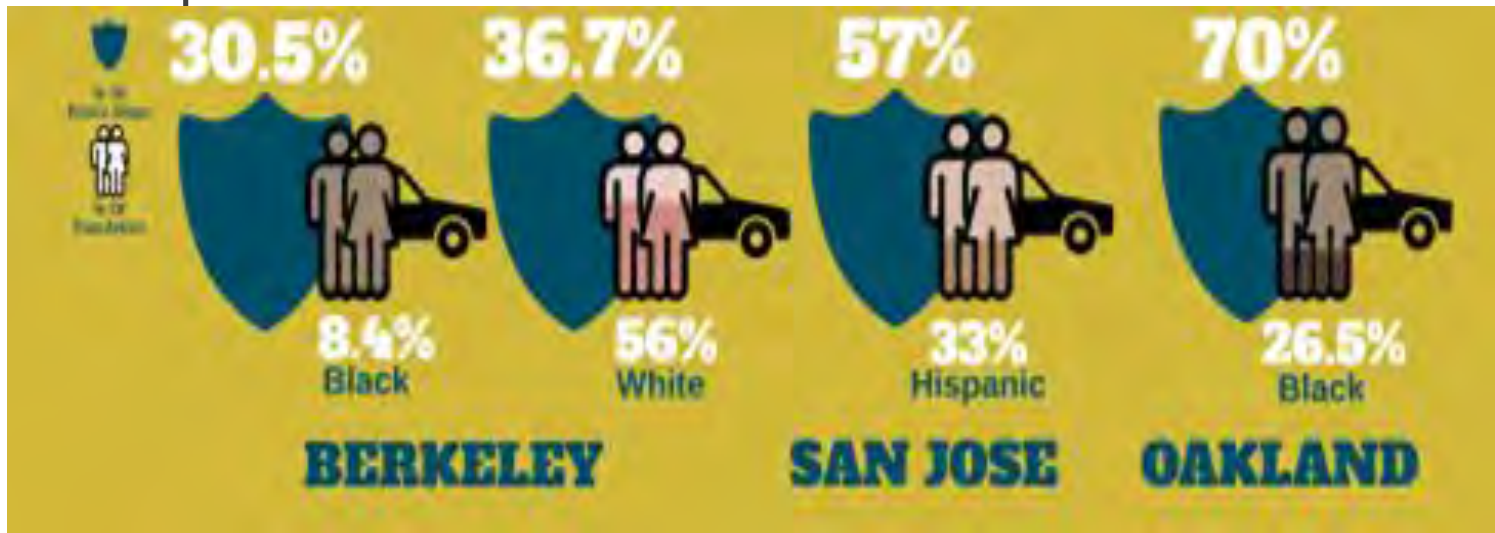
The license suspension debt trap

- *Not Just A Ferguson Problem:* 4 million licenses suspended for failure to pay or appear
- License suspension = Job loss, education stagnation, obligations, jail
 - 78% of Californians drive to work
 - Driving jobs are lower-wage jobs

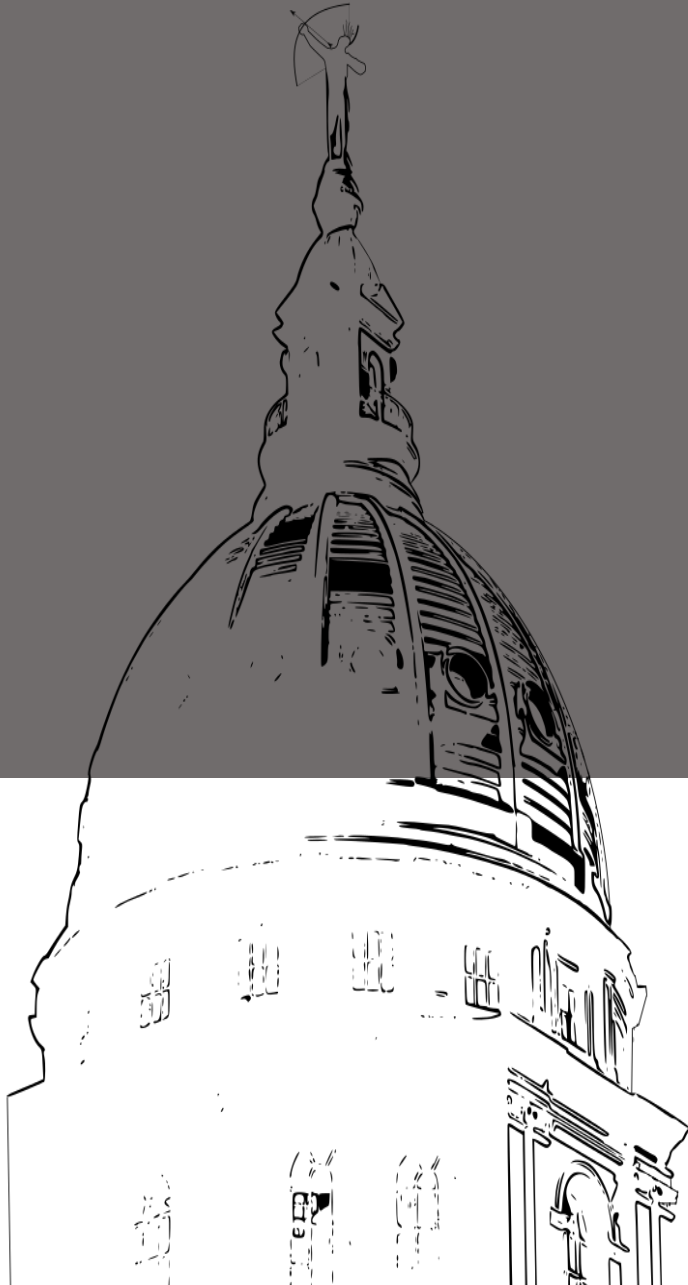


Racial disparity and policing

- Racial disparity at every step of the process
- Ticket-to-jail pipeline: Driving with a suspended license



Changing the Law



1. *Traffic Court Amnesty: 2015-2017*

- State legislation (3 separate bills)
- Payment plan → 50-80% reduction and license restoration
- Temporary; lots of limitations



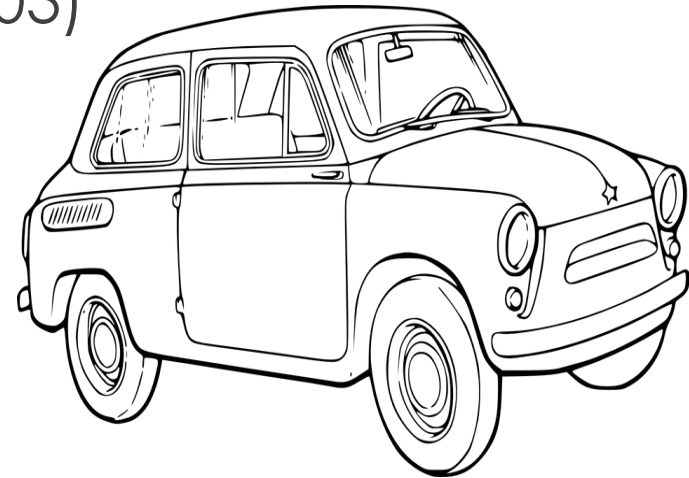
2. *Ability to Pay: Spring 2017*

Statewide Rules of Court:

- Rule 4.335: Ability to Pay Determinations
- Rule 4.107: Mandatory Reminder Notices
- Rule 4.105: Prohibits requirement to pay prior to a court appearance (2015)
- Rule 4.106: Expanding categories of “good cause” to warrant a waiver of fees

3. *License Suspension: Summer 2017*

- California became the first state in the nation to stop suspending licenses for failure to *pay* traffic tickets!
 - 2017-18 CA Budget (AB 103)
 - Can still suspend for failure to *appear*





Enforcing and Implementing the Law

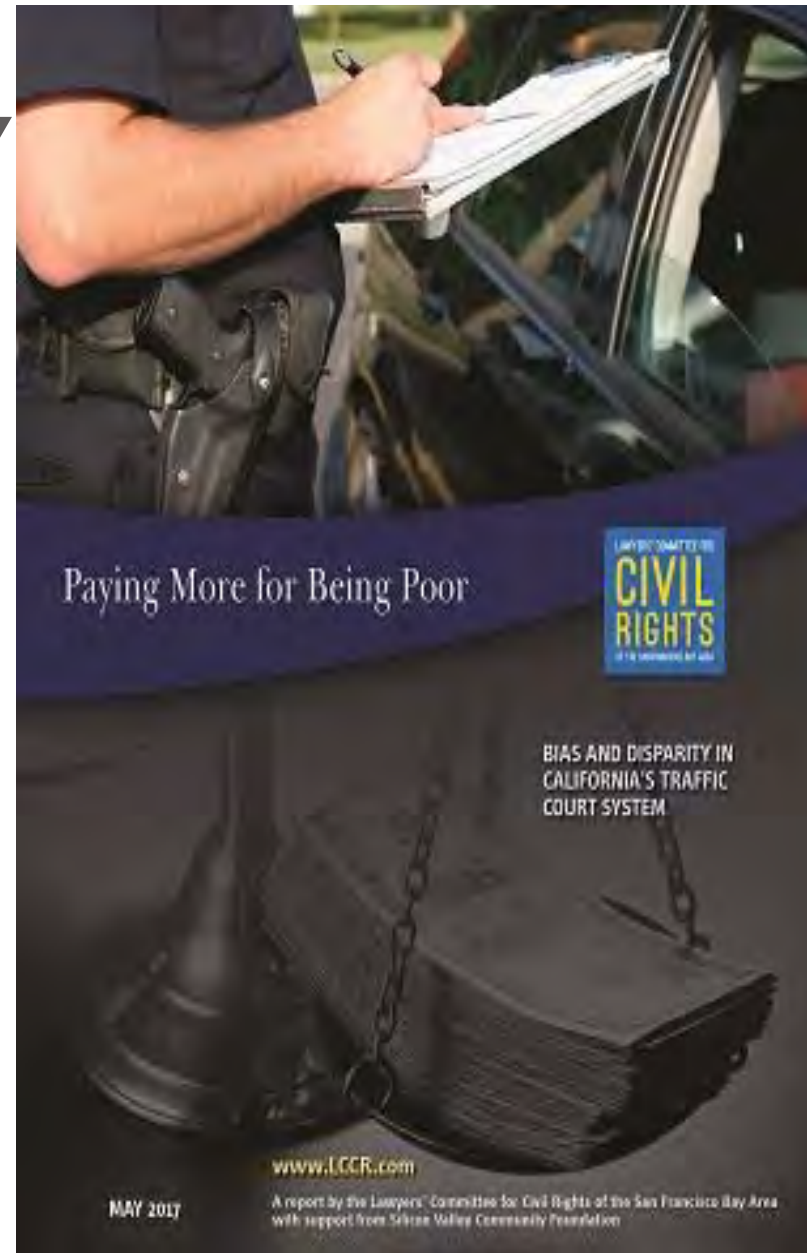
1. *Traffic Court Amnesty*

- 58 counties = 58 different processes
- Meetings with local courts
- Clinics and outreach
- Data collection and reports... to prepare for something better:
 - About 200,000 accounts resolved & licenses holds lifted



2. *Ability to Pay*

- County-by-county advocacy
- Getting counties to change policies, forms, notices, websites
- Statewide ability to pay form (Spring 2018)
- Clinics and referral network



Back on the Road “Ability to Pay” Implementation Toolkit

- **ebclc.org/category/back-on-the-road/**
- 58 county breakdown on EBCLC website
- Primer for advocates on the new rules
- Sample advocacy letter to court staff
- Know Your Rights materials
- Sample motion for an ability-to-pay determination
- Court-watching guide
- Survey/ referral form

3. *License Suspension*

- “Willful” failure to pay -
Rubicon v. Solano Superior Court (settled in 2017)
- Restoring already suspended licenses -
Hernandez v. DMV



Lessons Learned:

1. Change can happen in many ways, but big changes take multi-pronged advocacy
2. Court debt reform should be grassroots - focus on the impact and follow-up on the ground
3. Meaningful “ability to pay” processes need:
 - a. Consistent standards for fee reductions and indigence
 - b. Meaningful, appropriate alternatives to payment
 - c. Clear notice and user-friendly forms
4. Weigh “ability to pay” vs. just eliminating the fee



Strategies for Providing Effective Representation in Ability to Pay Proceedings

Know the Law

- In addition to the Constitutional protections and SCOTUS case law already mentioned,
- You must know the law in your specific jurisdiction.
- Some Courts will require a specific form/application.
- You also need to know the rules for making a record, which may include local rules in addition to state law.
 - Do you need to file a motion?;
 - Object in the courtroom?; or
 - Is an oral argument sufficient?



What Triggers Criminal Justice Debt?

- Fine-only offenses (some jurisdictions, these are in the criminal code);
- Criminal offenses that include jail time;
- Generally, anytime a case is resolved there will be costs, sometimes even with a dismissal.
 - Court costs;
 - Restitution;
 - Fines.

Some costs are mandatory, some can be waived at the outset, and some have to be addressed once in default.

Additionally, some programs “require” payments, such as probation, D. Adj. or PTI programs. All of these create an opportunity to advocate based on your client’s ability to pay.



When Might your Client be Entitled to an Ability to Pay Hearing?

- Before imposition;
- After imposition, but when client's situation changes;
- After default.
 - Default can mean warrants, arrest, and additional jail time, potential revocation from probation, etc.

The best case scenario is to anticipate your client's ability to pay and discuss with the court before your client defaults.



The Hearing

- Prep your client
 - The costs they are facing;
 - They may have to answer the judge's questions.
- Help your client craft a narrative BUT
- The advocate (you!) should make the argument.
- You must know your client's story;
 - Humanize them to the court; and
 - Have genuine compassion.
- Before the hearing you should speak with the prosecutor.
 - Will she agree to not object?
- Use motions and other court filings as an opportunity to educate the court and the prosecutor.



Bring Proof of your Client's Financial Situation

- Bring paystubs, proof of government benefits, dependents, disability, and any special circumstances.
- This includes your client's past financial situation, which can be useful in arguing future ability to pay,
 - This is particularly important if your client has been in jail pretrial.
- Anticipate the court's arguments, such as they might be able to pay after they are released, get a job, etc.



Know the Alternatives to Full Payment

- What is allowed?
 - Community service, treatment, classes, waiver, etc.
- What can your client do?
 - Make sure that you do not agree to an alternative that is equally difficult to comply with.
- Have creative solutions.
 - This is your chance to think outside the box.



Unintended Consequences

Will arguing ability to pay disadvantage your client?

- Use language of success;
- Have options lined up that your client can do.
 - Find a way to say “yes,” when possible.



Policy Implications of Direct Representation

- Allows for practical knowledge of the process; and
- Understanding of what is really happening on the ground.
 - Can have a law that seems positive but is not creating the intended outcomes.
- Allows advocates to understand when seemingly good policy reform will have a corresponding negative outcome.
- Creates connection between advocates and individuals who are directly affected.
 - Advocates are more effective when the issue is not abstract;
 - Former clients can become advocates and tell their stories.



Questions?

To request further information from our speakers if we didn't have time to answer your questions:

Sharon Brett: sbrett@law.harvard.edu

Karly Jo Dixon: kdixon@fairdefense.org

Brittany Stonesifer: brittany@prisonerswithchildren.org

Just a Reminder

- Tomorrow you will receive an email with:
 - The recording and materials for this webinar
 - A survey
 - Instructions for receiving a certificate of attendance.

- Thank you to our speakers!

