

# Addressing Modern Debtors' Prisons with Graduated Economic Sanctions that Depend on Ability to Pay

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## MISSION STATEMENT

The Hamilton Project seeks to advance America's promise of opportunity, prosperity, and growth.

We believe that today's increasingly competitive global economy demands public policy ideas commensurate with the challenges of the 21st Century. The Project's economic strategy reflects a judgment that long-term prosperity is best achieved by fostering economic growth and broad participation in that growth, by enhancing individual economic security, and by embracing a role for effective government in making needed public investments.

Our strategy calls for combining public investment, a secure social safety net, and fiscal discipline. In that framework, the Project puts forward innovative proposals from leading economic thinkers — based on credible evidence and experience, not ideology or doctrine — to introduce new and effective policy options into the national debate.

The Project is named after Alexander Hamilton, the nation's first Treasury Secretary, who laid the foundation for the modern American economy. Hamilton stood for sound fiscal policy, believed that broad-based opportunity for advancement would drive American economic growth, and recognized that "prudent aids and encouragements on the part of government" are necessary to enhance and guide market forces. The guiding principles of the Project remain consistent with these views.





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This policy proposal is a proposal from the author(s). As emphasized in The Hamilton Project's original strategy paper, the Project was designed in part to provide a forum for leading thinkers across the nation to put forward innovative and potentially important economic policy ideas that share the Project's broad goals of promoting economic growth, broad-based participation in growth, and economic security. The author(s) are invited to express their own ideas in policy papers, whether or not the Project's staff or advisory council agrees with the specific proposals. This policy paper is offered in that spirit.

**BROOKINGS**

# Abstract

There is growing evidence that the use of economic sanctions—fines, fees, surcharges, and restitution—at amounts that people have no meaningful ability to pay, results in significant financial and social instability for debtors and their families, and increased crime rates. These sanctions also have a delegitimizing effect on criminal justice systems that people see as more interested in revenue generation than fairness. This paper proposes policy solutions centered on the creation of a system of graduating economic sanctions according to a person’s ability to pay, and designed to meet the criminal justice goals of sentencing equality and crime reduction, while also improving outcomes for people and their families who would otherwise carry unmanageable criminal debt.

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# Introduction

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The use of economic sanctions to punish crimes ranging from minor traffic or public order offenses to the most serious felonies is ubiquitous in the United States. Nationally, millions of people hold billions of dollars of criminal debt from past economic sanctions imposed at the state and local level (Martin, Smith, and Still 2017). Federally, as of fiscal year 2017 approximately 300,000 people owed nearly \$136 billion in criminal debt, nearly 90 percent of which the federal government categorizes as uncollectable because of the limited financial resources of the debtors (Federal Sentencing Guidelines Commission 2016; U.S. Department of Justice 2018; U.S. Government Accountability Office 2018).

For many, payment of criminal justice debt stemming from economic sanctions is infeasible, particularly for those who already struggle to meet basic needs or who have limited ability to save, as well as those who face difficulties obtaining stable employment due to a record of conviction, chemical dependency, developmental or physical disability, or mental illness.

The inability to pay criminal justice debt quickly and in full can result in long-term, disastrous consequences. In many jurisdictions, outstanding criminal debt accrues additional financial penalties, including interest, late fees, and other assorted collections costs that at times outpace the amount initially imposed. This can make it impossible for people of limited means to ever pay the principal, keeping people embroiled in perpetual debt and punishment even for minor offenses. And for those who miss a payment or give up in the face of insurmountable debt, nonpayment may lead to constitutionally questionable practices, such as the deprivation of driver's and occupational licenses, public benefits, and voting rights; the extension of probation or parole; or even incarceration. As a result, some describe the imposition of unmanageable economic sanctions and additional penalties for nonpayment as a form of modern debtors' prison (American Civil Liberties Union [ACLU] 2010).

As attention to the consequences of using economic sanctions as punishment has increased, important legal and economic questions have arisen about their continued use. This paper, however, does not address growing concerns

that certain conduct is designated as illegal because it allows the government to engage in revenue generation or social control, rather than to provide public safety.<sup>1</sup> Nor does this paper address problems related to inconsistent application of economic sanctions. Studies suggest, for example, that both the imposition and amount of economic sanctions may depend on whether a person lives in a rural or urban area, the nature of the offense (divorced from offense seriousness), and the individual characteristics of the person sentenced including race, education level, and perceived financial condition (Cole et al. 1987; Harris, Evans, and Beckett 2011; Olson and Ramker 2001; Pleggenkuhle 2018; Ruback and Bergstrom 2006; Ruback and Clark 2011). Each of those concerns is worthy of further study and consideration. This paper, however, assumes that economic sanctions will be used as a form of punishment for at least some offenses, and seeks to provide a mechanism to make those sanctions a fairer and more equitable—albeit imperfect—method of punishment.

To that end, this paper offers a series of proposals related to the creation of mechanisms for economic sanctions that graduate according to a person's ability to pay. The first proposal focuses exclusively on structuring objective criteria for assessing a person's financial condition and his or her ability to make payments on criminal debt. The second proposal offers three methods of applying the determination of financial condition to assessment of sanctions: (1) a flat reduction of a percentage of the economic sanctions that would otherwise be imposed for those below a particular financial threshold; (2) a sliding scale approach that allows for greater granularity in sanctions; and (3) a day-fines model in which the person's adjusted daily income is multiplied by a penalty unit established through a ranking of offense seriousness to calculate the amount of economic sanctions to impose. This paper also recommends the application of graduation to all forms of economic sanction—including surcharges, fees, collection costs, and restitution—to ensure that the full amount of the sanctions imposed is within a person's ability to pay, along with the adoption of a distribution scheme that prioritizes restitution.

In addition, this paper offers a series of related proposals intended to support the goals of graduation, including procedures for postsentence modification when unexpected changes in financial circumstances occur, a requirement that

collections periods be time-limited, the use of supportive collections practices, the adoption of amnesty programs for those with debt predating the implementation of reforms, limitations on collateral consequences and the elimination

of penalties for nonpayment that make it more difficult for people to pay, and the development of noncarceral, noneconomic punishment alternatives.

# The Challenge

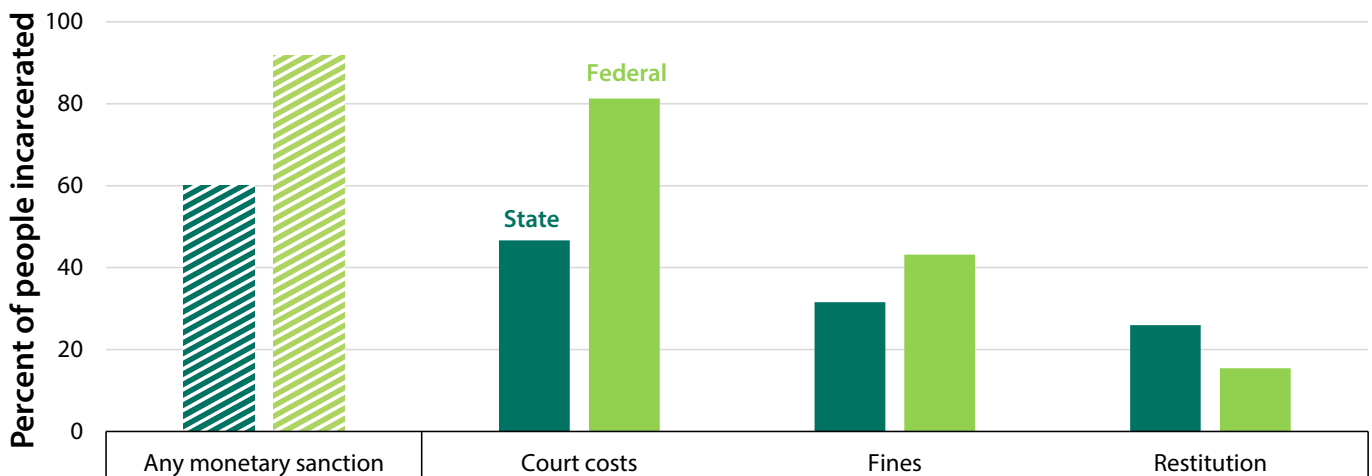
Across the United States, many different economic sanctions are used in municipal, traffic, juvenile, misdemeanor, and felony courts (Feierman et al. 2016; Harris 2016; White House 2015). There are several standard categories of economic sanction in use (Colgan 2014, 2018; Katzenstein and Waller 2015; Martin et al. 2018; Ruback 2015). First are statutory fines, that can range from one dollar to millions of dollars, depending on the seriousness of the offense. Second are surcharges, the amount of which is either a percentage of the statutory fines imposed or a flat amount added on top. Surcharges often are designated for specific purposes, including a wide array of public services unrelated to the charged offense or the court system. Third is restitution, which is payable to the victim for the purpose of making the victim whole. Finally, there are administrative fees; these are at least nominally intended to recoup system expenses, and include, among other things, fees imposed for the use of indigent defense counsel or a jury, for prosecution and law enforcement investigation costs, for pretrial and postconviction incarceration costs, for probation or parole supervision, and more. The wide reach of these sanctions is illustrated by figure

1, which shows that 60 percent of people incarcerated in state facilities and 92 percent of people incarcerated in federal facilities have experienced some form of monetary sanction.

Economic sanction amounts can vary widely from jurisdiction to jurisdiction. Supervision fees, for example, range from a low of around \$15 to more than \$100 per month, a difference that accrues as each month of supervision passes (Ruhland et al. 2017). An even wider gulf can exist with respect to indigent defense fees. While some jurisdictions impose a flat fee of a few hundred dollars, other jurisdictions charge the full cost of representation—at times in the tens of thousands of dollars—even though the person qualified for defense representation due to indigency.

These various forms of economic sanction add up, often turning what would otherwise have been a low statutory fine into a much more substantial total penalty. For example, a 2012 analysis of traffic tickets in California conducted for the California Assembly’s Committee on Appropriations described how a statutory fine of \$100 rose to \$490 (see table

FIGURE 1.  
Percent of People Incarcerated with a Court-Imposed Monetary Sanction, by Type of Sanction and Level of Government



Source: Liu, Nunn, and Shambaugh (2019) based on data from the Survey of Inmates in State and Federal Correctional Facilities, BLS (2004). Note: Data are restricted to inmates sentenced to serve time. See Harris, Evans, and Beckett (2010) for additional information.



1), and a statutory fine of \$500 jumped to \$1,829, in both cases as a result of numerous surcharges and fees. Table 1 shows that those additional economic sanctions ranged from a \$1 assessment to fund night court to a \$100 flat surcharge (Long 2012; Lawyers Committee for Civil Rights et al. 2015).

### ABILITY TO PAY

While some people have the financial capacity to pay economic sanctions when they are assessed, or within a short time thereafter, many simply are not able to pay sanctions. The 2017 Supplemental Poverty Measure—which measures poverty rates by assessing income including the effects of taxes and noncash benefits, as well as estimating expenditures for basic necessities, medical, and work-related expenses—revealed that 13.9 percent of people in the United States are living in poverty (Fox 2018). Many people on public benefits are unable “to secure even the basic necessities . . . , and are forced to sacrifice one need for another, e.g., not eat in order to pay for heat,” leaving little flexibility for the payment of economic sanctions (City of Richland v. Wakefield 2016). Even people with paid employment living above the federal poverty

line may be likely to experience significant difficulty paying off criminal debt (Pogrebin et al. 2014). For example, in many states people earning minimum wage take home a monthly income between approximately \$1,700 (where the minimum wage is \$7.25 per hour) and \$2,050 (where the minimum wage is \$10.10 per hour) after accounting for the Earned Income Tax Credit (EITC). In either case, those income levels are just over the federal poverty level for a single parent household with two children (Garver 2014). While still better off than those living below the federal poverty level, those families must pay housing, food, hygiene, medical expenses, child-care costs, and more before they can save, making it unlikely that they will have meaningful liquidity or savings on which they can draw (Beverly and Sherraden 1999). People living with limited economic slack, therefore, must cut back on essential items when placed under financial pressure (Mullainathan and Shafir 2010).

This problem is exacerbated by a lack of access to financial institutions. Approximately 9 million U.S. households are unbanked, meaning that no person in the household

TABLE 1.

## Cost of an Infraction Citation in California Traffic Court

	Assessment	Amount Owed
<b>Base Fine (Example)</b>		<b>\$100</b>
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 Transportation Fee (GC §76000.010)	\$4 for every \$10 in base fine	\$4
EMS Fund (GC §76000.5)	\$2 for every \$10 in base fine	\$20
Conviction Assessment (GC §70373)	\$35 fee per fine	\$35
Night Court Assessment (GC §42006)	\$1 fee per fine	\$1
<b>Actual Cost of Citation</b>		<b>\$490</b>
DMV Warrant/Hold Assessment Fee (Vehicle Code (VC) §40508.6)	\$10 fee	
Fee for Failing to Appear (VC §40508.5)	\$15 fee	
Civil Assessment for Failure to Appear/Pay (PC §1214.1)	\$300 fee	
<b>Cost of Citation if Initial Deadline is Missed</b>		<b>\$815</b>

Source: Lawyers Committee for Civil Rights et al. 2015.

Note: These data are for 2015.

has a bank account from which savings could be drawn (Federal Deposit Insurance Corporation [FDIC] 2015). Unbanked households are particularly prominent in minority neighborhoods, where there are fewer, if any, banks (Baradaran 2014; Beverly and Sherraden 1999). People who are unbanked must turn to significantly more-expensive lending options such as payday loans to pay criminal debt (Alabama Appleseed 2018).

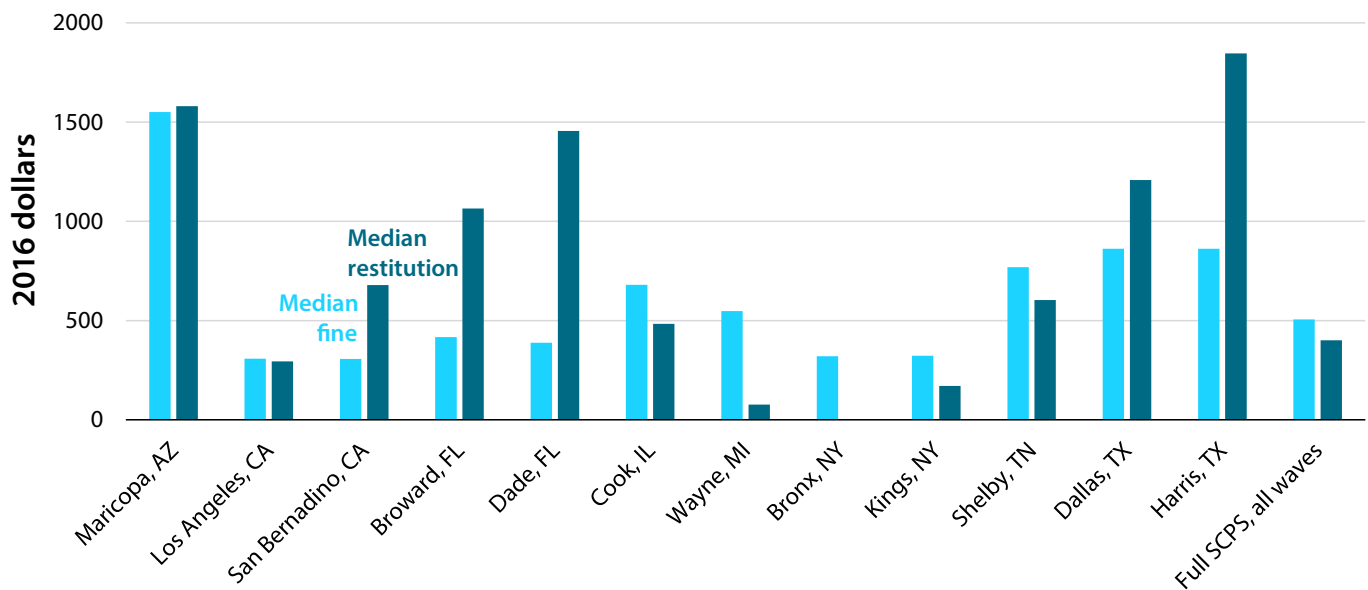
In light of these limitations on income and savings, it is unsurprising that the Federal Reserve’s 2017 Survey of Household Economics and Decisionmaking showed that, while overall economic well-being had improved in the previous five years, more than one quarter of adults in the United States are not capable of paying all of their monthly bills in full, more than one quarter of adults skipped necessary medical care due to a lack of funds, and four out of ten adults said that they would have difficulty covering an unexpected \$400 expense without selling personal effects or borrowing money (Board of Governors of the Federal Reserve System 2018). As figure 2 illustrates, the median fine across major counties is often high, indicating that many individuals would find it difficult to pay these economic sanctions.

The ability to pay economic sanctions is likely even farther out of reach for people who are sentenced to terms of incarceration. Of people charged with misdemeanor or felony offenses for which incarceration is a possible sentence, between 80 and 90 percent qualify for indigent defense

representation due to an inability to pay for counsel (Bannon, Nagrecha, and Diller 2010; Patel and Phillip 2012). Those figures reflect the limited incomes many people have prior to arrest (Rabuy and Kopf 2015). Furthermore, those who are sentenced to terms of incarceration may have no ability to earn an income while incarcerated—employment within jails and prisons can be sparse, and wages can range from a few cents to a few dollars per hour (Evans 2014; Katzenstein and Waller 2015; Link 2017).

After release from incarceration, many people struggle to meet even their basic human needs, including food, shelter, and hygiene (Harding 2014). A criminal conviction can significantly narrow employment prospects. In some cases, this is due to statutory limitations on occupational licenses or other disqualifications triggered by certain convictions (National Reentry Resource Center 2018). In others, it is due to private employer reluctance to hire, a reluctance that can be exacerbated by perceived administrative burdens related to wage garnishment when it is used as a mechanism for collecting criminal debt (Agan and Starr 2017; Beckett and Harris 2011; Evans 2014; Pager 2003; Petersilia 2000; Western 2006). Employment opportunities may also be reduced for people with mental health or chemical dependency issues, or who have physical disabilities, all of which occur at significantly higher rates among both adults and juveniles who are incarcerated than in the general population (Bronson, Maruschakand, and Berzofsky 2015; Bronson et al. 2017; James

**FIGURE 2.**  
**Median Fine and Restitution Amounts for Selected Counties, 1990–2009**



Source: Martin et al. (2018).

Note: Data are from the State Court Processing Statistics (SCPS). The median restitution for Bronx, NY, is unobservable because no cases included in the SCPS reported a restitution sentence. Fines and restitution are expressed in 2016 dollars.



and Glaze 2006; Subramanian et al. 2015; Underwood and Washington 2016). Limitations on employment opportunities hit people of color particularly hard, because they are more likely to be subject to employment discrimination due to perceptions of criminality (Agan and Starr 2017) and to return to communities with few employment options (Bell 2018; Pleggenkuhle 2018). For those lucky enough to find employment it is more likely to be only minimum-wage or part-time work without benefits, leaving them with limited ability to pay anything beyond what is necessary to meet basic needs (Pogrebin et al. 2014; Ruhland et al. 2017). In short, people returning from periods of incarceration are less likely to be employed, more likely to earn lower wages when they do obtain employment, and thus are more likely to have significant financial instability that will hamper paying off criminal debt (Western and Pettit 2010a).

Whether incarcerated or not, for those unable to pay economic sanctions immediately, additional financial penalties can accrue. Many jurisdictions charge interest and monthly collections costs, often at rates that make it difficult for a person of limited means to pay the principal debt (Colgan 2018). Jurisdictions also often impose significant fees for late or missed payments—nearly doubling the economic sanctions imposed for the California traffic ticket described above, for example—that again can push paying off criminal debt in full farther out of reach (Lawyers Committee for Civil Rights et al. 2015). For those with felony convictions in particular, criminal debt is frequently in the hundreds or thousands of dollars, with debt often increasing over time due to interest and various fees (Alabama Appleseed 2018; Bucklen and Zajac 2009; Harris, Evans, and Beckett 2010; Link 2019; Martin et al. 2018; Pleggenkuhle 2018; Reynolds et al. 2009).

In addition to increased financial burden from interest and fees, in some jurisdictions the failure to pay can result in what have come to be known as poverty penalties. Despite their dubious constitutionality when applied to a person who is unable to pay due to limited resources, these penalties include ineligibility for public benefits or for occupational or driver's licenses, the deprivation of voting rights, and even incarceration, among others (ACLU 2010; Beckett, Harris, and Evans 2008; Cammett 2012; Colgan 2019).

Furthermore, ongoing criminal debt has particularly significant implications for the use, length, and consequences of probation and parole. In the United States, more than 1 in 55 adults are on probation or parole (Horowitz 2018), as are approximately 180,000 juveniles annually (Hockenberry and Puzanchera 2017). In some jurisdictions, the only reason a person is placed on probation in the first instance is because of their inability to pay economic sanctions in full (Human Rights Watch 2014). With rare exceptions,

people on probation or parole are charged supervision fees for the period of their community supervision (Colgan 2019; Columbia Justice Lab 2018; Link 2019), and are also subject to a wide variety of supervision conditions that interfere with one's privacy, time, and financial well-being (Doherty 2016). The inability to pay economic sanctions can lead to extended terms of probation or parole, meaning that people are subject to continued supervision—and therefore the risk of incarceration for a violation—because they have no meaningful ability to complete payment (Colgan 2019; Link 2017; Nagrecha, Katzenstein, and Davis 2015).

## INCOMPATIBILITY WITH CRIMINAL JUSTICE GOALS

In light of the widespread use of economic sanctions and their disproportionate impact on people with limited or no means to pay, the imposition of unmanageable criminal debt is not in keeping with widely held criminal justice goals.

One recognized criminal justice goal is equality in punishment, in which two people who are equally culpable for the same offense should be punished equally (see box 1).<sup>2</sup> The use of economic sanctions raises a distinct problem with respect to equality in sentencing given that, unlike other forms of punishment, economic sanctions effectively extend the punishment beyond the person who committed the offense to innocent family members. It is not unusual for punishment of all kinds to cause some degree of harm to the families of convicted persons. For example, families, and particularly children, experience deprivations when separated from a family member because of incarceration (Bernstein 2005; Travis and Petersilia 2001; Western and Pettit 2010b). The distinction here is that, in the case of incarceration, the family member does not actually become subject to incarceration, whereas those who pay economic sanctions for a family member fulfill the punishment imposed. Family members often directly pay for economic sanctions, including through monies sent in to jail or prison from which outstanding criminal debt is deducted (Cook 2014; Katzenstein and Waller 2015; Link 2019; Pleggenkuhle 2018; Ruhland et al. 2017). Judges, probation officials, and others in charge of debt collection may even pressure family members directly to pay (Edsall 2014; Harvey et al. 2014; Katzenstein and Waller 2015). Because men are more likely to be involved in the criminal justice system, and therefore are more likely to carry criminal debt, those debts are often directly paid by their mothers, wives, and girlfriends (Western et al. 2015). For example, middle-aged African American women were more likely than other demographic groups to be paying criminal debt for others in a recent survey conducted in Alabama (Alabama Appleseed 2018).

In addition to equality in sentencing, a separate criminal justice goal is general deterrence, which, put simply, is the idea that the threat of punishment will deter people from breaking

## BOX 1.

### Equality in Sentencing

In seeking to achieve equality in sentencing, a question arises as to whether we should measure equality formally or substantively. Proponents of formal equality believe that an equal dollar amount should be imposed on all people who are equally culpable for the same offense. Proponents of substantive equality believe that, because of the regressive qualities of economic sanctions, the financial effect, rather than the specific dollar amount, is the appropriate measure. As a practical matter, the use of poverty penalties—increased debt resulting from collections costs, interests, and fees, as well as additional penalties such as prolonged community supervision, the loss of license and benefits, and incarceration—means that there is no formal equality between those who can pay and those who cannot, because only the latter will be subject to those additional forms of punishment (Colgan 2018). But even if poverty penalties were set aside, and only a specific dollar amount were imposed, the punitive experience would be more severe for those with limited means who must stretch each dollar farther to meet basic needs than for those who can pay easily, and therefore substantive equality still would not be achieved. Take, for example, a \$100 fine. A person with means can pay the \$100 and move on. If a person with limited means paid \$5 per month, as often is the case (Human Rights Watch 2014), the punishment would extend over 20 months, cutting into the debtor's budget for basic necessities each month. In cases with higher amounts of economic sanctions imposed or where people cannot reach the principal due to interest and other costs, people may struggle under the burden of economic sanctions for decades—not because of greater wrongdoing or increased culpability, but only because of an inability to pay (ACLU of Washington and Columbia Legal Services 2014; Beckett et al. 2008; Colgan 2018; Patel and Philip 2012).

the law.<sup>3</sup> There is a dearth of research regarding the general deterrent value of economic sanctions. One study that did investigate that question found that in four North Carolina counties fines had a general deterrent effect with respect to seven serious felonies (Cherry 2001). Further study would be necessary to assess whether those results are replicable to other offense types, particularly lower-level offenses that are most likely to be primarily punished by economic sanctions. Additionally, because deterrence is based on the notion that a person is making a choice regarding whether to violate the law, this study does not account for offenses likely to be punished through economic sanctions for which a person must make that choice under significant constraints, such as the offense of trespass for a person who is homeless and who sleeps in a public space (Bauman et al. 2014).

Yet another recognized criminal justice goal is that the punishment has rehabilitative or specific deterrent benefits for those on whom it is imposed, promoting future behavior that falls within the confines of the law. Relevant studies related to this goal focus on recidivism following the imposition of economic sanctions.<sup>4</sup>

As with general deterrence, studies measuring recidivism are mixed, though overall the research indicates that higher rates of economic sanctions, or imposition beyond a manageable amount, can increase recidivism. While one study found that the use of fines had better recidivism outcomes than driver's license revocation in the context of drunk driving cases (Yu 1994), and other studies indicate that, as a general matter for

adults, the imposition of economic sanctions do not correlate with recidivism (Iratzoqui and Metcalfe 2017; Minor, Wells, and Sims 2003; Outlaw and Ruback 1999), several others have linked recidivism to economic sanctions when they are imposed in ways that are more likely to result in an inability to pay. Those conditions may include the imposition of sanctions at higher dollar values, or the imposition of types of sanctions that often result in higher dollar values (e.g., fees and restitution) (Gordon and Glaser 1991; Iratzoqui and Metcalfe 2017; Mann et al. 1991; Miller 1981). Similarly, research has linked the completion of restitution—only possible if payment is economically feasible—to lower recidivism rates (Outlaw and Ruback 1999). These results are supported by several recent studies that focus more specifically on an inability to pay economic sanctions. For example, a 2014 study revealed that the Colorado Department of Corrections staff believed that adults commonly absconded from parole because they believed they could not pay their economic sanctions (Pogrebin et al. 2014; Ruhland et al. 2017). Furthermore, a handful of studies involving self-reporting by people with criminal debt include evidence that a significant share of people—ranging from 17 percent in one study to more than 38 percent in a 2018 survey—commit crimes such as drug sales, prostitution, and theft in order to obtain money to pay off economic sanctions (Alabama Applesseed 2018; Cook 2014; see also Harris, Evans, and Beckett 2010; Human Rights Watch 2014; Stillman 2014).<sup>5</sup>

As with research focused on adults, studies regarding the use of economic sanctions to punish juveniles tend to indicate

that the imposition of economic sanctions beyond a juvenile's ability to pay leads to higher rates of recidivism.<sup>6</sup> In one study, researchers concluded that the percentage of restitution paid was the most important predictor of whether the juvenile would recidivate, leading the authors to posit that courts should consider ability to pay when assessing restitution (Ervin and Schneider 1978; Jacobs and Moore 1994).<sup>7</sup> In 2017 researchers found that for juveniles, the imposition of restitution, higher overall sanction amounts, and a continuation of debt after the juvenile's case was otherwise closed each significantly increased the likelihood that a juvenile would go on to commit a future offense (Kraus 1974; Piquero and Jennings 2017).

Even if there were a more substantial and consistent indication of deterrent or rehabilitative value, there is significant and increasing evidence that the use of economic sanctions has negative repercussions for people owing criminal debt and their families that may undermine both criminal justice and broader societal goals.

For people of limited means, unmanageable economic sanctions have been tied to reduced access to basic human needs, reduced employment opportunities, and family disunification. For example, in a 2018 survey of people owing criminal debt in Alabama, 82.9 percent of respondents reported having to skip payments on basic necessities such as food, housing, hygiene, and medical care, as well as child support payments, all of which have implications for their own economic and social stability as well as that of their family members (Alabama Appleseed 2018; McLean and Thompson 2007; Ruback et al. 2006; Ruhland et al. 2017). Additionally, the inability to clear criminal debt can negatively impact a person's credit record. Because many potential employers and landlords check credit records, this can increase the difficulty people have in obtaining and maintaining stable housing and employment (Beckett, Harris, and Evans 2008; Evans 2014). These circumstances are made all the worse in cases where a collateral consequence of conviction, or a penalty for nonpayment, involves the denial of public benefits, thus further limiting a person's housing options or otherwise draining funds needed to support debtors or their families, or that results in the loss of occupational or driver's licenses that are often necessary for employment (Pawasarat 2000; Voorhees 2006; Waller 2005). Furthermore, while one study found no significant correlation between criminal debt and family strain for people returning from incarceration, perhaps due to the damage caused to familial relationships because of incarceration itself (Link 2017), the inability to provide basic necessities has been tied to family disunification. Family members may be forced to separate, for example, to obtain piecemeal housing or to mitigate the stress on children caused by the risk of arrest and incarceration of a parent due to nonpayment (ACLU of Ohio 2013; Campos-

Bui et al. 2017; Selbin 2016). In other words, financial distress brought on by unmanageable economic sanctions operates as a form of cumulative disadvantage for those who were already in economically precarious situations.

In addition to the negative consequences of unmanageable sanctions to debtors and their families, there are significant repercussions for the community. Increasing evidence suggests that unmanageable economic sanctions are criminogenic, pushing people to commit offenses to obtain money to pay off criminal debt. Furthermore, numerous studies have shown that social and financial instability of the type associated with the inability to pay economic sanctions, particularly due to the lack of housing, employment, and familial association, lead to an increased risk of criminal activity and otherwise impede reentry (Fontaine and Biess 2012; Graffam et al. 2004; Grogger 1991; Naser and La Vigne 2006; Pratt and Cullen 2005; Roman and Travis 2004; Uggen and Thompson 2003).

Along with the potential to increase crime, the use of unmanageable economic sanctions can cause societal harms by leading people with criminal debt and those without to question the legitimacy of a court system that appears driven by revenue generation goals rather than by goals of public safety and fair treatment. People ordered to either pay or face significant consequences up to and including incarceration, but who either have no means to pay or who can do so only by forgoing basic needs, come to see courts as lacking propriety and caring only about revenue (ACLU of Washington and Columbia Legal Services 2014; Pepin 2016; Shapiro 2014). This may be particularly exacerbated in jurisdictions where debt collection and related services are farmed out to private companies, who then charge additional fees, thereby worsening prior debts in the interest of corporate profit (Human Rights Watch 2014). Furthermore, these practices can be especially harmful to community-government relations in heavily policed areas (Harvey et al. 2014; U.S. Department of Justice 2015), particularly given recent research indicating that municipal reliance on economic sanctions is higher in cities with larger African American communities (Sances and You 2016).

Fines, surcharges, and fees are increasingly understood to operate as a regressive tax applied to a small number of community members and used to fund not just court systems and law enforcement, but also all manner of public projects including infrastructure, education, elections management, parks departments, and more (Colgan 2017, 2018; Harris 2016). In some jurisdictions, lawmakers have even begun writing ticketing increases into projected municipal budgets, and increasingly rely on economic sanctions to make up for revenues lost during economic downturns (Garrett and Wagner 2009; Stewart 2015).<sup>8</sup> Particularly when added to the significant social and economic consequences of criminal

debt on low-income families, it is not clear the deterrence and rehabilitative benefits of using economic sanctions—if any—outweigh the broader societal harms.

In light of growing evidence of the negative consequences of using economic sanctions, an increasing number of jurisdictions are developing systems to consider a person's ability to pay when determining the amount of economic

sanctions to impose. Unfortunately, in some jurisdictions judges are prohibited by law from considering a person's ability to pay—restrictions that would have to be eliminated in order to adopt the policy proposals offered herein—and in others where judges are required or allowed to do so, they often lack a reliable mechanism for assessing a person's financial condition. The policy proposals that follow are designed to address that need.

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# The Proposal

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This paper considers how the use of economic sanctions may be improved through their graduation to account for a person's financial condition. These proposals draw on experiences with ability-to-pay mechanisms currently or previously used within criminal justice systems, and, in particular, a set of pilot projects in six U.S. jurisdictions in the late 1980s and early 1990s that used day-fines (see box 2). Day-fines are a form of structured fine in which a person's adjusted daily income is multiplied by a number signifying the seriousness of the offense to establish the amount of the economic sanctions to impose. In addition, these proposals rely on experiences with means adjustments in the fields of bankruptcy, tax, and public benefits.

## DEVISE A SYSTEM FOR ABILITY-TO-PAY CALCULATIONS BASED ON OBJECTIVE CRITERIA

In its simplest form, the calculation of a person's ability to pay begins with the person's income and subtracts from that income a set of deductions for basic needs and other expenses. The policy decisions underlying what constitutes income and what deductions should be allowed, however, are more complicated. This paper proposes ways of addressing many of the most common issues that lawmakers may face in devising an ability-to-pay mechanism.

### *Establishing Base Income*

In many cases, the sources of income, or lack thereof, will be readily identifiable. Where the person has an income source—whether through employment or public benefits—for which there is no anticipated interruption, court personnel need only treat that income stream as base income.<sup>9</sup> Similarly, if there is evidence that a change in a given income stream is set to occur postsentencing, the ability-to-pay mechanism should take into account such changes. For example, if a person is to receive a raise in salary on a particular date, that additional income can be incorporated into the base income amount. In the same way, an anticipated loss of income—due, for example, to a period of incarceration—means that current income should not be projected beyond the anticipated end-date. Finally, when calculating base income, the steadiness of the income stream is relevant. Three in ten adults have family income that varies from month to month, as may be the case, for example, with seasonal or gig economy labor

(Board of Governors of the Federal Reserve System 2018). In such cases, considering the ways in which individuals must stretch income to cover down periods is critical to assessing a person's financial capacity (Colgan 2017).

The question of what should constitute income is more difficult when a person is unemployed at the time of sentencing but there is some indication of employability. Lawmakers should avoid designing ability-to-pay mechanisms that impute income in such circumstances, which artificially inflates the person's actual financial condition. This was a problem, for example, in the Oregon day-fines pilot project, that required courts to impute employment at minimum wage for those who were unemployed, resulting in the imposition of day-fines at amounts beyond what a person who was unemployed could meaningfully afford to pay (Colgan 2017; Forman and Factor 1995). Lawmakers should also avoid designing systems that require courts to project future employment. Even setting aside the expense of conducting hearings to receive and consider evidence related to an individual's prospects for employment, attempts to project future employment have been heavily criticized in the consumer bankruptcy and public benefits contexts. These criticisms include the inherently speculative nature of the inquiry, as well as the difficulty of taking into consideration structural impediments that may hamper employment prospects, including changing job market conditions, economic downturns, and the effects of employment discrimination (Bussel and Skeel 2015; Handler 1972; Handler and Hasenfeld 1991; Handler and Hollingsworth 1971; Zatz 2012). The ability to accurately predict future employment is even more difficult in the criminal sphere, given reduced employment opportunities during and after periods of incarceration partly caused by the collateral consequences or poverty penalties detailed above.

Considering these difficulties, lawmakers should limit income to only identifiable sources of actual income and, for those without any identifiable income, replace economic sanctions with alternative punishments, discussed further below. (Note that alternative sanctions may also be appropriate in some cases when income does exist.) Lawmakers also could consider delaying sentencing to allow people who appear to be eligible for public benefits an opportunity to apply for them. This was an option, for example, in the Milwaukee day-

finest pilot (Worzella 1992). Once benefits began accruing, those funds could be used as base income.

A separate question with respect to income is whether or how to include the income of family members in the base income amount. This raises competing concerns: on the one hand, inclusion of family income effectively punishes innocent family members. On the other hand, a person's actual available resources may be undervalued without the inclusion of family income. To balance those concerns, lawmakers could follow the lead of means adjustment processes used in the consumer bankruptcy and public benefits contexts by including income of the person on whom the economic sanctions will be imposed, as well as other resources to which that person has a legal or equitable claim and on which he or she typically relies to meet basic necessities (Colgan 2017).<sup>10</sup> Furthermore, lawmakers should exclude from base income monies that are intended to promote other governmental aims, such as funds set aside for education, the support and care of people

with disabilities, or other particularized needs, as is often done in the public benefits and student aid contexts (Colgan 2017; Douglas-Gabriel 2015; U.S. Department of Education n.d). Finally, lawmakers should exclude family income for juveniles altogether given the focus of juvenile justice systems on rehabilitation of youth who have engaged in delinquent behavior. Recent research suggests that placing fiscal burdens on families of youth who are adjudicated delinquent can have serious negative consequences on family dynamics (Campos-Bui 2017; Selbin 2016), thereby simultaneously increasing the risk of delinquency associated with familial economic instability and undermining the familial bonds that serve as protective factors against delinquent behavior (Shader 2004).

An additional question regarding the calculation of base income is how or whether to include monies received from illicit or otherwise legal but off-the-books employment. If such monies were excluded from the base income calculation, people could benefit from illegal activities by receiving a

#### BOX 2.

### The U.S. Experience with Day-Fines Pilots

In 1987, the borough of Staten Island, New York, launched a year-long pilot project to test the use of day-fines in misdemeanor cases. This project was quickly followed by pilot projects testing day-fines for use with various offense types: probation-eligible felony offenses in Maricopa County, Arizona; misdemeanor and low-level felony offenses in Bridgeport, Connecticut, Polk County, Iowa, and four counties in Oregon; and a limited 12-week project using day-fines for nontraffic municipal ordinance violations in Milwaukee, Wisconsin.

The pilot projects varied in design and outcome. In particular, graduation of economic sanctions in the Staten Island and Maricopa County projects resulted in increases in the amount and timeliness of payments, described further in box 4. Those projects are particularly useful for comparing ungraduated economic sanctions and day-fines. Staten Island's planners included a randomized subexperiment within the project so that they could compare prepilot ungraduated fines to day-fines, with the latter category further distinguished by those receiving enhanced collection mechanisms and those subject to preexisting collections processes (Winterfield and Hillsman 1991, 1993). Maricopa County planners divided judges within each of the county's four judicial quadrants, with some judges using the day-fines system and others using the prior system of ungraduated economic sanctions, with cases randomly assigned among the judges. Researchers then matched people sentenced to day-fines against a comparison group along "seven characteristics including: conviction offense (theft, drug, white collar, other), felony or misdemeanor conviction, age (under 21, 21–25, 26–30 and over 30), race, sex, conviction date (in calendar year quarters), and judicial quadrant," followed by manual screening of the cases to ensure those in the comparison group would have been eligible (due to nature of the offense and other requirements) to have received a day-fine sentence (Turner and Petersilia 1996, 25). While the remaining projects also provide evidence that graduation can result in improvements in the amounts and timeliness of payments, they do not provide sufficiently reliable data to draw direct comparisons between graduated and ungraduated sanctions due to systemic data issues or design flaws that did not allow for true graduation (Colgan 2017; Turner and Petersilia 1996; Worzella 1992).

Beyond comparative data, all six of these projects provide useful guidance with respect to institutional design, including how faulty design can impede the goals of graduation, and are used herein for that purpose (Colgan 2017; Coppola 1996; Forman and Factor 1995; Greene 1992, 1996; Hillsman 1990, 1995; Mahoney 1995; McDonald 1992a; Pilcher and Windust 1991; Turner 1995; Turner and Greene 1999; Turner and Petersilia 1996; U.S. Department of Justice 1996; Winterfield and Hillsman 1991, 1993; Vera Institute of Justice 1995; Worzella 1992; Zedlewski 2010).



reduction in the economic sanctions imposed. Including such income, however, could promote illegal activity by pushing people to continue those activities in order to complete payment, as noted in the discussion of criminal debt-related recidivism above. In addition to increasing crime rates, this also pushes people to remain in the underground economy, engaging in otherwise legal but unregulated labor such as off-the-books child care or house cleaning, which undermines the governmental aim of preventing exploitative working conditions that also violate the law (Colgan 2017; Venkatesh 2006). There are no options for calculating base income that satisfy both the concern regarding unfair benefit for illegal activity and a desire to avoid promotion of illegal forms of work, but there are second-best alternatives. Lawmakers could design ability-to-pay mechanisms to include money or property obtained through criminal activity or off-the-books but otherwise licit work that the person possesses at the time of sentencing, but not future income that would require continuation of those activities. An additional option would be to avoid the use of economic sanctions that may result in the promotion of illegal activities by relying instead on alternative forms of punishment, as discussed further below (Colgan 2017).

### *Establishing Deductions*

Once base income is established, the question becomes what expenses should be deducted in calculating an individual's ability to pay. The day-fines pilots each deducted a percentage of the person's income for self-support, family-support, and in some jurisdictions an additional flat deduction depending on whether the person lived above (a 33 percent deduction) or below (a 50 percent deduction) the federal poverty line (Forman and Factor 1995; Greene 1992; Pilcher and Windust 1991; Turner and Petersilia 1996). Such standard deductions could be further graded to allow for greater distinction between people at varying income levels (Raghavan 2018).

While a standardized structure for deductions such as that used in the day-fines pilot projects is generally workable, two key questions must be addressed to ensure that the model accurately captures a person's financial capacity: identification of family members for which deductions should be used and consideration of financial needs not otherwise captured in the standard model.

The determination of who is considered a family member for deduction purposes should match the decision above of whose income is included as base income, along with people in the household who do not earn income but are the dependents of

#### BOX 3.

### Considerations for People with Wealth

Though this paper focuses on reductions in economic sanctions for people of limited means, there is a related question as to whether economic sanctions should be graduated upward for people of more-substantial means. Doing so is certainly feasible within the proposed model. For instance, in addition to employment income, income from other sources—including business income, rental income, interest, dividends, royalties, pension or retirement income, and so on—could be included in the base income amount (Colgan 2017; Greene 1992). Furthermore, income sources that are not available for payment purposes, such as employer contributions to employee benefit plans, deferred compensation plans, and tax-deferred annuities, could be excluded from base income as is done, for example, in the bankruptcy context (Colgan 2017). A few of the day-fines pilot projects also included valuation of nonincome assets in their base income calculations (Forman and Factor 1995; Turner and Petersilia 1996).

In discussions related to increasing economic sanctions for people with greater wealth, opponents often raise the specter of traffic tickets reaching into the hundreds of thousands of dollars, as has been the case, for example, in Finland (Pinsker 2015). Often couched as a form of reverse wealth discrimination, these concerns can render the graduation of economic sanctions politically infeasible; for example, a planned day-fines pilot project in Ventura County, California, was abandoned after a newly elected judge and attorneys for wealthier defendants intervened (Colgan 2017; Mahoney 1995).

One possible solution is to set statutory maximum caps so that the benefits of graduation can reach people of limited means while remaining politically palatable for those of greater means. Doing so, however, has a significant potential downside: there is evidence that without upward graduation, economic sanctions are an insufficient deterrent for people who can easily pay (Polinsky and Shavell 1979). One study, for example, showed that when daycare centers fined parents for picking up their children late, tardiness increased, suggesting that parents with means saw the fine simply as the price for additional child care (Gneezy and Rustichini 2000).

those whose income is included in the base income amount (Colgan 2017). Once the qualifications for family membership are selected, deductions should be applied to each such person rather than placing artificial caps on the number of dependents for whom a percentage is deducted. While this may mean that in some cases the adjusted income figure is a very low dollar amount, it is necessary to obtain an accurate assessment of the person's actual ability to pay.

Second, while standardization in calculating income and deductions may generally be favored to ensure ease of administration as well as objectivity, it is important that there is some flexibility in the model to allow for circumstances in which a person has unique financial needs. In the public benefits context, for example, lawmakers have developed programs to provide extra assistance for special or emergency needs, such as those associated with serious medical conditions (Handler and Sosin 1983). Similarly, mechanisms for calculating ability to pay economic sanctions should include a safety valve to allow additional deductions for special needs that the mechanism's other standard deductions do not adequately accommodate. Not only will doing so better reach the goal of accurately determining a person's ability to pay economic sanctions, but it will also help promote other governmental interests, such as the full payment of child care and student loans, avoidance of bankruptcy caused by medical or other expenses, and the fulfillment of previously imposed economic sanctions (Colgan 2017; Raghavan 2018).

## CHOOSE A MECHANISM FOR ADJUSTMENT

After establishing a method of calculating ability to pay, lawmakers must decide whether a determination of limited financial capacity should lead to a flat reduction, reductions set on a sliding scale, or the use of a day-fines approach.

### *Flat Reduction in Penalties*

Under a flat reduction approach, once a person's net income minus deductions is determined to be lower than a given threshold, courts would apply a flat percentage reduction to the economic sanctions that would otherwise have been used. For example, in 2018 the Superior Court of the County of San Francisco launched a program for people who have household incomes below 250 percent of the federal poverty line and those who receive means-tested public benefits, such as food stamps. Those individuals qualify to have their traffic fines and fees reduced by 80 percent (San Francisco Superior Court 2018). The advantage of this approach is its ease of application; the flat deduction is applied to the economic sanctions that would otherwise have been imposed in any case that a person falls below the designated threshold. The downside to this approach is that it offers no relief for people who are just slightly over the qualifying financial threshold and who may also struggle with paying economic sanctions,

and may afford a reduction beyond what would be needed for at least some people who qualify. Therefore, this method of graduation may be best suited for the lowest level of violations—such as public order offenses and minor traffic violations—for which economic sanctions are typically small prior to graduation, and therefore a more granular approach would not significantly change the amount of graduation in most cases.

### *Sliding Scale of Penalties*

Another alternative is to use a sliding scale approach, which offers a greater degree of granularity, with the assessed sanction declining as the person's ability to pay becomes more limited. This likely does not create significant administrative burdens beyond that of the flat reduction approach, because the sliding scale could easily be reduced to standardized forms linking adjusted income levels with percentages of deduction, which could then be multiplied against what would otherwise be the economic sanctions imposed.

The advantages of this approach over the flat reduction are two-fold. First, it avoids arbitrary and abrupt changes in sanctions as net income approaches the designated threshold. Second, particularly for higher dollar value sanctions for which the sliding scale would have a more significant effect, it allows for a more accurate reflection of the person's ability to pay and of the seriousness of the offense.

### *The Day-Fines Model*

A third option is to adopt a day-fines model, which is a more structured version of a sliding scale approach. In a day-fines system, each offense is assigned a specific penalty unit or range of penalty units that increases with offense seriousness. Upon conviction for an offense, the penalty unit for that offense is then multiplied by the adjusted daily income of the person convicted. The dollar value of this multiplication would result in the total amount of economic sanctions imposed. For example, if Offense A was valued at one penalty unit, and the person's adjusted daily income was \$5 per day, the resulting day-fine would be \$5; if the person's adjusted daily income was \$100 per day, the day-fine would be \$100 (Colgan 2017).

To establish penalty units for use in a day-fines system, planners should begin by engaging in ordinal ranking of offenses by level of seriousness. Each jurisdiction has already engaged in this type of ordinal ranking, albeit not explicitly, by setting the eligible punishment for a given offense. For example, if the maximum penalty for an offense was a \$100 fine, it would be afforded a lower-penalty unit than would an offense with a maximum \$1,000 fine. Several jurisdictions have engaged in more-explicit ordinal ranking when establishing sentencing grids or by designating classes of offense by which certain classes receive higher degrees of

punishment than other classes. Once ranked ordinaly, the task is to assign penalty units for each offense or offense type.

Even if lawmakers are planning a day-fine system for only a limited set of offenses, it is still useful to consider the relative seriousness of other possible offenses within the jurisdiction to ensure that the penalty units are not set too high or too low in comparison. For example, though the Staten Island day-fines pilot project used the practice only in its misdemeanor courts, when setting penalty units planners considered what the penalty units would be for felony offenses. Doing so ensured that the degree of punishment imposed in misdemeanor cases would both comport with their lesser seriousness as compared to felony offenses and allow for expansion of the program into the felony context later (Greene 1992).

Once penalty units are established, the day-fines calculation is straightforward. Courts need simply multiply the person's adjusted daily income and the assigned penalty unit; the resulting figure constitutes the day-fine, and thus the amount of economic sanction imposed. The timing of payments of graduated economic sanctions, including day-fines, are addressed below.

#### **APPLY GRADUATION TO ALL FORMS OF ECONOMIC SANCTION**

For any of the three approaches described above—flat deduction, sliding scale, or day-fines—a critical question becomes whether graduation should be applied to all forms of economic sanction.

The addition of ungraduated economic sanctions imposed on top of a graduated amount can put the full package of sanctions beyond the person's financial capacity, thereby undermining the value of graduation and doing little to resolve the problems associated with unmanageable sanctions. This became a significant problem in the Oregon day-fines pilot, for example, because the state required that mandatory surcharges and fees be imposed in addition to the graduated day-fines amount. Judges reported that doing so pushed the total amount so high that it remained unpayable for many people even after a portion of the economic sanctions were graduated (Colgan 2017; Forman and Factor 1995). In contrast, Maricopa County structured the day-fines program so that people received one sanction amount, the entirety of which was tied to their ability to pay. Because the total package of economic sanctions was manageable, people on whom day-fines were imposed were significantly more likely than those with ungraduated sanctions to pay sooner and in full (Colgan 2017; Turner and Greene 1999; Turner and Petersilia 1996). Therefore, as with all other forms of economic sanctions, lawmakers should account for all collections costs in the first instance, rather than imposing interest and other fees during the collections process on top of the graduated

amount. This will ensure that the entire amount imposed will be tied to the person's financial condition, will make it feasible for people to make progress toward paying off the principal debt rather than becoming trapped in an indefinite cycle of additional charges, and will reduce the administrative costs to the government necessitated by the ongoing collections of delinquent accounts (discussed further in the Questions and Concerns section).

Importantly and counterintuitively—so long as lawmakers prize restitution over other purposes in the distribution of monies collected—victims may benefit from the full graduation of economic sanctions both in the amounts of restitution received and in the rapidity with which they obtain restitution funds. Victims very often receive little to no restitution in systems that do not graduate for ability to pay (Ruback 2015; U.S. Department of Justice 2018). As the U.S. Supreme Court has noted, ordering a person to pay restitution when they cannot afford to do so does not “suddenly make restitution forthcoming” (Bearden v. Georgia 1983). As described in box 4, however, evidence from the day-fines pilot projects suggest that graduation leads people to pay more and to pay more quickly than if unmanageable economic sanctions are imposed. It is important to note, however, that even with these potential improvements in the amounts collected and timing of payments, graduated economic sanctions may be lower than the restitution amount for which victims would otherwise be eligible. For a discussion of policy changes related to the distribution of collections that could provide victim access to full restitution in such cases—as well as a discussion of why graduation may lead people to pay more and more quickly than when unmanageable sanctions are imposed—see the Questions and Concerns section.

Furthermore, applying graduation to all forms of economic sanction will require the elimination of any mandatory minimum economic sanctions. The day-fines experience suggests that eliminating these minimums can have positive benefits: during the Milwaukee pilot project, its courts were required to impose a minimum of \$30 in economic sanction even if its ability-to-pay calculation would have resulted in a lower amount, thereby artificially inflating the economic sanctions imposed in more than a third of cases. Unsurprisingly, Milwaukee saw little improvement in the high default rates that existed prior to the pilot project (Colgan 2017; Turner and Petersilia 1996; Worzella 1992). This is in sharp contrast with the improvements seen in Maricopa County, where no additional sanctions could be added to the graduated amount, and where the outcome included both increased payment amounts and improved timeliness (Colgan 2017; Turner and Greene 1999; Turner and Petersilia 1996).

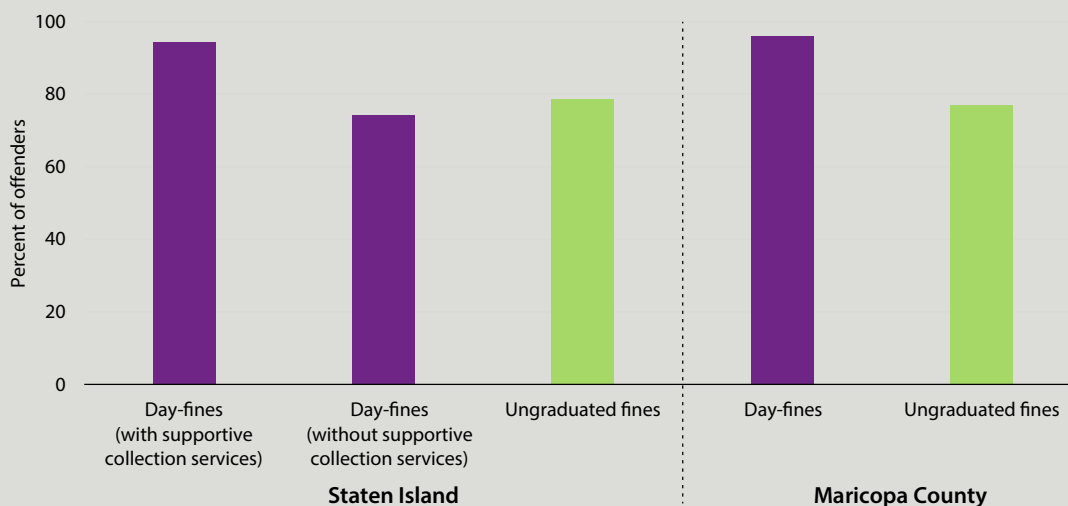
BOX 4.

## Evidence on Criminal Justice Debt Payment under Graduated Sanctions

Evidence from the day-fine pilot projects suggests that graduated economic sanctions will result in increased average payment. In Maricopa County, though the mean imposed economic sanction dropped with the use of day-fines, people receiving day-fines paid an average of \$669 and those subjected to ungraduated economic sanctions paid just \$344 (Turner and Greene 1999). Similarly, box figure 1 shows that Staten Island courts collected 77 percent of all day-fines imposed within 11 months, which “generated substantial additional revenues” as compared to prior practices that used ungraduated economic sanctions (Turner 1995, 26).<sup>11</sup> Staten Island’s collections might have been even higher but for the use of statutory maximum caps that reduced the amount of the day-fines imposed in 25 percent of cases (Greene 1992; McDonald 1992a; Winterfield and Hillsman 1993). The outcomes of the Maricopa County and Staten Island day-fines projects are bolstered by more-recent experiences with graduation of economic sanctions. For example, a 2018 analysis of legislative reforms in Texas that required graduation showed that postreform collection rates rose by approximately 7 percent (Texas Office of Court Administration 2018).

BOX FIGURE 1.

### Percent of People Who Paid At Least Part of Their Fine, Selected Day-Fine Pilots



Source: Turner and Petersilia 1996; Winterfield and Hillsman 1991.

Note: “Ungraduated fines” refers to the current practice of fine assignment in the respective counties. For the Staten Island pilot, there were two experimental groups: the first group paid fines on a day-fine model and received supportive collection services, while the second group only used the day-fine model but was not provided supportive collection services.



In addition to revenue increases, the Maricopa County project provides evidence that the timeliness of payment may also improve when economic sanctions are graduated. In the first year of the project, only 20.3 percent of people with ungraduated sanctions paid in full, a figure that was surpassed within three months by those sentenced to pay day-fines; by year’s end 52.7 percent of those with graduated sanctions had paid in full (Colgan 2017; Turner and Petersilia 1996).<sup>12</sup> Unlike Maricopa County, though, the use of day-fines resulted in longer payment periods in Staten Island. This, however, was because judges in Staten Island had been artificially reducing the amount of fines they imposed in an attempt to address their regressive qualities in advance of the pilot, thus on average the amount of day-fines exceeded the prior imposition of economic sanctions. This resulted in longer payment periods during the pilot, though it still improved collection rates (Winterfield and Hillsman 1993).

### ALLOW FOR POSTSENTENCE MODIFICATIONS

Though a well-designed system for graduated economic sanctions will allow people to move forward with only payable amounts imposed, it remains true that unexpected changes in financial circumstances, such as the loss of employment

or a medical emergency, can derail even those plans. This is particularly likely for people living with significant instability; for example, the lack of stable housing can result in drastic swings in rent (Desmond 2016). Therefore, lawmakers should allow people to seek a reduction in the economic sanctions

imposed, or substitution of alternative sanctions, if they experience such a change. The same structures for assessing ability to pay, with the new information substituted in, can be used to calculate a reduced overall sanction and to establish a new periodic payment plan if needed.

It is important to note that people with criminal debt, particularly those who have been subject to poverty penalties for nonpayment in the past, often fear that any contact with the court will result in arrest for nonpayment (U.S. Department of Justice 2015). As a result, should a person be delinquent on a payment without having yet sought a reduction, collections staff should quickly issue a delinquency notice, explaining not only the potential repercussions of a willful nonpayment, but also the steps a debtor can take to seek a reduction of payment if necessary. This notice should include the assurance that an appearance at court to seek a postsentence modification will not result in arrest.

### IMPOSE TIME LIMITS ON COLLECTIONS PERIODS

Research suggests that payment of economic sanctions is most likely when sanction amounts are graduated to ability to pay, and the period in which payment is to be made is as short as possible (Cole 1992; Hillsman 1990). This may be because the belief that one cannot extricate oneself from criminal debt will lead people to reduce or even abandon efforts to pay. Indeed, the results of a 2018 survey of people with criminal debt in Alabama showed that nearly half of respondents believed that they would never be able to pay all that they owed (Alabama Appleseed 2018), and other studies suggest that people returning from incarceration believe that they will never be able to pay off their criminal debt, thereby hampering successful reentry (Pleggenkuhle 2018; Pogrebin et al. 2014). In contrast, the graduation of economic sanctions to a manageable amount that allows progression to the elimination of the debt in a reasonable time should promote a belief that the debt is surmountable, leading to greater efforts at completing payment. For a discussion on why graduation might promote payment, see the Questions and Concerns section.

In addition to the ways in which limiting collections periods are beneficial to debtors, administrative benefits are also likely to accrue. One such benefit to the use of short collection periods is that it limits the time during which a person may experience a significant change in financial circumstances that would necessitate an adjustment of the economic sanctions imposed. Additionally, as detailed further in the Questions and Concerns section, reducing the number of outstanding accounts can result in an overall reduction of expenditures related to collections.

When establishing limitations on collections periods, lawmakers should ensure that those periods correspond with

offense seriousness. While establishing offense-based time limitations is possible for use with a flat deduction or sliding scale model of graduation, the day-fines model has a key advantage. The penalty units in the day-fines model provide a built-in structure for establishing time limitations that scale with offense seriousness. For example, an offense carrying one penalty unit would be limited to a one-time payment, whereas an offense carrying ten penalty units would be limited to ten payment periods. The due date of the first (or only) payment may be scheduled for a later date in order to accommodate the receipt of a paycheck or benefits award. Because the penalty units were multiplied by a person's adjusted daily income, each payment amount should be within the person's ability to pay absent a need for adjustment through a postsentence modification process as detailed above.

The question remains of what should occur if, at the end of the collections period, some portion of the economic sanctions imposed remains outstanding. This should be rare under the proposals set out above, because the amount was reduced to a manageable level in the first instance and postsentencing modification is available to address unexpected fluctuations in financial circumstances. That said, if criminal debt remains, and the court determines after a hearing that the person willfully failed to pay, the court could extend the collection term or impose additional sanctions. If, however, the failure to pay was not willful, courts should have the authority to forgive the remaining debt, reduce the debt to an amount within the person's means to pay immediately, or substitute in nonincarcerative alternative sanctions (Bearden v. Georgia 1983; Colgan 2019).

### COMBINE GRADUATED SANCTIONS WITH SUPPORTIVE COLLECTIONS PRACTICES

The results of the day-fines pilot projects suggest that graduating economic sanctions according to ability to pay, in and of itself, can motivate completion of payment. For example, in Milwaukee payment rates improved with the introduction of day-fines even though its court had no meaningful system of collections (Colgan 2017; Turner and Petersilia 1996; Worzella 1992).

Along with other recent studies, data from the day-fines pilot projects also suggest that completion of payment will be even more likely if jurisdictions provide supportive collections practices. Researchers involved in the Staten Island day-fines pilot project captured the importance of supportive collections practices. Planners included a randomized subexperiment within the project so that one group of people receiving day-fines received supportive collections practices (the experimental group) and another group did not (the control group). Researchers found that people in the experimental group were significantly more likely to pay than those in the control group (Winterfield and Hillsman 1991,

1993; see box figure 1). Additionally, recent research indicates that providing payment information improves payment outcomes for people who are employed and who have more limited criminal histories, likely because those people had a greater ability to pay (Ruback and Bergstrom 2006). To the extent that graduated sanctions increase ability to pay, more people would fall within that group.

Supportive collections practices, first and foremost, must offer clarity to a person about the nature of the economic sanctions imposed and how collections will proceed. Studies suggest that confusion about how economic sanctions were established and about the amounts imposed can result in reduced payments, and therefore such letters providing explanatory information can also improve collections (Knoth et al 2018; Lantz, Ruback, and Gladfelter 2014; Ruback et al. 2006; Ruback and Bergstrom 2006). At the outset, a clear explanation of the amount imposed and how it was calculated should occur at sentencing. Where the graduated economic sanctions imposed are sufficiently high that the person will require a payment plan, the periodic payment amount, the frequency of the payment periods, and exactly how payments should be made must also be explicitly described. During the payment period, issuance of notices prior to payment due dates, similar to those used to remind people of due dates for utilities, credit cards, and the like, are also helpful. Similarly, like those forms of notice, notices related to economic sanctions should also include documentation showing the reduction in principal achieved with each prior payment.

Along with providing clear information about amounts owed and the payment process, supportive collections practices should make the act of paying as easy as possible (Colgan 2017; Raghavan 2018). For example, a collections program should include multiple avenues for making payments, including online, through the mail, or in person. Lawmakers also should prohibit requirements that force people to incur extra costs, such as the requirement that people pay with cashier's checks or money order, which people may only obtain by paying fees to the U.S. Postal Service or another issuer. Similarly, cash payments should be allowed, particularly because of the high number of unbanked households in the United States (Baradaran 2014; FDIC 2015).

### **USE AMNESTY PROGRAMS FOR THOSE WITH DEBT PREDATING THE REFORMS**

Adoption of ability-to-pay mechanisms will benefit people going forward, but does not address the regressive qualities and negative consequences of ungraduated economic sanctions imposed on the millions of people struggling with past criminal debt. In order to increase overall system equity, lawmakers should consider the adoption of amnesty, or debt forgiveness programs, for people with outstanding economic sanctions. Several jurisdictions in recent years have engaged

in amnesty programs. Perhaps the most aggressive program exists in Durham, North Carolina. Due to a crisis in the community stemming from the fact that one in five adults had suspended driver's licenses—which, among other things, impeded their ability to obtain and maintain employment—the courts there are forgiving all economic sanctions imposed for traffic offenses to allow people to become eligible to obtain driver's licenses (Bridges 2019). Lawmakers in areas experiencing similar systemic problems should consider implementing that approach. More commonly, amnesty programs typically forgive late payment fees and other expenses associated with the debt being in arrears while offering an opportunity to establish a payment plan for all other outstanding economic sanctions (Wilcox 2017). While the forgiveness of such fees can make a meaningful difference, it may not render the remaining criminal debt manageable. Therefore, lawmakers should include in amnesty programs an opportunity to have remaining principal debt graduated according to ability to pay.

### **RESTRICT THE USE OF COLLATERAL CONSEQUENCES AND ELIMINATE POVERTY PENALTIES THAT MAKE PAYMENT LESS FEASIBLE**

In many jurisdictions, convictions for certain crimes or responses to the failure-to-pay economic sanctions result in the imposition of conditions that make a person's ability to pay less likely. Nationwide there are more than 30,000 restrictions on employment, occupational and business licensing, and government contracting; more than 2,000 restrictions on government benefits and housing; more than 1,700 restrictions on obtaining noncommercial motor vehicle licenses; and nearly 1,300 restrictions on participation in or funding for educational programs that may be triggered upon conviction (National Reentry Resource Center 2018). Similarly, many jurisdictions respond to the failure-to-pay economic sanctions with the revocation of driver's licenses or public benefits, even where such restrictions were not collateral consequences of the conviction itself.

In creating these barriers, lawmakers not only promote illicit work and otherwise legal but off-the-books employment, but they also drain individuals and their families of necessary resources, thus creating or exacerbating financial instability. Not only do these restrictions make it less likely that those subject to economic sanctions will be able to complete payment, they also expand the pool of people who will need graduation of economic sanctions in the first instance. Therefore, policymakers should limit bans on licensing access to cases where there is an identifiable public safety risk. Best practices outlined by the National Employment Law Project (Avery, Emsellem, and Hernandez 2018; Avery and Rodriguez 2016) would substantially improve policy related to the reduction of collateral consequences imposed upon

conviction.<sup>13</sup> Furthermore, poverty penalties for nonpayment of economic sanctions should be eliminated where nonpayment stems from an inability to pay (Colgan 2019).

## DEVELOP NONCARCERAL, NONECONOMIC ALTERNATIVE PUNISHMENTS

Though a full analysis of alternatives to the use of economic sanctions is outside the scope of this paper, it is worth noting that for those cases in which a person has no meaningful ability to pay, there are other nonincarcerative, noneconomic punishments that may be used.

Supportive services are one particularly promising avenue that might serve as a substitution or replacement for economic sanctions that would otherwise require a payment plan. The basic concept of a supportive services program is that it requires the person to participate in treatment, training, services, or other activities that are designed to address the underlying cause of the criminal conduct or to cause the person to reflect on that behavior. Supportive services programs are intended to respond to the criminal offense, have rehabilitative effects, and increase the legitimacy of the sentence, thereby making people more likely to both comply with the sentence and avoid future criminal behavior.

We can see an example of the possible benefits of using supportive services as a component of alternative sentencing in the Law Enforcement Assisted Diversion (LEAD) program in Seattle. The program involved prebooking diversion for people suspected of certain drug or prostitution offenses. Rather than traditional criminal justice responses (arrest, conviction, and incarceration and/or economic sanctions), the program provided participants with case management that included homelessness and housing services, job training and placement, financial support to ensure access to basic human needs such as food, shelter, and treatment, and other supportive services. As compared to a control

group, an analysis of the program showed statistically significant reductions in both subsequent arrests and felony charges (Collins, Lonczak, and Clifasefi 2015a). In addition, participants were more than twice as likely to have any shelter, and 89 percent more likely to have permanent housing than they were prior to participation (Clifasefi, Lonczak, and Collins 2016). Employment and income rates also improved, with people 46 percent more likely to be in job training, legally employed, or retired, and 33 percent more likely to have either income or public benefits at program follow-up (Clifasefi, Lonczak, and Collins 2016). These results may, of course, be interrelated given that, as detailed above, financial stability as well as social stability have been linked to reductions in recidivism. For a discussion of the cost-effectiveness of these types of supportive service programs, see the Questions and Concerns section.

Supportive service programs that require longer-term intervention are likely an inappropriate substitute for economic sanctions for lower-level offenses because it risks expanding the scope of the punishment beyond the economic sanction that would be otherwise imposed. For example, if the normal expectation for a low-level offense is an economic sanction payable in one day, services that extend longer than that period of time would result in a net-widening effect in state control over people's lives (Eaglin 2016; Miller 2004). This does not mean that temporally brief responses are unavailable; even a short period in which people are connected to needed services or provided with employment counseling can be beneficial. Rather, in designing such alternatives, time limitations that would be used with respect to collections periods for economic sanctions should be taken into account.

Another possible alternative to economic sanctions is the use of community service. Though forced labor has been used as

### BOX 5.

## The Limited Evidence about Effects of Supportive Services

As with any reform, it is important to gather data on supportive service and community service alternatives, both to ensure that they are appropriately substituting for unmanageable economic sanctions and to discern whether they may be expanded as a suitable replacement for economic sanctions or incarceration. In particular, while community service is often described as having rehabilitative benefits, either because it allows a person to gain skills or because it provides an opportunity to make reparation for the underlying offense (Morris and Tonry 1990), the actual effects of community service on recidivism are underexamined, with only limited data suggesting that there is no meaningful difference in recidivism rates when community service is compared to incarceration or probation (Bazemore and Maloney 1994; Feeley, Berk, and Campbell 1992; McDonald 1992b; Tonry and Lynch 1996). Analyses also should be undertaken to ensure that community service does not have a negative effect on the labor market by displacing paid employment (Morris and Tonry 1990; Zatz 2015). Therefore, data collection and evaluation should be treated as an important component of these reforms.

a punishment since the colonial era, most notoriously in the Jim Crow South (Blackmon 2008), community service in its more modern conception was first introduced into sentencing practices in the United States in the 1960s as a substitute punishment for traffic fines imposed on low-income drivers (Tonry and Lynch 1996). In subsequent years, community service alternatives have been critiqued for undervaluing the work and for placing people in precarious positions without available remedy, such as if injuries occur during the course of the service (Zatz 2015). With respect to the former, community service programs should be designed to include time limitations targeted to the seriousness of the offense, and—if designed to directly work off what would otherwise have been the graduated amount of economic sanction—be credited at a minimum at wages reflecting market rates for the type of labor involved (Criminal Justice Policy Program 2016; Zatz 2015). With respect to the latter, community service programs should mimic formal employment by providing labor protections (Criminal Justice Policy Program 2016; Zatz 2015). For example, the state of New York requires community service programs to be designed to “assur[e] that the conditions of work, including wages, meet the standards therefor prescribed pursuant to labor law” and to afford workers’ compensation coverage (New York Family Court 2012). Planners should also ensure that community service requirements do not interfere with paid-work opportunities or necessitate expenses for child care, transportation, and the like (Zatz 2015). Furthermore, it is unrealistic to impose community service on people with developmental or physical disabilities or mental health issues that would preclude their ability to complete the community service program,

which may constitute a sizeable portion of the subset of people who have no meaningful ability to pay economic sanctions (Bronson, Maruschakand, and Berzofsky 2015; Bronson et al. 2017; James and Glaze 2006; Subramanian et al. 2015; Underwood and Washington 2016). The supportive services option described above is more appropriate in such circumstances.

Whether supportive services or community service is used, it is critical that participation in those alternatives does not include the payment of fees. In many jurisdictions, lawmakers have passed along costs for mental health and chemical dependency treatment, education and employment services, or participation in community service, to the people on whom such sentences are imposed (Appleman 2016; Colgan 2018; Human Rights Watch 2014). This is, of course, antithetical to the idea of using these alternatives as a substitute for economic sanctions for those who have no meaningful ability to pay.

In short, designing mechanisms for graduating economic sanctions can and should be undertaken in conjunction with establishing nonincarcerative, noneconomic sanctions. Texas provides a recent example of that approach. In 2017, Texas lawmakers adopted reforms that allowed courts to substitute community service for economic sanctions when a person was unable to pay, and included as a form of community service attendance at employment training programs, GED courses, chemical dependency treatment, counseling, mentoring programs, and similar activities (Texas Office of Court Administration 2018).



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# Questions and Concerns

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## ***1. How will courts ensure that the relevant information regarding a person's financial capacity is accurate?***

A key concern for those devising an ability-to-pay mechanism is whether the information needed to complete the calculation will be readily available, particularly given federal restrictions on accessing tax and bank records. By necessity, ability-to-pay determinations will rely on self-reporting as the primary source of financial information. Self-reporting of financial data is quite common in criminal justice systems, and is used to assess whether a person qualifies for indigent defense representation, in presentence investigation practices, and to set monetary bail (Colgan 2017).

The day-fines pilot projects relied on self-reporting of financial information. Except for the staff in Bridgeport's project reporting some difficulties, those involved in gathering financial data reported that doing so was straightforward and did not interfere with case processing (Colgan 2017; Coppolo 1996; Forman and Factor 1995; Turner and Petersilia 1996; Vera Institute of Justice 1995). Furthermore, documentation from three of the day-fines projects that engaged in verification testing showed high accuracy from self-reporting. In 90 percent of cases tested in both Milwaukee and Staten Island, people provided accurate information (Hillsman and Greene 1987; Worzella 1992), and though records from the Oregon projects do not include quantitative analyses, court personnel reported a high degree of accuracy there as well (Forman and Factor 1995).

Along with the outcomes of the day-fines pilot projects, studies of self-reporting of monies earned through both legal and illicit employment also show that self-reporting can be highly accurate.<sup>14</sup> With respect to income earned through legal employment, self-reporting is imperfect, but generally provides a fairly accurate reflection of income (Angrist and Krueger 1999; Bound and Krueger 1991), with reliability improving along with the clarity of the question asked (Bound et al. 1994). Some studies do suggest that self-reporting of illicit income may result in overreporting of income (Tremblay and Morselli 2000; Wilson and Abrahamse 1992), but a study of questionnaires from 2,200 people in prison found that 80 percent of respondents accurately estimated illegal earnings (Chaiken and Chaiken 1982). Furthermore, a more recent study of self-reports of illegal

income indicated that, while information provided contained some inaccuracies, responses were largely reliable (Nguyen and Loughran 2017).

Some studies regarding self-reporting in the context of public benefits, however, indicate that self-reported financial data are not always reliable. Several studies of public benefits programs have shown that underreporting of benefit receipt by survey respondents is high (Meyer, Mok, and Sullivan 2015), and that overreporting of benefits also occurs (Krafft, Davis and Tout 2015).

Caution is warranted in imputing the results of survey-focused research to this context. First, and perhaps most importantly given that the goal for graduating economic sanctions is accurate assessment of ability to pay, multiple studies suggest that a substantial portion of false negative and false positive results in surveys are the result of "benefit confusion." In other words, the misreporting is due to respondent misidentification of the source, rather than the amount, of the benefit (e.g., reporting receipt of Old-Age Survivors and Disability benefits when the actual benefit comes from Social Security Income) (Call et al. 2013; Davern et al. 2009; Gathright and Crabb 2014; Johnson and Herbst 2013; Krafft, Davis, and Tout 2015; Meyer, Mittag, and Goerge 2018). Second, several of these studies rely on responses to the Survey of Income and Program Participation that surveys participants several times over a multiyear period. People who participate in each wave of the survey are more likely to accurately report than those that do not (Meyer, Mok, and Sullivan 2015); one driver of error rates is imputation of benefits information when survey respondents decline to provide information (Meyer, Mittag, and Goerge 2018). Those issues are not present in the context of setting an amount for economic sanctions, at least so long as ability-to-pay mechanisms do not allow for imputation of income. Third, there are indications that the structure and implementation of public benefits surveys may result in underreporting for a variety of reasons, including unnecessary complexity in the questions asked, questions that call for responses that people are unlikely to know from memory, and interviewer behavior that promotes rapid completion of the survey over accuracy (Moore, Bogen, and Marquis 2010).

Even with those distinctions, however, there are useful lessons from the public benefits survey context that may aid in designing mechanisms for obtaining information for the ability-to-pay calculation. First, and perhaps most importantly, is recognition that inaccuracies may result from errors of memory rather than intentional efforts to falsify financial information. Memory errors are particularly likely where the mechanism relies on immediate recall of information to complex questions regarding income sources, especially where those sources are irregular or vary over time, where people have difficulties in translating known information into the data requested, and where people are asked to recall information about benefits receipt significantly predating the request for information (Bound, Brown, and Mathiowetz 2001; Call et al. 2013; Huynh, Rupp, and Sears 2002; Meyer, Mittag, and Goerge 2018; Meyer, Mok, and Sullivan 2015; Moore, Bogen, and Marquis 2010). Therefore, designing a process for self-reporting that allows an opportunity for the person to gather information, including documents reflecting wages and benefits, can improve the accuracy of data received (Moore, Bogen, and Marquis 2010; Moore, Marquis, and Bogen 1996). Researchers have found that people often retain documents of this nature in the public benefits context (Moore, Bogen, and Marquis 2010; Moore, Marquis, and Bogen 1996). Of course, some people will not have such records at their disposal, and so questions must be developed to aid in the provision of accurate information. For example, rather than asking, “What is your monthly income?”—which suggests that income is received consistently and collectively—a series of questions asking the respondent to state each type of income received, the frequency with which it is received, and the circumstances under which the income source may be interrupted allows for a more accurate set of information from which to construct the person’s likely income going forward (Moore, Bogen, and Marquis 2010).

In addition to designing processes that provide greater opportunities for providing accurate information, communicating the purpose of the questions and an assurance that the answers provided will be kept confidential may also aid in collecting accurate information through self-reporting. Studies have suggested that a reason for inaccuracy in survey responses may relate to reluctance to provide information regarding public benefits to which social stigma attaches (Bound, Brown, and Mathiowetz 2001; Johnson and Herbst 2013; Klerman, Ringel, and Roth 2005; Meyer, Mittag, and Goerge 2018); Meyer, Mok, and Sullivan 2015). For example, underreporting is more prominent with respect to Social Security Income than with Old-Age Survivors and Disability Insurance, the latter of which has a lower degree of stigma attached (Huynh, Rupp, and Sears 2002). Similarly, self-reporting of child-care subsidies, which carry relatively lower stigma, results in both reduced degrees of underreporting as

compared to other forms of public benefit and a high degree of overreporting (Krafft, Davis, and Tout 2015). Of course, many of the people from whom information is requested to assess ability to pay economic sanctions will receive income from public benefits programs that carry social stigma. Therefore, providing a clear explanation of the limited nature of the data’s use as well as assurances of confidentiality are important (Landreth 2001).

A court could also include a verification process, although doing so is more labor intensive and therefore will add to the administrative costs of the program. Those costs could be lessened, however, by using spot-checking rather than verification in all cases. Based on the high degree of accuracy in self-reporting in the day-fines project noted above, the U.S. Department of Justice’s Bureau of Justice Assistance suggested that informing people that the information provided may be subject to verification in combination with spot-checking could be a cost-effective way of promoting accuracy (U.S. Department of Justice 1996).

## ***2. Why might graduation of economic sanctions promote payment?***

As noted above, evidence from the Maricopa County and Staten Island day-fines pilot projects—as well as a more recent shift to graduation in Texas—show improvements in the amount and timeliness of payments upon the introduction of graduation. Though additional research is needed to investigate these outcomes, there are two theories that provide insight into those results.

First, social cognitive theory, which originated from the work of Professor Albert Bandura of Stanford University, may provide some explanation of why graduation results in improved payments. Social cognitive theory includes the concept of self-efficacy, in which a person’s belief as to whether they can achieve a desired result has a direct impact on the person’s level of effort toward achieving that goal (Bandura 1977). A person may believe, for example, that they cannot pay economic sanctions because doing so would preclude them from obtaining basic necessities, or because interests and collections costs prevent them from reducing the principal debt. Self-efficacy theory would suggest that those beliefs would lead the person to abandon attempts to pay (Colgan 2017; Mitchell and Kunsch 2005).

Second, increased payments of graduated penalties would be commensurate with work regarding procedural justice theory, which posits that when people believe they have been treated fairly they are more likely to adhere to the law (Papachristos, Meares, and Fagan 2012; Tyler and Sevier 2014). People who struggle to pay off criminal debt are more likely to believe that both the amounts of the economic sanctions and the sentencing procedures used in their imposition were unfair

(Ruback et al. 2006). In contrast, a process through which court personnel work with people to ensure not only that periodic payment amounts are within their means but also that the length of the payment period is limited, procedural justice theory would suggest that the sense of fairness generated through that process would promote payment (Colgan 2017).

### ***3. Is the graduation of economic sanctions according to ability to pay administratively and economically feasible?***

The process of establishing the ability-to-pay mechanism and, if we use a day-fines model, the penalty units for each offense or offense category, is sufficiently complex that it will require time and resources. Once designed, however, each aspect of the system lends itself to the creation of standardized forms and tables. In the day-fines pilot projects, for example, planners developed grids setting out penalty units by offense; once a judge determined the appropriate penalty unit given the offense of conviction, that unit number need only be multiplied by the person's adjusted daily income (Colgan 2017; Greene 1992). To calculate that adjusted daily income, administrators also used forms to fill in each possible category of income and each possible deduction (e.g., the percent deducted per dependent), with the calculation that followed necessitating only simple math (Forman and Factor 1995; Greene 1992; Pilcher and Windust 1991; U.S. Department of Justice 1996). These income and deduction calculators were similar to the mechanism now in use in the San Francisco Superior Court (2018) and recommended by the National Task Force on Fines, Fees and Bail Practices (2017).

There will, of course, be administrative expenses associated with the self-reporting process and, if used, any system for verification of self-reported financial data, though such administrative costs are likely offset by decreases in other expenditures that address the nonpayment of economic sanctions. As detailed above, data from the day-fines pilot projects indicate that graduation of economic sanctions increases the likelihood that people pay at all, in full, and more quickly. With fewer delinquent accounts, a well-functioning system for graduating economic sanctions can ease congested court dockets and other administrative costs related to collections (Ruhland et al. 2017).<sup>15</sup> It may also reduce the use of arrest warrants for nonpayment and other law enforcement expenditures. In Texas, for example, the recent reforms led to a significant reduction in the use of warrants for failure to appear and failure to pay (Texas Office of Court Administration 2018). In addition—for those jurisdictions that incarcerate people awaiting hearings to determine whether their failure to pay was willful—graduation of economic sanctions to payable amounts should reduce expenses related to the use of local jails. For example, a recent study of expenditures in New Orleans showed that the city's use of incarceration to address the inability to pay bail, fines,

and fees, created a \$1.9 million annual deficit (Henrichson, Laisne, and Wool 2017). Furthermore, studies suggest that the types of supportive collections practices recommended above have returns well above their costs, with approximately \$6 in return for every \$1 spent (Knoth et al. 2018; Lantz et al. 2014). Finally, because the need to pay criminal debt may be pushing people into criminal activity (Alabama Appleseed 2018; Cook 2014; Harris, Evans, and Beckett 2010; Human Rights Watch 2014; Piquero and Jennings 2017; Stillman 2014), making payment feasible should reduce criminal justice expenditures for law enforcement investigation, court processing, and punishment overall.

There will also be expenses related to administering alternative sanctions in circumstances when people have no meaningful ability to pay, though increasing evidence suggests that well-designed alternatives could result in significant savings in the long term. For example, with respect to the Law Enforcement Assisted Diversion (LEAD) program detailed above, though initial costs of implementing the program were higher as compared to the costs of maintaining the program in later months, overall the program resulted in statistically significant reductions in criminal justice system costs related to the use of incarceration in both jails and prisons, the processing of both misdemeanor and felony cases, and other system costs (Collins, Lonczak, & Clifasefi 2015b). Furthermore, the Washington State Institute for Public Policy (WSIPP), a nonpartisan, multidisciplinary, research organization, has undertaken an ongoing meta-analysis of criminal justice practices that shows that many programs related to therapeutic services, substance abuse and mental health treatment, workforce development, and educational services lead to substantial crime reduction and, therefore, criminal justice system costs. For example, as of December 2018, WSIPP researchers concluded that for every dollar spent a \$36.13 benefit is anticipated from the use of cognitive behavioral therapy for juveniles and \$18.31 is anticipated from the use of employment counseling and job training for adults (WSIPP 2018).

### ***4. Is it possible to devise a graduated sanctions system that still ensures victims receive full restitution?***

Yes, this is possible through prioritizing restitution in the distribution of monies collected and the creation of a fund through which victims could be paid in full even in cases in which a person has insufficient means from which to fully compensate a direct victim.

With respect to the former, lawmakers could easily create a distribution mechanism by which monies received are distributed to restitution until restitution is fully paid, before being distributed for any other purpose. For example, in Maricopa County's day-fines pilot projects, the amounts collected were distributed first to cover restitution; only after

restitution was completely paid did the county distribute remaining funds to cover court costs, probation costs, and various state funds (Colgan 2017; Turner and Greene 1999; Turner and Petersilia 1996). Though many states already prize the distribution of restitution, other states prioritize collections costs or other funds, and therefore those practices would need to change.<sup>16</sup>

With respect to the latter, a central fund for restitution would allow victims to be made whole even in cases where a person was unable to pay full restitution. For example, in a case involving a direct victim where the graduated amount was lower than what would otherwise be the restitution award, all monies collected from the economic sanctions would be paid to the victim, supplemented by the restitution fund, to make the victim whole. In cases in which the graduated amount is higher than the restitution owed, or in which there is no victim, lawmakers could distribute some portion of monies collected to the restitution fund as well as other uses. A structure that could accommodate such a distributive method is in place in all 50 states through the federal crime victim compensation program (National Center for Victims of Crime n.d). Lawmakers, however, have often capped restitution awards from program funds or prioritized the distribution of economic sanctions for other purposes, and therefore may need to reprioritize distributions to prize restitution (Fetsco 2012; Ruback 2015; Ruhland et al. 2017).

### *5. If the day-fines experiments were successful, why did they disappear?*

Day-fines failed to catch on in the United States in no small part because they were introduced at the height of the tough-on-crime furor of the late 1980s and early 1990s (Colgan 2017; Pinsker 2015; Rosenberg 2015). The effects of that tough-on-crime focus on the use of day-fines, for example, was evident in Iowa. There had been hope that the Iowa legislature would make the day-fines pilot project a permanent fixture in 1996, but lawmakers turned their attention instead to establishing new criminal offenses and higher penalties, as well as expanding the scope of the state's sex offender registry (Colgan 2017). Across the country, the tough-on-crime policies of this era were initially sustained by an economic upturn as well as the use of surcharges and administrative fees imposed to try to cover the costs of mass incarceration and mass probation (Frase 2013; White House 2015). As the cost of maintaining those systems continued to rise and the economy soured, lawmakers increased the types and dollar amount of economic sanctions. Again, rather than expand the day-fines program, Iowa chose instead to increase the amount of money the state would seek to recoup from indigent defendants through fees, surcharges, and restitution (Colgan 2017). Iowa was far from alone. Though Maricopa County's day-fines project survived for several years, by the mid-2000s Arizona's increased use of mandatory minimum fines, surcharges, and restitution made

it impossible to incorporate all economic sanctions within the day-fines amount. With pressure on lawmakers to appear tough on crime and periodic staffing changes that created a barrier to full institutionalization of the day-fines method, the project ended (Colgan 2017).

In addition, the day-fines pilot projects did not catch on for a variety of reasons unique to each jurisdiction. The city of Bridgeport, Connecticut abandoned its project due to a series of technological problems related to the computer systems used to track day-fines amounts, the need to engage in complicated court procedures brought on by complexities in Connecticut law, and the rotation of the judge trained to use day-fines to another court (Colgan 2017; Coppolo 1996; Turner and Petersilia 1996; U.S. Department of Justice 1996). In Staten Island researchers from the Vera Institute of Justice initially staffed the pilot project. The end of the project created a staffing gap. In addition to general difficulties institutionalizing new practices in New York at the time, county lawmakers were reticent to expend money on staffing in the short term, despite evidence that day-fines would likely lead to revenue increases and decreased expenditures in the long term (Colgan 2017; Hillsman 1995). Similarly, the fear of revenue declines in Milwaukee led officials there to allow its 12-week pilot project to sunset—despite evidence of improved collections and a potential for cost savings that could be gained by avoiding jail expenditures, arrest warrants, court appearances, and more (Colgan 2017; McDonald 1992a; Worzella 1992). Finally, a combination of serious design errors in Oregon's pilot project—including the imputation of the minimum wage to people who were unemployed, the inflexibility of allowable deductions, and the addition of surcharges and fees on top of the day-fines amount—led lawmakers to return to a preexisting statutory mechanism that allowed for even greater reductions in economic sanctions for people who had no meaningful ability to pay (Colgan 2017; Forman and Factor 1995; Turner and Petersilia 1996; Vera Institute of Justice 1995).

### *6. Are these proposals politically viable?*

Lawmakers are under significant pressure to generate revenue while also avoiding tax increases. Despite a new bipartisan embrace of criminal justice reform, appearing soft on crime remains a political risk for lawmakers in many jurisdictions. As evidence increases that the graduation of economic sanctions may lead to systems that are more cost-effective and to crime reduction, however, those concerns have less purchase. Furthermore, bipartisan support for reforms specific to graduation are growing. Liberal organizations including the ACLU (ACLU 2010; ACLU of Ohio 2013; ACLU of Washington and Columbia Legal Services 2014), conservative groups such as ALEC (ALEC Resolution 2016), educational centers (Criminal Justice Policy Program 2016; NYU Center on the Administration of Criminal Law 2017),

court administrators (Task Force on Fair Justice for All 2016; Pepin 2016), and other nonpartisan entities such as the American Bar Association (ABA 2018) and the drafters of the

Model Penal Code (Reitz 2015), are now united in calling for the graduation of economic sanctions according to ability to pay.

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# Conclusion

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**G**raduating economic sanctions according to ability to pay will help alleviate their inherently regressive qualities, and in doing so will render the use of economic sanctions both fairer and more equitable. In addition, graduated sanctions, particularly in combination with proposals described herein, can significantly reduce or eliminate many of the downstream consequences of unmanageable economic sanctions. A properly designed system for graduation can result in improved financial and social stability for people struggling with criminal debt and their families, and can benefit society through improved payment outcomes, reduced recidivism, and greater criminal justice equity.

As with any reform, the introduction of a system of graduation should include sufficient data collection and provision for evaluation to allow an analysis of what components of the program are working, and what may need to be adjusted to reach the program's goals. Graduated sanctions can be implemented in a variety of ways; it is important to understand the effects of each component, as well as the ways those individual policies interact. As the results of program evaluation become available, the details of graduated sanctions can be refined to better balance public objectives of sentencing equality, crime reduction, and improved outcomes for people who would otherwise have unmanageable criminal debt, and their families.

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# Author

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Professor Colgan earned her B.A. from Stanford University and her J.D. from Northwestern University School of Law, where she was Note and Comment Editor of the Northwestern Law Review, a member of the National Moot Court Team, and the recipient of the Wigmore Key award. After law school, she worked as an associate for Perkins Coie LLP (2000-05), where she litigated a variety of matters in federal and state court and engaged in extensive pro bono work focusing primarily on access to competent indigent defense counsel in rural Washington and post-conviction representation of juveniles tried in adult criminal courts. From 2006-11, Professor Colgan worked as the Managing Attorney of the Institutions Project at Columbia Legal Services, representing juveniles and adults confined in prisons, jails, mental health facilities, and immigration detention in civil rights litigation, collateral

appeals, and legislative advocacy. Professor Colgan has been recognized for her work on criminal and juvenile justice reform, including the Washington State Bar Association Thomas Neville Pro Bono Award, the Northwestern University Children & Family Justice Center Alumni Award, and the Stanford Law School Pro Bono Distinction Award. She continues to serve the criminal justice community as a consultant on issues related to punishment, access to counsel, and juvenile justice.

Professor Colgan's scholarship centers on the relationship between constitutional interpretation and the practical effects of the law. She is particularly interested in the intersection between criminal law and poverty, the treatment of juveniles in juvenile and adult criminal contexts, and the systemic consequences of constitutional interpretation (e.g., underfunding of indigent defense systems). Her recent scholarship has appeared in the California Law Review, Iowa Law Review, Stanford Journal of Civil Rights & Civil Liberties, UCLA Law Review, Vanderbilt Law Review, and William and Mary Law Review.

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# Endnotes

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1. An example is the infamous offense of “Manner of Walking in Roadway”—a form of jaywalking—targeted at African Americans in heavily policed segments of Ferguson, Missouri, as described in the U.S. Department of Justice report documenting abusive police practices there (U.S. Department of Justice 2015).
2. The criminal justice goal of equality in punishment is often associated with retributivism, also known as just deserts theory, which is centered around the notion that a person should be punished for an offense no more or less than they deserve. Desert, in turn, is measured by the seriousness of the offense and the person’s degree of culpability for it (Fletcher 2000).
3. General deterrence, along with rehabilitation and specific deterrence discussed herein, are tenets of the utilitarian (or consequentialist) theory of punishment. Proponents of a utilitarian approach posit that punishment is justified only if it serves the overall social welfare. If the severity of the economic sanctions along with other social harms created by their use outweigh the deterrent and rehabilitative benefits of that punishment, then their use cannot be justified (Bentham 1871).
4. As a note of caution, comparisons of these studies is complicated by the fact that they often measure recidivism in different ways (e.g., new police investigation, new arrest, parole/probation violation, parole/probation revocation, or new conviction), may focus exclusively on one type of economic sanction rather than the full panoply of economic sanctions imposed, in some cases predate the expanded use of surcharges or administrative fees that can significantly raise the amount of debt imposed, may have had insufficient data to control for relevant variables such as employment status, and typically do not differentiate between people who have the capacity to pay economic sanctions and those that do not.
5. The imposition of unmanageable economic sanctions may have broader implications for public safety beyond pushing people toward criminal activity as a means of paying criminal debt. A recent study showed that in municipalities that are heavily dependent on economic sanctions to generate revenue, police are significantly less likely to solve violent and property crimes (Goldstein, Sances, and You 2018).
6. Some early studies of the use of economic sanctions with juveniles suffered from limited sample size and a lack of control for offense type, though two early studies showed that the use of restitution had positive effects, particularly as compared to probation (Schneider 1986). A more-recent study also suggested that when combined with restorative justice practices and opportunities to earn money to pay, restitution can have positive effects at least as compared to the imposition of probation and economic sanctions alone (Kuehn, Yarnall, and Champion 2014; see also Butts and Snyder 1992; Rowley 1978). The inability to complete payment, however, has been shown to have negative consequences for juveniles. One 2014 study found that nonpayment of economic sanctions did not significantly predict that a court would find a violation of community supervision conditions or new charges, but that judges were more likely to revoke community supervision if a juvenile paid a lower percentage of restitution (Haynes, Cares, and Ruback 2014).
7. Additionally, an earlier study comparing recidivism rates of juveniles sentenced to pay restitution and those sentenced to incarceration suggested that there is either no difference in recidivism rates stemming from the two types of punishment or only a limited reduction of recidivism for juveniles who are not incarcerated (Schneider 1986). That is particularly telling given increasing evidence that the incarceration of juveniles has significant criminogenic effects (Mendel 2011).
8. In a Hamilton Project proposal, Michael Makowsky (2019) discusses these and other issues related to revenue motivations in the criminal justice system.
9. Though other income components like capital income and retirement income are likely minimal for most individuals, these should be included as well (see box 3).
10. In the consumer bankruptcy context, a debtor’s monthly income includes most amounts earned by the debtor as well as monies earned by any person so long as those funds are available for shared family household expenses; income also includes assets to which the debtor has a legal or equitable interest (Colgan 2017). Another example can be found in the Section 8 housing context, in which Housing and Urban Development (HUD) policies establish monthly rent by limiting income to that earned by the head of household, spouse, or cohead of household, and benefits accruing to any member of the house (Colgan 2017; U.S. Department of Housing and Urban Development 2003). Similarly, cabining family income in the sentencing context to include only resources in which the person convicted of an offense has a shared interest would aid in linking the punishment directly to the person who committed the offense, while reducing the pool of extended family members potentially affected by the economic sanction.
11. Although Milwaukee’s program design suffered from the use of mandatory minimum fines that artificially inflated day-fines amounts, even in that case graduated economic sanctions resulted in improved collections, with 37 percent of people with day-fines paying in full, as compared to 25 percent of people with ungraduated economic sanctions (Worzella 1992). Similarly, while data constraints prevented as robust of an analysis as that in Maricopa County and Staten Island, in Polk County, RAND researchers were able to compare pre- and postpilot data regarding the five most common offenses in the county—which made up 89 percent of all cases—to show that collection amounts rose from \$197 to \$360 despite the fact that the average day-fines amount dropped as compared to ungraduated economic sanctions (Vera Institute of Justice 1995). Furthermore, while available information regarding the Bridgeport pilot project does not allow for a comparison by dollar amount, it does show that full payment was received in 76.3 percent of felony and 79.7 percent of misdemeanor cases (Turner and Petersilia 1996). Court staff involved in the Oregon pilot project also reported improved collections (Forman and Factor 1995).
12. Again, analyses of available data in Polk County supports the Maricopa County results with respect to timeliness. Researchers found that 17.7 percent of people subject to day-fines paid within one week, a third within three months, more than half within six months, and nearly 90 percent within a year (Turner and Petersilia 1996). Similarly, documentation of the Bridgeport pilot project shows that 82 percent of all day-fines were collected within one year of sentencing (Turner and Petersilia 1996).
13. See Piehl (2016) for a discussion of collateral consequences in the context of overall criminal justice punitiveness and sentencing reform. See also White House (2015) for extended discussion of collateral consequences related to occupational licensing.
14. While one study did suggest that self-reporting of illicit income was unreliable, the study required respondents to recall illicit income over a lengthy period—including intervals of 10 years—and therefore memory and recall problems among respondents may have affected the results (Anglin, Hser, and Chou 1993).
15. The extent to which a reduction in delinquent accounts will reduce administrative costs will, of course, depend on whether there were significant collections-related expenditures predating the implementation of the graduation mechanism. For example, in the Polk County day-fines project, there was an increase in administrative costs related to collections, and therefore a smaller offset from the improved collection rates, because prior to implementing the day-fines pilot project the county effectively had no system for collections (Turner and Petersilia 1996).
16. In undertaking the task of resetting distribution priorities, lawmakers should also collectively consider the various purposes for which they have designated economic sanctions. Many jurisdictions have adopted these myriad forms of economic sanction piecemeal over time, without consideration of their importance relative to each other. Lawmakers can take the opportunity to assess each of the uses of economic sanctions and eliminate or place at lower priority those that no longer meet public policy goals.



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This work draws significantly on the author's prior work: Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 *Iowa L. Rev.* 53 (2017). Further detail regarding the day-fines pilot projects, as well as practices in consumer bankruptcy, tax, and public benefits systems, may be found in that article.

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## Highlights

In this paper, Beth Colgan of the University of California, Los Angeles School of Law describes the harms associated with unmanageable monetary sanctions. Drawing on evidence from day-fine pilot projects, Colgan offers proposals for taking more account of a person's ability to pay when determining sanctions.

In support of the core proposals, Colgan also describes related best practices that would maximize the proposals' potential benefits.

## The Proposals

- **Devise a system for ability-to-pay calculations.** Policymakers will set guidelines for what sorts of income should be used as the basis for graduated sanctions. This will require decisions about how to treat potential sources of income such as public benefits, other family members' income, volatile employment income, financial assets, and others.
- **Choose a mechanism for adjustment.** Policymakers will select one of three methods for applying graduation to existing economic sanctions based on an individual's ability to pay. The three proposed models are: a flat reduction in penalties, a sliding scale of penalties, or a day-fines model.
- **Apply graduation to all forms of economic sanction.** Policymakers will graduate all forms of economic sanctions including fines, fees, surcharges, and restitution.
- **Allow for post-sentence modifications.** Policymakers will allow courts to adjust criminal justice debts when the individual's financial situation changes after the sentencing period.
- **Impose time limits on collections periods.** Policymakers will establish clear deadlines for payment to occur so that individuals are not trapped in an endless cycle of payment.

## Benefits

Reforming monetary sanction policies in the criminal justice system will improve efficiency and efficacy for debtors, administrators, and victims. For debtors, graduating economic sanctions based on an individual's ability to pay will make repayment more feasible and prevent them from getting trapped in an endless cycle of fee accrual. For administrators, simplifying the system will reduce complications associated with failure to pay. Lastly, evidence suggests that victims entitled to restitution will be recompensed more reliably.



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