



Decoding the DOJ’s “Dear Colleague” Letter:

Key Talking Points for Advocates

On April 20, 2023, U.S. DOJ leaders [issued a revised “Dear Colleague” letter](#) addressing in detail the assessment and collection of fines and fees against both adults and juveniles. The letter, signed by Kristen Clarke, Assistant Attorney General, Civil Rights Division, Amy Soloman, Assistant Attorney General, Office of Justice Programs, and Rachel Rossi, Director, Office for Access to Justice, focuses on the U.S. Constitution and federal statutes, and it also makes many policy recommendations and statements that can be utilized by advocates in their work.

General Talking Points

- **“Eliminating the unjust imposition of fines and fees is one of the most expeditious ways for jurisdictions to support the success of youth and low-income individuals, honor constitutional and statutory obligations, reduce racial disparities in the administration of justice, and ensure greater justice for all.” [18]**
- **“Courts, prosecutors, and police should be driven by justice – not revenue.” [11]**

“Imposing and enforcing fines and fees on individuals who cannot afford to pay them has been shown to cause profound harm. Individuals confront escalating debt; face repeated, unnecessary incarceration for nonpayment of fines and fees; experience extended periods of probation and parole; are subjected to changes in immigration status; and lose their employment, driver’s license, voting rights or home. This practice far too often traps individuals and their families in a cycle of poverty and punishment that can be nearly impossible to escape.” [2]
- “The detrimental effects of unjust fines and fees fall disproportionately on low-income communities and people of color, who are overrepresented in the criminal justice system and already may face economic obstacles arising from discrimination, bias, or systemic inequities.” [2]
- “[T]o the extent that [fine and fee] practices are geared toward raising general revenue and not toward addressing public safety, they can erode trust in the justice system.” [3]

- **Failure to comply with the constitutional and legal requirements described in this letter might expose jurisdictions to civil enforcement actions by the Department. [15]**

Fines and fees are ineffective and undermine important goals

- “[A]ssessment of unaffordable fines and fees often does not achieve the fines’ and fees’ stated purposes.” [3]
- “In many cases, unaffordable fines and fees undermine rehabilitation and successful reentry and increase recidivism for adults and minors.” [3]
- “Critically, many jurisdictions do not track the costs of collecting fines and fees; it is therefore difficult to assess whether it effectively generates revenue at all.” [3, fn.12]

Key constitutional principles

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- The due process and equal protection principles of the Fourteenth Amendment prohibit “punishing a person for his poverty.” [6]
- State and local courts have an affirmative duty to determine an individual’s ability to pay and whether any nonpayment was willful before imposing incarceration as a consequence.
- Courts should do ability to pay analyses before imposing adverse consequences for nonpayment. [8]
- People “should not be required to complete extended terms or more burdensome terms of probation” due to an inability to pay. [8]
- Individuals should not be barred from participating in or completing a diversion program, be subjected to more onerous conditions for participating in a diversion program or have a diversion program extended because they cannot pay fees. [8]

Excessive Fines Clause – 8th Amendment

- With respect to determining whether fines are excessive and a violation of the Eighth Amendment, “we recommend that courts also consider individuals’ economic circumstances when assessing fines and fees.” [5]
- “When a person already cannot afford a basic need, such as housing, a fine or fee of any amount can be excessive in light of that person’s circumstances, and thus may not be appropriate even if legally permitted.” [5]

- Fining a person who is unhoused can destabilize that person and can further obstruct their ability to satisfy basic needs.” [5]
- Unhoused individuals –who are unable to afford a place to live or sleep—are unlikely to be able to pay any fine or fee.” [5 fn.15]

Conflicts of interest

“Courts, prosecutors, and police should be driven by justice – not revenue.” [11]

Due process bars conflicts where an institutional financial interest in the outcome of a case gives rise to a significant personal interest for the judge, even where there is no prospect of personal financial gain.” [Page 11]

The Department has taken the position that due process protections also apply when the disposition of fines creates a personal interest in the outcome of an enforcement proceeding for other officials who enforce the law, including police, prosecutors and probation officers.[11]

Right to Counsel - 6th and 14th Amendments

The Sixth Amendment requires that a defendant be provided the right to counsel in at least any criminal proceeding that may result in incarceration.”[13]

Under the Fourteenth Amendment, defendants likewise may be entitled to counsel in civil contempt proceedings for failure to pay fines or fees where incarceration is a possible penalty.[13]

Where a right to counsel exists, that right cannot be conditioned on a defendant’s payment of fines or fees that the defendant lacks the ability to pay. [3]

As a best practice, courts should ensure that individuals are provided with access to counsel in appropriate cases involving fines and fees, including, as discussed above, in proceedings that may result in incarceration or in juvenile proceedings. [13]

Ability-to-Pay Assessments

“State and local courts have an affirmative duty to determine an individual’s ability to pay... State and local courts should conduct this analysis even if a defendant does not specifically raise the issue.” [6]

In doing ability-to-pay assessments, . . . [h]istorically, . . . courts have not considered how an individual spends money, but have instead focused solely on whether the individual has sufficient income and financial resources to pay the fine at issue while still meeting basic needs.” [7]

Ability to pay determinations require “that court uniformly and consistently apply standards for making such determinations. . . “ [7]

[J]urisdictions may also benefit from creating presumptions of indigency for certain classes of defendants - for example, those who are eligible for public benefits, unhoused, living below a certain income level, or serving a term of confinement” as well as for youth. [7]

Enforcement of Fines and Fees/Collections/Alternatives

It is the position of the United States that imposing certain serious adverse consequences for failure to pay an unaffordable fine or fee, where alternative approaches could serve the government’s interests, violates the Fourteenth Amendment. [9]

As a best practice, jurisdictions should consider collecting fines and fees by, for instance, adopting penalty-free payment plans, offering amnesty periods during which individuals can have warrants canceled and fees waived, or connecting individuals who cannot afford to pay fines and fees with workforce development and financial counseling programs. These alternatives are likely to serve a jurisdiction’s interest in ensuring payment of fines and fees better than incarceration or other adverse consequences. [9]

Jurisdictions may also consider waiving or reducing the debt of a person unable to pay the debt .. [or not] imposing punitive financial obligations in the first place.” [9]

Importantly, however, state and local governments should be mindful that these alternatives can, under certain circumstances, inadvertently impose greater penalties on those who are disadvantaged. For example, a payment plan might still unnecessarily penalize a low income person for their poverty if the plan imposes onerous user fees or interest.”[10]

- The imposition of seemingly non-financial obligations may still result in indirect financial obligations. For example, while community service could be an alternative to payment of adults or youth, it could nevertheless exact a financial consequence if individuals are required to pay costs for participation, take unpaid leave from their jobs, pay for childcare, or miss educational opportunities to fulfill it. Ditto “education, substance abuse and mental health counseling, and other programs.” [10]

Access to Courts/Due Process

- The Fourteenth Amendment prohibits conditioning access to the judicial process on the payment of fees such as court costs.” [12]
- “Fines and fees assessed by courts are often incorrectly framed as a routine administrative matter. . . . [R]egardless of the charge, predicated indigent individuals’ access to a hearing, to counsel, or other judicial process on the payment of costs can

deprive those without financial resources of access to justice and potentially violate their rights.” [12]

Notice - Due Process

- We recommend that courts undertake measures to **ensure that individuals actually receive the citations and summonses intended for them**, and adequately inform individuals of the precise charges against them, the amount they owe or other possible penalties, the date of their court hearing, the availability of alternative means of payment, the rules and procedures of court, their rights as a litigant, and whether they must appear in person. [13-14]

Youth

- “Fines and fees can be particularly burdensome for youth, who may be unable to pay court-issued fines and fees themselves, burdening parents and guardians who may face untenable choices between paying court debts or paying for the entire family unit’s basic necessities, like food, clothing and shelter.” [2]
- “Children subjected to unaffordable fines and fees often suffer escalating negative consequences from the justice system that may follow them into adulthood.” [2]
- “[M]inors are generally unable to earn the money needed to pay fines and fees because many are too young to legally work, are of compulsory school age or full-time students, have great difficulty obtaining employment due to having a juvenile or criminal record, or simply do not yet have employable skills typical of adults.” [5]
- **[J]urisdictions should presume that children and youth are indigent and unable to pay fines and fees.**[7]

DOJ Enforcement - Discriminatory Impact - Violations of Federal Statutes

- Even in the absence of intentional discrimination, we recommend that courts and other state actors carefully consider whether their collection of fines and fees have disproportionate effects based on race or another protected characteristic. [14]
 - For example, courts should consider whether certain fines and fees practices, such as debt-based driver’s license suspensions, disproportionately affect people of color. [14]

- The Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. section 12601, makes it unlawful for law enforcement officers to engage in a pattern or practice of conduct that violates the U.S. Constitution or federal law, including, under certain circumstances, the unconstitutional or unlawful imposition and enforcement of fines and fees.[15]

- **Failure to comply with the constitutional and legal requirements described in this letter might expose jurisdictions to civil enforcement actions by the Department. [15]**

- The courts' obligations to comply with these principles extends to activities carried out by court staff and private contractors on the courts' behalf.
 - “[J]udges must ensure that the law is followed by all staff and private contractors to preserve ‘both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done.’” [15-16]

- Recipients of federal financial assistance, including court systems, must comply with the statutory prohibitions against discrimination in the imposition of fines and fees. [16]
 - In order to meet their statutory obligations, courts must, for instance, provide appropriate language assistance services to LEP (Limited English Proficient) individuals in connection with the assessment and collection of fines and fees.
 - Such assistance includes, but is not limited to, ensuring that court users with LEP have competent interpreting and translation services during all related hearings, trials, and motions, provided at no cost.[17]

- **If the Department finds that one of its funding recipients has violated federal law and has failed to voluntarily resolve those violations, the Department may suspend or terminate, or refuse to grant or continue, federal financial assistance. [18]**

- **Additionally, the Department may independently initiate compliance reviews (i.e. investigative audits) into its funding recipients to determine whether their administration of fines and fees violates applicable federal civil rights laws.[18]**