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THE ABILITY TO PAY COURT FINES, INCLUDING JAIL AND PRISON FEES,

has remained an issue since Michigan first authorized the imposition of correctional fees in 1846.¹ Today, many courts order excessive fees for misdemeanors or infractions. As a result, defendants are paying for services that were traditionally provided at no cost — indigent defense, room and board, probation and parole supervision fees, electronic monitoring devices, healthcare, haircuts, treatment programs, and psychological assessments. When the defendant cannot pay, the punishment can grow exponentially. Higher fees, jail time, or driver's license revocation are often assessed when a defendant cannot pay the initial fine. These penalties are compounded by ancillary losses, such as the inability to provide for one's



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family, which accompanies employment and transportation losses resulting from a revoked driver's license. These measures serve as punishment not for the initial offense, but as a penalty for one's inability to pay.² The poor, African-Americans, and Latinos are disproportionately affected.³

In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court held that a court can only impose jail time for a defendant's failure to pay a fine if the defendant could have paid the fine but "willfully" chose not to. As a result, courts must first inquire as to a defendant's ability to pay a fine before ordering jail time. The 2015 U.S. Department of Justice's ("DOJ") report on Ferguson, Missouri's system of imposing fines and fees reported, however, that Ferguson and other jurisdictions fail to hold hear-

ings to determine a defendant's ability to pay.⁴ This report sparked a renewed awareness and interest in systematic imposition of fines and fees in judicial systems nationwide.

These fines and fees fund court systems, jails, and prisons. Some judges, prosecutors, and law enforcement officers believe such fees make defendants accountable. Others say they overpenalize defendants by inflating the initial fine with interest and late fees and by imposing jail and license revocation.

In 2016, DOJ warned local courts about imposing fines that violate "due process, equal protection and sound public policy."⁵ One such policy consideration: Who is responsible for funding courts and jails — the legislature, other local governing bodies, or convicted defendants? In response to the DOJ report, Missouri lowered fines for tickets, and other states provided amnesty to defendants with massive debt from fees. Judges must take affirmative responsibility to set best practices in the issuance of fines and fees, ensuring the linkage to access to justice.

This edition of *Judicature* further explores this important issue through a thoughtful roundtable discussion by a rousing group of chief justices, led by former jurist and current Dean of Duke Law School, David F. Levi, who discuss how courts can be responsive to the disparately punitive effects of excessive fines and fees. We also include an article analyzing alternative sentencing as a means of addressing an indigent defendant's inability to pay fines and fees, as well as a review of the book *American Prophet* and several other excellent articles discussing discovery and evidentiary issues. Thank you for reading.

A handwritten signature in black ink, appearing to read "Cheri Beasley".

Cheri Beasley, Justice, Supreme Court of North Carolina

¹ Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014). ² Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR.org (May 19, 2014). ³ *Id.*; see Alice P. Green, *The Disproportionate Impact of the Criminal Justice System on People of Color in the Capital District*, CTR. FOR L. & JUST. (Feb. 2012); Michael Martinez, *Policing for Profit: How Ferguson's Fines Violated Rights of African-Americans*, CNN.com (Mar. 6, 2015). ⁴ See Civil Rights Div., U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* (Mar. 4, 2015). ⁵ Debra Cassens Weiss, *Justice Department Warns Local Courts About Illegal Enforcement of Fees and Fines*, ABA J. (Mar. 14, 2016). Complete citations available at www.law.duke.edu/judicature/vol100no4.

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