

Mayor's Office of Criminal Justice
New York City Council
Committee on the Justice System
Committee on Governmental Operations
Establishing a day-fines pilot program in the Office of Administrative Trials and Hearings &
Mandating a citywide audit of collateral consequences for drug arrests and convictions
December 11, 2019

Good Morning Chair Lancman, Chair Cabrera and members of the Committee on Justice Systems and Committee on Governmental Operations.

My name is David Goldin, and I am the Administrative Justice Coordinator in the Mayor's Office of Criminal Justice (MOCJ). I appreciate the opportunity to testify today.

As you know, MOCJ advises the Mayor on public safety strategy and, together with partners inside and outside government, develops and implements policies that promote safety and fairness and reduce unnecessary incarceration. As Administrative Justice Coordinator, I work with the City's administrative tribunals on matters of shared concern across agencies and on the use of civil adjudication in enforcement of the City's health and safety regulations.

In recent years, the Council has taken critical steps to promote equity and fairness in the City's enforcement of those regulations. In particular, in May 2016, the Council passed the Criminal Justice Reform Act (CJRA), which substituted civil tickets, returnable to the City's Office for Administrative Trials and Hearings (OATH), for certain low-level offenses that were previously issued criminal summonses. These offenses include violations of open container, littering, and unreasonable noise laws. With the passage and implementation of the CJRA, criminal summonses for these offenses have been reduced by more than 90%.

Failure to appear at criminal court results in an arrest warrant. Researchers at the Data Collaborative for Justice have estimated that the CJRA has likely resulted in 63,000 fewer criminal warrants in its first 18 months in effect. For offenses adjudicated at OATH under the CJRA, respondents have the option of participating in an educational module instead of paying a fine. To date, more than 1 in 3 individuals found "in violation" have chosen to complete the community service educational module.

The CJRA reflects principles of fostering fairness and economic justice in enforcement, which MOCJ shares with the Council. Advancing those same principles, the City lightened the touch of law enforcement in other ways, resulting in a 79% decrease in criminal summonses (through year end 2018) since the beginning of the Administration. As required by State law, people issued a criminal summons and found guilty of even a violation must pay a mandatory surcharge of \$120. Taking steps to reduce the likelihood that an individual comes into contact with the criminal justice system means reducing the chances they will have to pay a costly and often unaffordable court fee.

We continue to work with stakeholders both within and outside City government to examine the ways our criminal justice system subjects individuals to financial penalties, and in particular, how those penalties impact individuals who can least afford them.

We work with law enforcement, prosecutors, and the courts to create pre-arrest diversion opportunities for individuals facing economic and mental health challenges so that they can avoid the criminal justice system altogether. We are also examining opportunities to expand the use of community service. We believe that, in certain cases, community service in the form of educational engagement is a more appropriate penalty than a fine. For example, where the underlying offense is minor and does not cause harm to another, both the individual and the City benefit from initiatives that seek to educate and correct behavior rather than penalize.

Against that background, MOCJ offers these comments on the Intro at issue today. In keeping with our overall approach and research interests, we are familiar with the use of day fine models in the criminal law context, both abroad and as part of pilots in the United States. Day fine models start from a sound premise – acknowledgment that a \$100 fine impacts a person making minimum wage differently than a person earning a six-figure salary. We believe this is an important issue to examine, but we want to highlight four critical issues that need to be addressed in developing the pilot proposed in the Intro.

First, we note that the penalties now imposed for violations of the City's health and safety codes are constrained by statutes enacted by the Council and are specifically set forth in penalty schedules adopted by the various enforcement agencies. Those schedules were adopted to maintain uniformity in adjudication outcomes and prevent disparate results in cases involving similarly situated individuals and facts. For most of the relevant statutes, significant changes in the penalties to be imposed for violations would require specific legislation. Then, amending those penalty schedules to take into account legitimate considerations of equity and fairness will require agency rule-making as mandated by the City Charter. We believe the Council should involve the City's enforcement agencies in designing a pilot program to address these issues. The enforcement agencies, not OATH, are most familiar with the relationship between where and how many tickets they issue, what penalties they impose and why, and how to craft an enforcement approach best calculated to maintain health and safety without economic unfairness and overall inequity. Likewise, the agencies can and should help inform enforcement strategies that reduce disproportionate financial penalties by increasing reliance on, for example, agency-issued warnings or demonstrations of compliance by respondents. Moreover, a successful adjustment of the penalty schedules to promote equity and fairness should also protect a respondent's ability to resolve an outstanding summons directly with the agency that issued it, without requiring the unnecessary involvement of OATH.

Second, many specific features of the traditional day fine model reflect its development and use in a criminal, rather than civil, enforcement context. In addition, we believe that that model may in some respects be too procedurally complex and time-consuming to implement without significant modifications when it comes to tickets returnable to OATH. Instead of importing the traditional day fine model, we suggest the Council may want to consider developing a different approach that more efficiently takes into consideration the respondent's financial situation. For example, consideration could be given to setting penalty schedules with three or four tiers corresponding with income levels, and/or a fee waiver for individuals who are indigent. Consideration could also be given to expanding the use of community service to other offenses adjudicated at OATH or at New York City's summons courts.

Third, we note that if the Council determines that a not-for-profit organization should play a role in designing the pilot program, budget and procurement issues would need to be addressed, requiring time to implement. Whether the work of evaluating the pilot is done by such an organization or otherwise by the City, we agree that it could yield needed data and research on the use of ability-to-pay models in courts. Although much has been written about the need for evaluating an individual's ability to pay when setting a penalty, much of the field research is outdated or anecdotal. Data on the cost of implementation and the impact on collection rates and amounts collected, for example, could help determine what the appropriate use of standardized ability-to-pay calculations should be in other contexts.

Fourth, and finally, we understand the Intro is not intended to include offenses that were moved to OATH as part of the CJRA. We think that intent should be made explicit by incorporating language clarifying that CJRA offenses would not be included in a pilot. As mentioned earlier, individuals found in violation of those offenses can avoid paying the fine altogether by selecting the community service option. The availability of this option mitigates concerns about economic inequity.

The Administration is committed to promoting equity and fairness in criminal and civil enforcement of the City's laws and will carefully study this issue in a thoughtful manner with the appropriate enforcement agencies. We look forward to working with the Council toward this end in amendments to the proposed Intro.

Turning towards the second pre-considered intro mandating a citywide audit of collateral consequences, the City is committed to ensuring equity and fairness and recognizes the barriers collateral consequences impose. This core value was rooted in the work of the Mayor's Task Force on Cannabis Legalization and our support for the expungement of criminal records for past cannabis offenses. We thank the State for championing expungement for cannabis offenses this past session. Regarding the legislation being heard today, we support the proposed expansion of the Municipal Drug Strategy Council to examine the impact of collateral consequences as it relates to controlled substances. However, there are a number of legal and operational questions posed by this bill that we need to investigate further with the City Council. For example, given public safety considerations implicated for various employees as well as additional legal obligations and oversight by federal and state entities, we recommend defining "collateral consequence" to exclude adverse actions agencies are required by law to impose and for which there is no discretion. Similarly, we should ensure that any reporting requirements exclude private health information obtained in a clinical or treatment context.

Thank you for the opportunity to testify here today. I would be happy to answer any questions.



520 Eighth Avenue, New York, New York 10018
p. 646 386 3100
f. 212 397 0985
courtinnovation.org

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Greg Berman. Director

**Center for Court Innovation Testimony
New York City Council
Committee on the Justice System
Committee on Governmental Operations
Establishing a Day-Fines Pilot in the Office of Administrative Trials and Hearings
December 11, 2019**

The Center for Court Innovation agrees with the concept of establishing a pilot program in the Office of Administrative Trials and Hearings (OATH) to rigorously assess each respondent's disposable income; reduce fine amounts where appropriate; and provide a community service alternative for individuals with no ability to pay a fine.

Overview

The proposed legislation responds to a need and opportunity to reduce the harmful effects of fines and fees on low-income and marginalized communities. Failing to adjust financial penalties to what individuals can afford can perpetuate cycles of poverty and produce continuing system involvement resulting from nonpayment.¹ Moreover, fines and fees are often imposed in response to low-level charges such as theft of services or trespassing in a public park after closing, which can be connected to the underlying problem of poverty. In this context, conducting a well-implemented day fines pilot test among cases handled by OATH is a prudent, rational step that, if successful, could yield laudable advances in the fairness of our City's civil justice system.

At the Center for Court Innovation, our perspective derives from four relevant areas of experience:

- **National Technical Assistance:** The Center is the lead national technical assistance provider on a *Price of Justice Initiative* created by the Department of Justice to reform the use of fines and fees in five states: California, Louisiana, Missouri, Texas, and Washington.²
- **Alternatives to a Civil Fine:** In conjunction with the Criminal Justice Reform Act, the Center recently partnered with OATH to provide community service and e-learning as proportionate and accessible alternatives to a civil summons fine in cases previously handled in the criminal courts.³
- **Community Service:** The Center just completed a national study of community service⁴ and has a long history of implementing community service in ways that promote procedural fairness.⁵
- **Ability-to-Pay Analysis:** The Center has written a widely disseminated analysis of New York's bail reform law and is currently working with stakeholders across New York City on its implementation—including adherence to new ability to pay provisions for bail-eligible cases.⁶

National Fines and Fees Initiatives

Adjusting fines, fees, and bail amounts based on people’s financial resources is a cutting-edge practice that U.S. states and localities nationwide are increasingly adopting. In 2019 alone, California and Washington State both piloted ability-to-pay assessment tools intended to identify individuals whose financial situation merits a reduction in a fine or fee. Michigan, North Carolina, and Texas, and the counties of San Francisco and Mecklenburg, have all distributed bench cards to judges or launched other reforms designed to lessen the financial burdens of fines and fees. In New York, the bail reform law that goes into effect January 1, 2020 includes trailblazing language requiring criminal courts to consider “individual financial circumstances, and ... ability to post bail without posing undue hardship” in those cases that remain eligible for bail.⁷

Below are a few added details on some of the most significant efforts to date. Through its *Price of Justice Initiative* work, Center for Court Innovation staff are in especially close contact with key players in California and Washington State, whose pilot projects may yield important lessons for implementing the proposed day fines program in New York City.

California. In 2019, based on an earlier ability-to-pay questionnaire,⁸ the California Judicial Council launched a computerized tool in five pilot counties: San Francisco, Santa Clara, Shasta, Tulare, and Ventura. The tool enables estimating an individual’s total household income and expenses. Based on where income falls in comparison to the Federal Poverty Guidelines, the tool recommends that judges reduce an individual’s fine by a specified percentage. Stakeholders in each pilot county debated and decided the precise cut-offs that would, respectively, trigger different fine reductions. For example, in one county, stakeholders decided to recommend reducing a fine by 90 percent if income was at 100 percent or less of the poverty line; and recommended reducing fines by relatively lower percentages where income rose all the way up to 400 percent of the poverty line. By contrast, in another county, the highest recommended fine reduction was 70 percent, and stakeholders only agreed that some reduction was appropriate up to 200% of the poverty limit. The California example illustrates how a rigorous approach might work, while also demonstrating how stakeholder input can combine with scientific considerations to create a product that is trusted in a local setting.

Washington State. Like California, Washington also piloted a computerized ability to pay tool in 2019.⁹ Developed by Microsoft, Washington’s tool collects income and public assistance information and then classifies defendants based on a preexisting state definition of *indigence*, encompassing anyone whose household income falls at 125 percent or less of the poverty line. Washington also considers people indigent if they receive public assistance, are homeless, or are currently committed to a mental health institution. Finally, Washington’s tool collects information about, and encourages judges to consider, the defendant’s outstanding debts (if any); and the tool explicitly asks what defendants believe they can pay each month. Unlike California’s approach, the Washington tool does *not* recommend a specific percentage reduction in a fine, instead leaving it to each judge to determine precisely how to use the financial information. Ten judges have been piloting the tool since June 2019, and other judges statewide have been provided the tool to use at their discretion. Washington’s Minority and Justice Commission will soon submit an evaluation report, which the Center for Court Innovation would be pleased to share and discuss with the New York City Council.

North Carolina. In 2018, the North Carolina Administrative Office of the Courts commissioned a bench card analyzing common financial penalties in the state and providing judges with recommendations for taking ability to pay into account.¹⁰ The bench card recommends basing fines and fees on how a defendant’s income compares to the poverty line—but, unlike in Washington, North Carolina’s bench card does not identify a specific percentage of the poverty line as constituting indigence. Instead, the bench card simply displays a chart showing how much household income respectively represents 100, 125, 200, and 300 percent of poverty. By contrast, another bench card created locally in Mecklenburg County (NC) recommends highly specific indigence criteria, defined as one or more of: (1) household income at 200% or less of the poverty line; (2) receiving public assistance; (3) full-time student; (4) currently homeless, (5) homeless at any time in the past six months; or (6) currently residing in a mental health facility or inpatient treatment program. People meeting any of these criteria are “presumed unable to pay or unable to pay in full.”¹¹

Other Examples. The Michigan Supreme Court established an Ability to Pay Workgroup in 2014 and issued a written (hard copy, not computerized) ability to pay checklist and payment plan calculator for judges statewide. The Workgroup recommended that courts reduce the fines and fees of people with income up to 200 percent of poverty.¹² San Francisco’s Office of the Treasurer and Tax Collector established a *Financial Justice Project* five years ago whose mission is to reform excessive fines and fees in both the criminal and civil justice systems. In 2015, the Task Force recommended 40 reforms, including the elimination of many fees and new procedures for reducing the fines and fees of people with a demonstrated low income.¹³ Finally, the National Center for State Courts issued a bench card intended for jurisdictions nationwide, which encourages judges to consider multiple factors in assessing people’s ability to pay, including: (1) household income at 125 percent or less of the poverty line; (2) receiving public assistance; (3) homeless, incarcerated, or resides in a mental health facility; (4) living expenses; (5) other fines the person already owes (if any); and (6) the possibility that a fine could “result in manifest hardship.” The bench card explicitly recommends alternatives when there is no ability to pay, including community service; participation in a program; or waiving the fine.¹⁴

The Bottom Line. *New York City can become one of several pioneering jurisdictions nationwide in reducing the well-known harms of fines and fees—but we are not alone in pursuing this type of reform.*

Important Ability to Pay Domains and Considerations

1. Virtually all ability-to-pay assessment tools include a series of questions seeking to determine household size and monthly household income. These two data points, in turn, enable placing the individual on the Federal Poverty Guidelines (FPG) chart—which has different poverty thresholds for households of different sizes. Typically, a series of questions seek to establish how much income the individual obtains from each of multiple sources (e.g., employment, public assistance, pensions, or child support payments). Questions are worded to encompass other family members who live with the respondent; or separate questions are asked about the income of other people in the family or household. Alternatively, some tools ask about the respondent’s income alone, not family or household members; this approach could be viewed as marginally more reliable, because people do not have to estimate what others in their family earn; but it precludes accurately situating the individual on the FPG chart and, therefore, makes it more difficult to credibly conclude whether the person is indigent.

2. Most existing assessment tools rely on the Federal Poverty Guidelines to create a clear criterion for determining whether someone is indigent—and, therefore, should not be charged a fine or fee of any amount—or, at the least, should be charged no more than minimal amount. For the purpose of establishing a household income-based threshold for indigence, it is standard to rely on the Federal Poverty Guidelines. However, not a single tool in the literature defines indigence at 100 percent of poverty. Instead, it is widely accepted that the poverty line is too low, leading to varying standards ranging from 125 percent (Washington State and the National Center for State Courts) to 150 percent (used in the most common payment plan calculations in the student loan world) to 200 percent (Mecklenburg). The Center for Court Innovation has taken the position that 150 percent is reasonable for New York City, while acknowledging that this position does not reflect scientific certainty and is, therefore, negotiable.

3. To adequately establish indigence, most ability-to-pay assessment tools also inquire about several other key factors, including current or recent homelessness or living in a halfway house or a mental health institution. Specifically, other common criteria for indigence besides comparing household size and income against the Federal Poverty Guidelines include: (a) living situation (e.g., homeless, shelter, couch surfing, or living in a halfway house, mental health facility, or other inpatient treatment facility); (b) recent history of homeless (e.g., generally in the past 6 months or past 12 months); and, sometimes: (c) whether the individual is a full-time student.

4. Some, but not all, assessment tools include questions about expenses, assets, and debt. The rationale for *not* including these items is that the nationally standardized Poverty Guidelines can serve as a substitute, since data-driven assumptions about people’s average expenses are “baked in” to how the Guidelines define poverty for different household sizes. But insofar as some people may have disproportionate expenses, for example if they are caring for elderly dependents or sick family members, or if they have accumulated heavy debt, it can be more precise to try to measure the expenses and/or assets of each respondent. This may be especially true in New York City, where variations in key expenses like rent can lead an individual to have unusually high expenses.¹⁵ Even if expenses are not used as part of an initial mathematical calculation of ability-to-pay, the Center for Court Innovation recommends asking questions about expenses to provide courts with some flexibility to make adjustments in individual cases where expenses are especially high.

5. Assessing up-to-date financial resources on the day or month in question may be relevant to New York City’s planned pilot. The proposed New York City legislation seeks to pilot “a system of assessing and imposing fines that takes into account the daily disposable income of a respondent.” This could simply be interpreted as a standard measure of monthly income divided by 30.4, but for people with irregular money on-hand, or who may work more, or less, in one week or month than the next, it may be worth considering whether questions should establish extremely current financial resources.

6. Stakeholder and community engagement is a best practice before finalizing any ability-to-pay strategy. As this testimony should make clear, standard good practices do exist in measuring an individual’s ability-to-pay a fine or fee in the justice system—but there is not a single, scientifically absolute answer. Given this reality, both California and Washington State, for example, relied to an extent on stakeholder input before finalizing their tools; and Washington’s process also involved input from community stakeholders, including individuals who had been personally impacted by fines and fees. We recommend genuine outreach of this nature as part of New York City’s approach.

The Bottom Line. *The most essential domains and question-items for any ability-to-pay assessment are well-known—and effective tools can and have been created in other jurisdictions and contexts. The Center for Court Innovation stands ready to assist the City Council in engaging stakeholders and making thoughtful choices among several legitimate options for the proposed day fines pilot.*

Community Service and E-Learning Alternatives to Fines and Fees

To redress the inequities of fines and fees, especially for people who have no ability to pay at all, there is presently a growing effort to institute effective alternatives that promote accountability, while not disproportionately penalizing low-income Americans. Two potential alternatives that are currently under exploration nationwide and have been implemented in New York City are in-person community service and computer-based interactive learning modules, also known as e-learning.¹⁶

Community Service. Traditionally used as an alternative in criminal courts,¹⁷ community service can include a range of activities that seek to further connect individuals with their community, highlight the ways in which their offenses impact others, and resolve any harm that has occurred. Examples include neighborhood beautification projects, classes that educate participants about the effects of offenses, and assisting local service organizations.¹⁸ While community service has typically centered physical labor as the reparative action, education and reflection focused on community impact and personal responsibility can also be a meaningful and effective form of community service.

E-Learning. E-learning alternatives that use technology to provide an alternative to fines and fees are a more recent development in the civil and criminal justice landscape. Usually available through a computer or on-site kiosk, e-learning sanctions aim to educate users about relevant laws or regulations and encourage them not to commit further offenses. The length of the e-learning is usually proportionate to the amount of the alternative fine. While e-learning is not the ideal solution for everyone, such as people who are not computer literate, there are many benefits to both users and practitioners. E-learning modules can be easily translated into multiple languages, allowing more people to engage in an alternative in their preferred language. E-learning can also use a range of engagement strategies and cater to different learning styles. Some jurisdictions provide the alternatives online so that they can be accessed from any computer, allowing users to avoid further costs such as transportation and childcare. E-learning can also be quite cost effective from a practitioner perspective; while there is an up-front cost, agencies can save the staff time that comes with providing in-person service options to each participant. Finally, the e-learning can be accessed immediately at any time, eliminating any potential scheduling conflicts or wait times. For these reasons, e-learning has become an increasingly popular alternative to fines and fees over the past few years.

Implementation of the NYC Criminal Justice Reform Act (CJRA). In 2017, the Center for Court Innovation partnered with the Office of Administrative Trials and Hearings (OATH) to provide both in-person community service and e-learning as alternatives to civil summons fines. As part of the implementation of the Criminal Justice Reform Act (CJRA), passed by the City Council in 2016, the Center planned and implemented these alternatives for respondents who came to OATH to resolve a civil summons for eligible offenses such as drinking in public, littering, and violating park rules. Center staff were located onsite at OATH locations and provided services to participants through 2018; in January of 2019, the Center transitioned to a technical assistance role and OATH Help Center staff

took over the provision of the alternatives. The program offers respondents found in violation a choice between paying a fine or completing an alternative, the length of which is proportionate to said fine. Alternatives are one-, two-, three-, or six-hour sessions for fines between \$1 and \$1,000; and available alternatives include both in-person community service and e-learning options. During the year and a half that the Center provided services directly, over 1,000 cases were successfully completed; the vast majority (88%) were resolved through a one-hour alternative in lieu of fines up to \$150.

OATH Community Service. At OATH, in-person community service can be completed through facilitated group sessions focused on civil offenses and how to avoid receiving another summons; individual sessions that connect high-need participants to community-based social services; on-site community service projects such as assembling hygiene kits to be distributed to those in need, or off-site beautification projects for longer mandates.

OATH E-Learning. Most participants choosing an alternative mandate at OATH resolve their case through a one-hour e-learning module. Created in collaboration between the Center for Court Innovation, OATH, and the Mayor’s Office of Criminal Justice, the module uses principles of procedural justice—respect, understanding, neutrality, and voice—to ensure that users understand the CJRA, how their case has been handled, and potential consequences for future summonses. The module also gives users advice about how to avoid future summonses by providing legal information, such as where drinking alcohol is prohibited or on which park paths cyclists can legally bike in fun and accessible ways. In addition, the module highlights the broader impact that individual actions can have on a community, encouraging users to reflect on their offense and how it could potentially affect those around them. For example, one interactive activity focuses on the differing perspectives of cyclists and pedestrians as they share space, while another activity explores the potential consequences of not cleaning up pet waste for New Yorkers trying to enjoy a day in the park. Finally, the module also provides information about local resources that users may need, such as housing, employment, and legal services. This last section can be particularly useful for users who may feel embarrassed or uncomfortable asking for support from a staff member. By utilizing a wide variety of user interactions, including role plays, matching games, and videos, the module provides an experience that is both informative and enjoyable for the user.

Results and Next Steps. The tone of the e-learning was designed to be both engaging and respectful, with an express goal of changing the way people perceive their interactions with the justice system. After an initial trial, the Center for Court Innovation found that 91% of users said the information they learned from the module was useful. Additionally, 89% of users reported feeling positively at the end of the module. Due to this encouraging user data, the Center and OATH have developed an additional e-learning module for individuals who received higher fines and a website where the modules can be completed remotely. This website and a second module will launch in the coming weeks.

The Bottom Line. *Through the implementation of the CJRA, the Center for Court Innovation and OATH have developed the internal infrastructure and robust programming necessary to provide meaningful and effective alternatives to civil fines. With adjustments to the existing content of both the extant community service and e-learning offerings, these sessions could be updated to apply to new types of eligible offenses and provide New Yorkers with further options to resolve civil cases.*

Conclusion

The Center for Court Innovation agrees with the overarching concept to establish a day fines pilot as a first step towards rigorously considering people's financial resources and, where appropriate, making viable alternatives to a civil fine available, such as community service or e-learning. The Center also commends the Mayor's Office of Criminal Justice for its support. We believe that our agency's own work in this area has led us to possess a significant repository of relevant experience and background literature, and we would be delighted to share further information that may be of value to the City moving forward.

Notes

¹ See Brand, J. (2018). "How Fines and Fees Criminalize Poverty." *The Appeal*. Available at: <https://theappeal.org/fines-and-fees-explained-bf4e05d188bf/>; Harris, A., Evans, H., & Beckett, K. (2010). "Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States." *American Journal of Sociology* 115 (6): 1753-1799.

² Center for Court Innovation. (2016). *The Price of Justice Grant Program: Addressing the Overuse of Justice Fines and Fees: Fact Sheet*. New York, NY: Center for Court Innovation. Available at: https://www.courtinnovation.org/sites/default/files/media/documents/2017-10/the_price_of_justice_grant_program.pdf.

³ Center for Court Innovation. (2017). *Civil Alternatives*. New York, NY: Center for Court Innovation. See, information, at: <https://www.courtinnovation.org/programs/civil-alternatives>; and Center for Court Innovation. (2018). *Technology as an Alternative to Civil Fines*. Webinar at <https://www.courtinnovation.org/publications/technology-alternative-civil-fines-webinar>.

⁴ Picard, S., Tallon, J. A., Lowry, M., & Kralstein, D. (2019). *Court-Ordered Community Service: A National Perspective*. New York, NY: Center for Court Innovation. Available at: https://www.courtinnovation.org/sites/default/files/media/document/2019/community_service_report_11052019_0.pdf.

⁵ See, for example, Herrschaft, B. (2012). *New York City Community Cleanup: The Impact of a Program for Low-Level Offenders*. New York, NY: Center for Court Innovation. Available at: <https://www.courtinnovation.org/publications/new-york-city-community-cleanup-impact-program-low-level-offenders>.

⁶ Rempel, M., & Rodriguez, K. (2019). *Bail Reform in New York: Legislative Provisions and Implications for New York City*. New York, NY: Center for Court Innovation. Available at: <https://www.courtinnovation.org/publications/bail-reform-NYS>.

⁷ See Criminal Procedure Law, Section 510.30; and, see, analysis in Rempel, M. & Rodriguez, K. (2019), Op Cit.

⁸ Judicial Council of California. (2018). *Can't Afford to Pay Fine: Traffic and Other Infractions*. TR-320/CR-320. Available at: <https://www.courts.ca.gov/documents/tr320.pdf>.

⁹ The Minority and Justice Commission of the Washington Courts has made its tool publicly accessible at: <https://beta.lfocalculator.org/>.

¹⁰ Markham, J. M. (2018). *Monetary Obligations in North Carolina Criminal Cases*. Available at: <https://nccriminallaw.sog.unc.edu/wp-content/uploads/2018/08/2018-07-31-20180094-Monetary-Obligations-Card-for-proofing.pdf>.

¹¹ Mecklenburg County District Court. (2019). *Bench Card: Imposition of Fines, Costs, Fees, and Restitution*. Available at: <https://finesandfeesjusticecenter.org/content/uploads/2018/11/Mecklenburg-Final-Imposition-Bench-Card-10.16.17.pdf>.

¹² Michigan Supreme Court. (2015). *Ability to Pay Work Group: Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay*. MI: State Court Administrative Office. Available at: <https://courts.michigan.gov/Administration/SCAO/Resources/Documents/Publications/Reports/AbilityToPay.pdf>.

¹³ The Financial Justice Project. (2015). *San Francisco Fines & Fees Task Force: Initial Findings and Recommendations*. San Francisco, CA: Office of the Treasurer and Tax Collector. Available at: <https://sftreasurer.org/sites/default/files/2019-09/SF%20Fines%20%26%20Fees%20Task%20Force%20Initial%20Findings%20and%20Recommendations%20May%202017.pdf>.

¹⁴ National Center for State Courts. (n.d.). *Lawful Collection of Legal Financial Obligations: A Bench Card for Judges*. Williamsburg, VA: National Center for State Courts. Available at: https://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx.

¹⁵ For example, the Mayor's Office for Economic Opportunity in New York City estimates the City's poverty line at 120 percent of the federal threshold for a single adult for no child; 123 percent for a single adult with one child, and 126 percent for two adults with two children. See NYC Mayor's Office for Economic Opportunity. NYC Opportunity 2018 Poverty Report. New York, NY. Available at <https://www1.nyc.gov/assets/opportunity/pdf/NYCPov-Brochure-2018-Digital.pdf>; and NYC Mayor's Office for Economic Opportunity. (2019). *New York City Government Poverty Measure 2017: An Annual Report from the Office of the Mayor*. New York, NY. Available at: https://www1.nyc.gov/assets/opportunity/pdf/19_poverty_measure_report.pdf.

¹⁶ See, e.g., American Civil Liberties Union. (2010). *In for a Penny: The Rise of America's New Debtors' Prisons*. New York, NY: The American Civil Liberties Union. Available at: https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf; Bannon, A., Nagrecha, M., & Diller, R. (2010). *Criminal Justice Debt: A Barrier to Reentry*. New York, NY: The Brennan Center for Justice. Available at: https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf; Smith, D. W., Campbell, C. F., & Kavanagh, B. P. (2017). *Trends in State Courts: Fines, Fees, and Bail Practices: Challenges and Opportunities*. Williamsburg, VA: The National Center for State Courts. Available at: <https://www.ncsc.org/~media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx>.

¹⁷ See Picard, S., et al. (2019), Op Cit.

¹⁸ See Herrschaft, B. (2012). Op Cit.



520 Eighth Avenue, New York, New York 10018

p. 646 386 3100

f. 212 397 0985

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**Center for Court Innovation Testimony
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Establishing a Day-Fines Pilot in the Office of Administrative Trials and Hearings
December 11, 2019**

Good morning. My name is Adam Mansky. I am the Director of Criminal Justice at the Center for Court Innovation. I thank you for the opportunity to testify regarding the proposed day fines pilot in the Office of Administrative Trials and Hearings (or “OATH”).

The envisioned pilot responds to a need and opportunity to reduce the harmful effects of fines and fees on low-income and marginalized communities in New York City. Failing to adjust financial penalties to what individuals can afford can perpetuate cycles of poverty and produce continuing system involvement resulting from nonpayment.

As we have learned from our work as the technical assistance provider in a national *Price of Justice Initiative*, adjusting fines to people’s actual ability to pay is a cutting-edge practice that many jurisdictions are adopting. In 2019 alone, California and Washington State implemented computerized ability-to-pay assessments designed to rigorously identify individuals whose financial situation merits a reduction in a fine or fee. Michigan, North Carolina, and Texas, and the counties of San Francisco and Mecklenburg, have all distributed bench cards or launched other reforms designed to lessen the burdens of a fine.

Here in New York, the bail reform law that goes into effect January 1, 2020 includes trailblazing language requiring criminal courts to consider “individual financial circumstances, and ... ability to post bail without posing undue hardship” in cases that remain eligible for bail. We can now bring pioneering reforms to New York City’s civil justice system as well.

The most important domains for measuring someone’s ability to pay a fine are well known. Collecting information on household size and household income, together, allow for comparing an individual’s financial resources against thresholds contained in the Federal Poverty Guidelines. People’s expenses, if unusually high, may merit a further adjustment in what they can afford. Finally, living situation should be determined, for instance to know whether someone has a current or recent history of homelessness. Recognizing that federal poverty standards underestimate the thresholds below which people experience financial strain—especially in an expensive city like New York—we would need a thoughtful approach that combines national best practices and good stakeholder and community outreach to obtain meaningful input and build trust in our final approach.

As for the key step of providing meaningful alternatives, in 2017, the Center for Court Innovation partnered with OATH to provide in-person community service and e-learning in lieu of fines ranging from \$1.00 to \$1,000. In-person community service options included facilitated group sessions focused on how to avoid receiving another summons; and community service projects such as assembling hygiene kits to be distributed to those in need. However, in our experience, about 78% of participants opted for e-learning when given a choice between completing community service and an e-learning module to resolve a one-hour alternative mandate. Created by OATH and the Center for Court Innovation, in conjunction with the Mayor’s Office of Criminal Justice and City Council, this module provides information about the CJRA, other civil offenses, and how users can change their behavior to avoid receiving other summonses in the future. The module uses the principles of

procedural justice—respect, understanding, neutrality, and voice—and a variety of user interactions, including role plays, matching games, and videos, to create an informative and enjoyable user experience. Initial data shows that 91% of users found what they learned to be useful, and 89% reported feeling positively at the end. The Center and OATH have recently developed an additional e-learning module for people who have received larger fines and a website that allows the modules to be completed remotely. This will be available in the coming weeks.

In sum, the Center for Court Innovation agrees with the concept of establishing a day fines pilot as a first step towards rigorously considering people's financial resources and, where appropriate, linking them to alternatives. The Center, also, commends the Mayor's Office of Criminal Justice for its support. We believe that our own agency's work, on best practices for measuring someone's ability-to-pay a fine and, also, on implementing viable alternatives with OATH, has provided us with a repository of helpful experience and useful literature, and we would be delighted to share further information that may be of value to the City moving forward.

CRIMINAL JUSTICE
POLICY PROGRAM
HARVARD LAW SCHOOL

Day Fines

A primer for U.S. jurisdictions based on a case study of
Germany's proportionate fines system

The Basics

What are day fines?

Day fines provide a framework for calculating fines as punitive sentences in criminal cases. In day fines systems, total fine amounts are scaled to the nature of the offense and the individual's ability to pay. Day fines are used in over 30 countries in Europe and Latin America.

How is a fine calculated in a day fines system?

The total fine amount is the product of two numbers. The first is the number of units assessed to the offense based on sentencing factors such as the nature and seriousness of the case.

The second is the daily rate, or the amount the person is able to pay towards the fine per day given their income, expenses, and other personal circumstances.

The total fine is the product of the units and the daily rate. For example, if the court assessed an offense to be 20 units and determined the person could pay \$10 per day, the total fine amount would be \$200.

How is that different from how monetary sanctions are set the U.S.?

In the U.S., fines are typically imposed within a statutory range based on sentencing factors. Courts may sometimes factor in ability to pay but it is not common. In addition to fines, people in the U.S. often face restitution and revenue-raising fees and surcharges ("fees"). In a true day fines system, the scaled fine amount is the only money that the person must pay. Any additional monetary sanctions undermine the purpose of scaling the fine and render payments out of reach for many people. As advocacy has shown, people in the U.S. face serious consequences for non-payment including prolonged criminal-legal system contact, warrants, arrest, incarceration, additional financial penalties, and driver's license revocation.

HOW DAY FINE SYSTEMS CALCULATE FINES

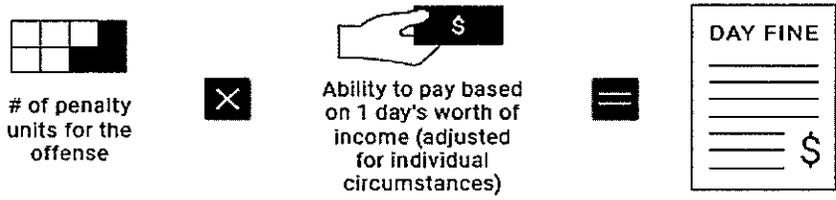


Image Credit: Paragini Amin.

Application of Day Fines

How do day fines fit into criminal-legal systems in other countries?

Day fines were introduced in Germany over 40 years ago. The reasons for adopting day fines were to make fines affordable so that they could be used as sanctions for a wide range of offenses (instead of incarceration and supervision) and to create transparency about how fine amounts are calculated. Before day fines, Germany's system for imposing fines was similar to the U.S. system (without the fees).

The good news is that today, judges and prosecutors in Germany believe in the need to inquire into an individual's ability to pay upfront in every case and have a process for making the determination. But Germany's example also reveals the downside of day fines. Despite tailoring to individuals' ability to pay, fine amounts are often still too high. About 83% of criminal cases receive fine-only sentences and people are able to pay their full fines in about 70% of cases. Approximately 10% of prisoners in Germany are there because they were unable to pay their fines.

Further, most of these cases are low-level misdemeanors, including crimes of poverty. For example, fare evasion cases make up approximately 8.5% of all fine cases. A person who is unable to pay their fare is unlikely to be able to pay the fine. Indeed, research in one jurisdiction in Germany showed that one in seven fare evasion cases end in incarceration and data show that these people are low-income.

How might day fines be used in U.S. criminal-legal systems?

U.S. stakeholders are interested in day fines as an alternative to our current system in which people are charged fines, fees, and restitution without consideration of ability to pay. Day fines provide a framework for judges to consider ability to pay upfront. People would receive one financial sentence based on that calculation with no additional amounts added on top.

Day fines are useful as a transparent framework for calculating graduated financial penalties. A number of factors contribute to whether day fines are the right solution in a given jurisdiction and whether they will reduce the negative consequences of our current policies. These issues are discussed in greater detail below.

- Day fines should result in a proportionate fine as a sentence for an offense. They should not be used to assess revenue-raising fees (which should be abolished), especially on top of other sentence requirements, and fines should be lowered if there are other sentence components so that the overall sentence is proportionate.
- Day fines will reduce inequities in our current systems only if the daily rate is calculated in a way that truly accounts for people's financial circumstances based on objective criteria.
- Day fines systems require trust between system actors and the individuals who are before the court.
- Day fines should not be used to add a veneer of fairness to otherwise questionable criminal-legal system practices.

Successful experimentation with day fines is also more than just policy change. Jurisdictions will have to engage in education and culture change so that day fines are robustly implemented to yield fairer fines. Without buy-in and culture change, jurisdictions are likely to adopt policies in which fines are too high and/or to drift back to previously-imposed monetary sanction levels. The whole community should be included in these discussions so that there is buy-in and accountability for reform.

Mechanics of Day Fines

What policies should be in place for assessing units?

Jurisdictions will need to assign all offenses a number or range of units. This exercise is similar to developing a sentencing grid. Jurisdictions should create narrow unit ranges because if ranges are broad, courts can use that latitude to manipulate fine amounts to their former levels.

Jurisdictions will also have to develop policies to ensure that day fines are part of an overall proportionate sentence. For example, if a judge assigns a case 20 units and puts the person on supervision, the fine should be reduced to reflect the punitive nature of supervision. Importantly, day fines should not be used to add fees to sentences. People in court systems should not be assessed fees. If courts do impose fees, they should be factored into the total amount as described above.

How should the daily rate be calculated?

The calculation of the daily rate is the most important part of day fines implementation. The daily rate must meaningfully account for people's reasonable cost of living and other financial circumstances and require payment of a set percentage of people's true discretionary income. In Germany, people with limited means are sentenced to low fine amounts. U.S. jurisdictions will have to decide how to approach day fines for people with lower or no income, including waiver and/or alternatives. Details on defining ability to pay and proportionate alternatives to fines may be found in our report [here](#).

As we learned from our research in Germany, if the daily rate does not truly reflect people's financial circumstances, we are likely to have the same injustices we see today. Jurisdictions must therefore learn from impacted people about their financial realities and ensure that their local politics will allow for real change. One issue we saw in our research is that policymakers and judges often do not understand the experiences of poverty and often overestimate what people can afford. They will have to be educated in order for true change—including, at times, lower fine amounts than currently imposed—to take hold.

How should jurisdictions obtain information about people's financial circumstances?

For almost all cases, prosecutors and judges in Germany rely on people's self-reported sworn statements (on paper or via colloquy) about their financial circumstances. Judges ask a simple set of questions about the person's income (if any), dependents, debts, and any other relevant circumstances. Judges and prosecutors report that they trust the truthfulness of people's testimony, and that the information they receive is sufficient to make the necessary calculations.

Day fines systems should not require people to provide documentation to support their statements about their ability to pay. As Germany's experience demonstrates, day fines systems can function well without these burdensome requirements. Jurisdictions will have to develop procedural protections so that all individuals understand the process and have the opportunity to provide information about their financial circumstances.

(continued on next page)

FAQ

What should my jurisdiction do to decide whether to adopt day fines?

- Jurisdictions should bring together a diverse group of stakeholders to determine if day fines are the right solution. Critically, jurisdictions should consult impacted individuals, community groups, and other experts to understand the socio-economic circumstances of people in the courts.

Only then can the jurisdiction determine: a) if other solutions such as de-criminalization, changes to policing practices, free fare cards, and other approaches make more sense as a response to unpayable fines; and b) if some scaling of financial penalties is appropriate, and if so, what the daily rate calculations must include so that the total fines are truly payable by individuals.

- They must also review data from the courts. Certainly, if jurisdictions impose fines, they should be proportionate. However, day fines should not widen the net or otherwise make sentences in a jurisdiction harsher. Understanding how day fines fit into a sentencing structure will require reviewing past case outcomes, mapping the cases to which day fines might apply, and ensuring they will indeed serve as a reform. Day fines should not be used to address harmful policing practices that punish low-level quality-of-life offenses or crimes of poverty. Those issues should be addressed with police reform, decriminalization, and other alternative policies.
- If a jurisdiction decides to move forward with day fines, it will need a sentencing commission to assign units to offenses. The commission will also have to decide how the daily rate will be calculated.
- Jurisdictions will also have to assess whether state legislative change is required to implement day fines. For example, jurisdictions with mandatory state penalties will need to analyze how these should be approached.

Whom should I contact if I have questions?

The information in this primer is a summary of the research in our forthcoming report on day fines in Germany. Don't hesitate to reach out if you want additional details or information.

Mitali Nagrecha, Director, National Criminal Justice Debt Initiative
mnagrecha@law.harvard.edu
617-496-3002

NYC Council Testimony: Day Fines

Joanna Weiss
Fines and Fees Justice Center
185 West Broadway, Suite C-538
New York, NY 10013
jweiss@finesandfeesjusticecenter.org

Good morning. My name is Joanna Weiss. I am the Co-Director of the Fines and Fees Justice Center, a national organization that seeks to restore integrity to our justice system by eliminating fees in the justice system and making fines proportionate to the individual and to the offense. Fines and fees hurt New Yorkers and New York City. They make our communities less safe, they perpetuate and exacerbate poverty, and they extract millions of dollars from our vulnerable communities, particularly communities of color.

I want to thank Speaker Corey Johnson for proposing File No. T2019-5491 to implement a day fines pilot program in the Office of Administrative Trials and Hearings (OATH). This program would constitute an important step towards ensuring that the imposition of fines in New York City is both fair and equitable. I also want to thank the Council for eliminating several criminal justice fees, such as jail phone call fees and credit card bail payment fees, and taking steps to reform the use of fines.

The Fines and Fees Justice Center strongly supports the proposed day fines pilot program. Tariff-fines, or flat fines, which are set at a specific amount to punish a particular offense are unfortunately the primary form of economic sanction used today in the United States. Tariff or flat rate fines are inherently regressive, because they are far more damaging to people with limited means than they are on the wealthy. Day fines, or means-adjusted fines, are fairer and more effective sanctions than flat fines. Day fines promote economic justice by ensuring that working class New Yorkers are not expected to pay the same dollar amount as billionaires when sentenced to a fine, and they ensure that each sanction is proportionate to the offense. Fines are meant to punish behavior we as a society don't want, but more importantly, they are meant to deter people from continuing to violate the law. We should be looking for the lowest sanction possible to deter the behavior from continuing. But what deters me is very different from what would deter a minimum wage worker, and different from what it would take to deter Bill Gates or Donald Trump Junior. When we issue the same penalty across the board, a minimum wage worker may have to choose between paying the fine, and affording food or medicine, while it is entirely too low to deter Trump Junior.

Because of concerns over the regressive nature of flat fines, researchers in the 1980s and 90s became interested in the day fine sanction scheme, favored by many countries in Europe and South America. In 1987, The Vera Institute of Justice and the National Institute of Justice introduced the first American day fines pilot, for use in misdemeanor sentencing in Staten Island. Seven other cities and counties also piloted day fines in criminal courts. Although the pilots were discontinued with the advent of the tough on crime movement, research and evaluation of those pilot projects provide promising evidence that a properly designed and operated day fines program can be efficient and accurate at calculating people's

ability to pay as well as a more equitable sanctioning scheme. In the criminal context, day fines also improved public safety outcomes, reducing recidivism. Following a day fines program in Maricopa County, AZ, only 11% of defendants ordered to pay day fines were rearrested versus 17.3% of defendants ordered to pay flat fines.¹

The proposed day fines program will allow OATH to choose ten offenses from two agencies, and it is imperative for OATH to choose offenses for which the implementation of day fines will help people at the lower end of the economic spectrum. Specifically, we recommend implementing day fines for violations often imposed on low income and vulnerable New Yorkers such as unlawful vending, or fines imposed on taxi drivers. We also recommend the use of day fines on those offenses that may be charged against both average New Yorkers, and large companies. For example, building code violations can result in daily penalties until a violation is fixed, and can be imposed against large developers and invidious home owners. In September of this year, the New York Times highlighted how such a law - one meant to prevent fatal building accidents - was often enforced against regular home owners who don't understand the building code, rather than developers whose inattention to building code caused worker deaths. We need to ensure ordinary New Yorkers are not substantially harmed financially, let alone ruined by the same fines that are treated by developers as the cost of doing business. And we need to give judges the power to treat these different defendants differently.

Additionally, for the day fines program to be successful, it must impose as few burdens as possible for the people who are subjected to fines. Most people who appear at OATH are not represented by a lawyer, many do not speak English as a first language, and many do not have the ability to take off from work to handle a low level violation. To avoid the necessity of in-person hearings, day fines must be available in online hearings. OATH should also avoid imposing burdensome wealth or income verification systems and instead allow people to self-report their income. Self-reporting income is already used in many criminal justice contexts, for example to determine whether a defendant qualifies for indigent defense representation. Self-reporting was also successfully used in many of the pilot programs piloted in the 1980s and 1990s. According to past day fines program evaluations, defendants accurately self-report income even with respect to illegal income sources, and may even *over-estimate* certain income sources.²

Also, for people who can not afford even the most reduced fine, judges should be allowed to waive the fine if it is in the interest of justice, or offer a simple accessible alternative, like the video community service modules OATH offers as an alternative to CJRA offenses.

Finally, we appreciate that the Council wants the day fines pilot to be evaluated, including its revenue impact. We agree that the day fines pilot should be evaluated. We work closely with researchers who would gladly assist designing and implementing a rigorous evaluation. We also think it's reasonable the the City learn the financial impacts of a pilot program. However, while drawing on past evaluations of

¹ Turner, Susan, and Joan Petersilia. Evaluation of Day Fines in Maricopa County, Arizona, 1991-1993 (ICPSR 2024). RAND. <https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/2024/summary>

² Colgan, Beth. "Graduating Economic Sanctions According to Ability to Pay." Iowa Law Review, Volume 103 Issue 1. <https://ilr.law.uiowa.edu/print/volume-103-issue-1/graduating-economic-sanctions-according-to-ability-to-pay/>

day fines programs, it is reasonable to expect that day fines will stabilize revenue intake -- the revenue impact of day fines cannot be a determining factor to evaluate the success of the pilot program. Courts must not be revenue generation centers. We must evaluate our courts to determine if they are fairly dispensing justice. A proper evaluation of a day fines pilot should focus on its impact on the legitimacy of OATH's hearing process, and on deterring future violations. It can not rest on whether the pilot generates revenue.

Finally, for the pilot to be a success, OATH must design, implement and evaluate this pilot in close collaboration with an organization with expertise on fines and fees, day fines pilots, and a demonstrated interest in improving the administration of justice in New York City.

Thank you for the opportunity to address this important issue. The Fines and Fees Justice Center would be glad to provide further guidance to facilitate the implementation of this day fines pilot program.



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

Lindsey Smith – Special Litigation Practice

BROOKLYN DEFENDER SERVICES

Presented before

The New York City Council

Committee on Justice System

Committee on Governmental Operations

Oversight Hearing on Day Fines Pilot and Collateral Consequences

December 11, 2019

My name is Lindsey Smith and I am a Youth Justice Debt Fellow in the special litigation practice of Brooklyn Defender Services (BDS). Our organization provides multi-disciplinary and client-centered criminal defense, family defense, immigration, civil legal services, social work support and advocacy in tens of thousands of cases involving indigent Brooklyn residents every year.

I thank the New York City Council Committee on Justice System and Committee on Governmental Operations, and in particular Chairperson Rory Lancman and Chairperson Fernando Cabrera, for the opportunity to testify about day fines and collateral consequences of drug arrests and convictions.

I. PROPOSED DAY FINE PILOT PROGRAM (T2019-5491 - Johnson)

As an organization that serves people in poverty who are arrested, we oppose fines and other monetary punishments that do not take into account our clients' ability to pay. On any given day, hundreds of indigent people plead guilty to crimes or non-criminal violations and are saddled with court-imposed fines, fees, and surcharges that they have no realistic ability to pay. These

monetary sanctions have a pernicious and regressive impact on the predominately Black, Latinx, and poor people and their families who are targeted by the criminal legal system.¹ Fines, like all sanctions, should not have a profoundly more harsh effect on poor people than on people with means found guilty of the same offense. They should not be ruinous to an indigent person, further propelling them into cycles of economic instability, while simply stinging to a person of means. Nor should anyone face incarceration or civil judgment for failing to pay a financial sanction that failed to reflect ability to pay—especially where, as in Brooklyn, 90% of criminal defendants cannot afford an attorney.

The day fines pilot has the potential to alleviate the punishment of poverty by eliminating unaffordable OATH fines. However, we also have very serious concerns about it. Even a proportionate fine regime will not establish a fair and equal punishment system because of the deep inequalities that determine who receives any sanction in the first place. To the extent day fines would be implemented to address so-called “quality of life offenses” that relate to poverty and/or arise largely due to biased enforcement practices, they may only reinforce or help provide cover for injustice. For example, we continue to urge installment of public bathrooms rather than sanctions for public urination, which often impact people without housing. Additionally, the pilot should provide meaningful alternative sanctions for people with no disposable income and should be accessible to people who cannot attend a court date. We do not see any public interest in imposing and enforcing fines for those without money, but at the same time we object to onerous community service obligations, particularly for those with work or family care responsibilities. It is also critical that any day fine program exclude minimum fines and omit any user fees, court fees, or surcharges that would undermine the purpose of tailoring fines to ability to pay. Finally, revenue motives should not come into play in assessing the merits of any pilot program.

We also note that judges have a constant nonwaivable duty to ensure that a penalty they impose is constitutional—even if some summonses adjudicated before OATH have scheduled or purportedly “mandatory” fines.² This includes ensuring a penalty is not unconstitutionally excessive in consideration of the economic circumstances of the person being punished.³ While day fines are one way to incorporate ability-to-pay in a structured manner, even without this pilot, both OATH and criminal court judges are constitutionally mandated to consider ability-to-pay in each and every sentencing decision that includes a financial component, yet they often have failed to do so.

A. Judges Should Consider Ability to Pay Whenever They Impose a Monetary Sanction, At All Levels of the Criminal, Civil, and Administrative Legal Systems, to Prevent Punishment of Poverty

In criminal court, fines are used to punish infractions, misdemeanors, or felonies, sometimes as

¹ Office of the N.Y.C. Comptroller, *Fees, Fines and Fairness: How Monetary Charges Drive Inequity in New York City's Criminal Justice System* (Sept. 10, 2019), https://comptroller.nyc.gov/reports/fees-fines-and-fairness/#Financial_Penalties_Imposed_in_New_York_State.

² See *Prince v. City of New York*, 966 N.Y.S.2d 16 (App. Div. 1st Dep't 2013); *Matter of Street Vendor Proj. v. City of New York*, 43 A.D.3d 345, 346 (App. Div. 1st Dep't 2003).

³ See *Cty. of Nassau v. Canavan*, 1 N.Y.3d 134, 139 (2003); *Prince*, 966 N.Y.S.2d.

an alternative to incarceration. (These are distinct from the mandatory surcharges associated with convictions, which we believe are unconstitutional as applied in certain cases and should be waivable, if not abolished.) Given the structural inequalities in our criminal legal system, fines unduly burden poor defendants and their families, disproportionately Black and Latinx people. Currently, New York statute only requires that judges even *consider* a defendant's financial circumstances when imposing a fine as punishment for a felony.⁴ In sentencing a defendant for a misdemeanor or violation, no consideration of ability to pay is required by statute.

Imposing a fine beyond the ability of a defendant to pay has a real human cost. Unpaid fines can even result in jail time if a judge determines the person has “willfully” not paid,⁵ an inquiry which is often informal and based on surface-level impressions. BDS represented one person who was surviving on food stamps and sleeping on friends' couches after losing his job. The judge, seeing the client had a cell phone, determined he was able to pay over \$150 in fines and fees and ordered him to do so by the following day. Our clients are also met with skepticism about why they agreed to pay a fine in the first place if they could not afford it. Such a reaction overlooks the precarious financial state of people living paycheck-to-paycheck.⁶

If a defendant establishes to a court's satisfaction that they cannot pay, judges rarely remove the fines or substitute them with alternatives like programming. Instead, judges will order the person to return in a month or two, sometimes resulting in years of regular court appearances to request more time to pay—each appearance requiring travel to court, taking time off work or loss of employment if time off is not permitted, and organizing and paying for childcare. Very infrequently, judges will convert the fine to civil judgment so the person will not risk jail time for nonpayment.⁷ Of course, a civil judgment may have a punitive impact that lasts longer than any jail sentence, negatively affecting employment, access to loans and credit, and even housing for years. Apart from these blatantly punitive outcomes, countless people we represent have paid a fine they truly could not afford rather than face incarceration, forgoing groceries, bills, or even rent.

Worse still, research shows that at the front end, judges sentence poor people to incarceration instead of fining them at disproportionate rates out of a belief that poor people will not pay their fines.⁸ The availability of day fines in criminal courts could prevent such an egregious result by providing a clear mechanism to tailor fines to ability to pay, but it also has the potential to net-widen punishment and the use of fines.

B. Concerns About the Proposed Day Fine Pilot

i. Racial and Other Biases and Misuse of Punishment to Address Social Problems

Fines and fees are particularly problematic because of the intentional discrimination, racial bias and stereotyping of Black, Latinx and immigrant communities that lead to the well-documented

⁴ P.L. § 80.00(1).

⁵ C.P.L. § 420.10; *People v. Montero*, 480 N.Y.S.2d 70 (App. Term 2d Dep't 1984).

⁶ Jeanna Smialek, *Many Adults Would Struggle to Find \$400, the Fed Finds*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/business/economy/fed-400-dollar-survey.html>.

⁷ C.P.L. §§ 420.10(6), 420.40(5).

⁸ Beth Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 99-100 (2017).

racial disparities at every stage of the criminal legal system.⁹ Although tailored day fines may serve as a useful alternative to scheduled fines or incarceration, they should not be used to target behavior that ought not be punished in the first place. For example, some of the low-level offenses moved to OATH via 2016's Criminal Justice Reform Act, such as public urination, open container or being in park after dark, punish poverty-related conduct that often stems from lack of access to resources like housing and warrants greater support, not punishment. Sharp racial disparities in policing "quality-of-life" offenses and the discretion left to NYPD officers to decide whether civil or criminal enforcement is appropriate in each case only exacerbate these problems.¹⁰ Rather than using enforcement to extract money out of low-income communities of color, our city should invest in guaranteed housing and jobs, harm-reduction and reparative interventions that reduce interactions with the legal system.¹¹

ii. Ensuring People Experiencing Poverty Have Meaningful Access to Fair Sanctions

The day fine pilot should be structured in a way that enhances the access people in poverty have to fair sanctions. It should include people with no disposable income, steer clear of any minimum fines, and provide a way for respondents to access alternative sanctions including day fines and community service without having to appear in court.

First, the proposed day fine pilot would set fines based on "daily disposable income." But for some of our clients living below the poverty line or relying on benefits, disposable income is nil. Imposing any fine on a person receiving benefits is often *per se* excessive because it requires that person to pay money to OATH that the government has determined is necessary for their health and survival.¹² These respondents should not be slapped with higher scheduled fines if they have no disposable income with which to calculate a day fine. Instead, the pilot should ensure access to alternatives like connection to supportive services, addressing the root causes of the person's contact with civil enforcement.

Second, and similarly, the pilot should not include any mandatory minimum fines in the day fine scheme. Minimum fines artificially inflate day fines imposed on the lowest-income individuals, undermining the possibility that day fines will reduce unequal punishments across income

⁹ U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications* (Sept. 2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf. See also Greg Ridgeway, *Analysis of Racial Disparities in the New York Police Department's Stop, Question, and Frisk Practices* (Santa Monica, CA: RAND Corporation, 2007), https://www.rand.org/pubs/technical_reports/TR534.html.

¹⁰ New York City Council, *The Criminal Justice Reform Act: One Year Later*, <https://council.nyc.gov/the-criminal-justice-reform-act-one-year-later/>; NYC Dep't of Investigation, Office of the Inspector General for the NY.P.D., *An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010-2015* (June 22, 2016) 5-6, <https://www1.nyc.gov/assets/oignypd/downloads/pdf/Quality-of-Life-Report-2010-2015.pdf> (2015 quality-of-life enforcement higher in areas with higher proportions of Black and Latinx residents).

¹¹ See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009) (noting both the "economic burdens" and "legitimacy costs" that flow from enforcement of low-level offenses); Casey Tolan, *How New York City Is Slowly Rethinking Broken Windows Policing*, Splinter News (Feb. 3, 2016), <https://splinternews.com/how-new-york-city-is-slowly-rethinking-broken-windows-p-1793854462>.

¹² E.g. 7 U.S.C. § 2014 (Supplemental Nutrition Assistance Program reserved for households where financial resources are a "substantial limiting factor" in obtaining a more nutritious diet).

levels.¹³

Third, the proposed pilot should not require OATH respondents to appear in court to access day fines and other alternative sanctions such as engagement in services, as OATH currently requires for eligibility for community service.¹⁴ This shuts out respondents who are unable to afford subway fare or childcare, or whose job does not allow them to miss a day. If the goal is to improve substantive equality in sanctions, then the relative benefits of pleading guilty by mail or online should not be limited to those who can afford the scheduled fine.

iii. If Expanded, the Day Fine Program Must Include Elimination of Court User Fees.

Tailoring fines to ability-to-pay is only effective if other monetary sanctions like user fees and court surcharges are also tailored. At least one previous day-fine pilot failed in part because the combined “package” of financial sanctions, including mandatory court fees and surcharges, exceeded the person’s ability to pay and undermined the effectiveness of the day fine model.¹⁵ Although mandatory surcharges and fees are not an issue at OATH, criminal courts in New York City continue to impose massive amounts of mandatory surcharges and other user fees on defendants, with less than a third of that ever collected.¹⁶ Judges have no statutory authority to tailor this court debt to defendants’ ability to pay at sentencing,¹⁷ likely because they have *no penological purpose*, but exist only to raise revenue.¹⁸ To ensure punishments are truly fair across economic strata, the Council should advocate for the abolition of these mandatory surcharges and fees as well as the tailoring of all punitive fines to meaningful ability to pay.

iv. Revenue Collection Should Play No Role in Punishment Decision.

While we appreciate the inclusion of reporting requirements in the proposed pilot, we urge the Council to refrain from considering revenue in assessing the program’s success. Revenue-raising is an illegitimate punitive aim, and the amount of sanctions paid to the city by respondents and their families bears no relationship to whether those sanctions are fair and proportionate.¹⁹ Where greater punishment does result in increased revenue, the city must be vigilant that a revenue motive does not distort the fair administration of justice and erode community trust, as it has in other jurisdictions like Ferguson, Missouri.²⁰

¹³ Colgan, 103 IOWA L. REV. at 73 n.147.

¹⁴ Office of Admin. Trials and Hearings, *Clerk’s Office FAQ*, <https://www1.nyc.gov/site/oath/clerks-office/clerks-office-faq.page#community-service>.

¹⁵ Colgan, 103 IOWA L. REV. at 79-80.

¹⁶ Office of the N.Y.C. Comptroller, *Fines, Fees, and Fairness*, *supra* note 1. In 2018, per internal data, Kings County courts imposed approximately \$1.51 million in non-punitive fees and surcharges on BDS clients, all of whom had been deemed indigent and too poor to afford an attorney.

¹⁷ P.L. § 60.35; *People v. Jones*, 26 N.Y.3d 730 (2016).

¹⁸ *People v. Guerrero*, 12 N.Y.3d 45, 48-49 (2009).

¹⁹ Tina Rosenberg, *Instead of Jail, Fines Cut to Fit the Wallet* (opinion), N.Y. Times (Oct. 9, 2015), available at <https://opinionator.blogs.nytimes.com/2015/10/09/scaling-fines-to-what-offenders-can-pay/>.

²⁰ U.S. Dep’t of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

C. Conclusion

The punitive legal system's reliance on fines and other monetary sanctions disproportionately extracts wealth from Black and Latinx communities and deepens inequality in New York. Day fines may amount to fairer monetary sanctions, but must be implemented thoughtfully and in line with the above principles. As long as fines are *not* tailored to income, they remain a regressive punishment for the poor.

II. CITYWIDE AUDIT OF COLLATERAL CONSEQUENCES FOR DRUG ARRESTS AND CONVICTIONS (T2019-5492 – Ampry-Samuel)

BDS supports T2019-5492, which requires an audit of all city agencies on their policies regarding the collateral consequences of a drug-related arrest or conviction with respect to employees or recipients of agency services. However, BDS recommends amendments so that the audit includes all arrests and convictions, not just those related to drugs. A person who previously suffered from substance use disorder and was arrested for stealing a package from a foyer – often charged as Burglary in the 2nd Degree which is considered violent felony even though it includes no actual violence—and has since transformed may be no less able to be an effective employee or good tenant than a person whose only arrest was for the drug use itself. We also respectfully urge that the scope of the audit be expanded to include adverse actions by agencies against those applying for employment and adverse actions against those targeted for enforcement by agencies, such as families under investigation by the Administration for Children's Services (ACS).

The term collateral consequences can imply subordination to criminal sanctions, but in reality, these consequences can be far more severe and enduring. The American Bar Association has identified 47,001 federal statutory collateral consequences of criminal convictions and an additional 1,274 here in New York. This figure excludes non-statutory collateral consequences, such as discrimination in housing, employment, and education. Both statutory and non-statutory consequences compound the marginalization and oppression that immigrants endure in our society. Among the most common consequences of arrests, incarceration, and convictions that we see are loss of housing and employment, disrupted schooling and health care, loss of one's children to ACS and arrest by ICE, indefinite immigration detention and eventual deportation. These are among the many reasons we have long urged large-scale reductions in arrests. Further, for symptoms of poverty, public health challenges, and other social issues, we seek complete decriminalization or, in the case of marijuana, legalization.

People we represent are consistently denied jobs with the New York City Department of Education due to prior convictions, including old drug convictions. Further, nearly all employees who are arrested on drug charges—that is, before any finding of guilt—are placed on immediate suspension. Chancellor's Regulation C-105 specifically states that the "New York City School System is a particularly concerned with the following offenses . . . possessing, distributing or selling controlled substances." Enforcement of this regulation often seems more in the service of preventing negative media attention rather than protecting student and facility safety.

A. Impacts in Family Court

Parents with criminal system involvement are at risk of family separation by ACS at the point of arrest or incarceration. Where a parent is arrested in the presence of their child, the New York Police Department (NYPD) often notifies ACS, which could trigger months of invasive surveillance and unnecessary child removals. Procedure No. 215-01 of the NYPD's Patrol Guide directs officers to obtain care for a dependent child under eighteen by inquiring whether a relative or friend will care for the child, and then notify ACS, but in our experience NYPD officers too often go straight to ACS.

BDS represents over half of all parents in child welfare cases in Brooklyn, one of the busiest family courts in the country. This is one of the many reasons we support the Marihuana Regulation and Taxation Act, which would protect parents from being ensnared in the criminal legal system for personal marijuana possession, erase many of the re-entry barriers that inhibit employment, education, and personal growth for people who have already been criminalized, and redirect scarce public funds toward public health and education resources that strengthen families. Furthermore, as the Drug Policy Alliance has written, the bill would help “[p]revent unnecessary denial of custody, visitation, or parenting time by requiring clear and convincing evidence of unreasonable danger to the safety of a child that is not solely based on the presence—or non-pertinent details—of a parent’s marijuana use.” Ultimately, we believe a culture shift to end the hyper-stigmatization and kneejerk condemnation of parents of color who use marijuana or other drugs is needed. We hope that that could be engendered, in part, by legalization, but certainly this audit could shine a spotlight on ACS practices and help educate policymakers and the public in the meantime.

B. State and Federal Policies

Understandably, this bill does not account for state and federal collateral consequences, of which barriers to professional licensing and immigration consequences, respectively, are among the harshest. Still, we believe it is important to address them.

Our clients are routinely denied clearance by state licensing agencies. For example, a large number of our clients are Home Health Aides, who must be cleared by the New York State Department of Health. Many are denied clearance due to prior drug-related conviction, and others lose their jobs due to drug-related arrests. Stable employment is essential for the health and safety of our communities, yet in this way it is threatened by mass criminalization.

Even non-criminal violations trigger immigration consequences, including ineligibility for Deferred Action for Childhood Arrivals (DACA). Under the DACA guidelines, anyone with three “misdemeanors” is completely ineligible and barred from receiving DACA status. Unfortunately, because New York violations like disorderly conduct and trespass are technically punishable by over five days in jail, they are considered “misdemeanors” for federal purposes and for the purposes of DACA. These non-criminal violations are considered so minor that they are not allowed to even appear on a person’s rap sheet (though because of errors they often do). They are frequently the result of aggressive policing; our clients are arrested for minor alleged offenses that the District Attorney’s office does not believe warrant criminal prosecution. And

yet disorderly conduct convictions stand between our clients and lawful status, work authorization, a social security card, a college scholarship, protection from deportation, and more. They literally stand between our clients and their future. Furthermore, these same non-criminal violations, because they are federal “misdemeanors”, make our clients into enforcement priorities for the Department of Homeland Security (DHS).²¹ They make harmless New Yorkers—our friends, neighbors, coworkers and local small business-owners—into “criminal aliens” who, according to DHS, “should be removed.”²² Even cases that would eventually be dismissed, place immigrant New Yorkers at extreme risk because of courthouse arrests by ICE.²³

C. Ending Drug Prohibition and Replacing it With a Public Health Response

BDS believes a public health approach is essential to reducing the harms of substance use disorder and other drug use. The criminal legal system is simply ill-equipped to prevent drug use, meaningfully reduce the supply of drugs, or—most important—help keep people who use drugs as safe as possible and minimize harm to their families and communities. The City’s and State’s discordant efforts to meld the enforcement and public health approaches often result in unnecessary and counterproductive incarceration and criminal records, social stigma, and tragic deaths. Indeed, despite ample rhetoric from policymakers about “not being able to arrest our way out of the overdose crisis,” thousands of people in New York City continue to be arrested on drug charges, the vast majority of whom are Black and Latinx, and many are subjected to the torture of solitary confinement—a jail within a jail, or a prison within a prison—for using narcotics while incarcerated.

Portugal’s model for drug policy suggests that we may be able to dramatically reduce overdose deaths and other serious harms related to addiction through a careful and deliberate decriminalization of the use and possession of all drugs coupled with an aggressive public health strategy. In that country, heroin use has been cut by an estimated 75% and, more importantly, overdose deaths have plummeted. Portugal has the lowest rate of drug-induced death in Western Europe—less than 2% of the rate in the United States. In light of the overdose epidemic, lawmakers should seriously study this model and import its successes.

We thank the Council for the opportunity to speak on these issues and hope you will continue to view BDS as a resource.

If you have any questions, please feel free to reach out to Jared Chausow, Senior Policy Specialist, at jchausow@bds.org.

²¹ Dep’t of Homeland Security, “Policies for Apprehension, Detention and Removal of Undocumented Immigrants” (November 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

²² Id.

²³ See: Personal Testimony about Courthouse arrest of Clarence Threlkeld, a citizen: <http://bds.org/bds-immigration-client-with-u-s-citizen-father-testifies-before-city-council-about-his-courthouse-arrest-by-ice/>

**Written Testimony of The Bronx Defenders
By Ivan Bohorquez, Civil Legal Advocate, Civil Action Practice**

**New York City Council Committee on Justice System
Hearing Regarding T2019-5492, A Local Law to amend the NYC Charter, in relation to
mandating a citywide audit of collateral consequences for drug arrests and convictions**

December 11, 2019

My name is Ivan Bohorquez and I am a civil legal advocate in the Civil Action Practice at The Bronx Defenders. Thank you for the opportunity to testify before you today on this important matter.

The Bronx Defenders is a public defender non-profit that is radically transforming how marginalized people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called holistic defense that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and

national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

I. Introduction

The Civil Action Practice, now in its 19th year, is designed to defend against the many enmeshed civil penalties that arise out of a person's arrest. As a civil legal advocate in the Civil Action Practice, I provide direct representation, advocacy and support for clients who are entangled in multiple legal systems and at risk of losing their livelihood, important life-sustaining benefits, and other basic needs and rights. We regularly see how drug-related accusations and convictions can lead to a whole host of direct, devastating civil consequences, not only for the person who stands accused but for their entire family. These consequences are often hidden and invisible to the people accused of the crime, to practitioners, legislators and even to judges and the courts. They are scattered across sections of statutes, local laws, and state and local agency regulations and policies. They can touch every aspect of a person's life and can occur any time after an arrest, leading to job loss, denial of benefits, deportation, loss of property or even eviction from one's home. The American Bar Association, through its national inventory of collateral consequences of criminal convictions, catalogs at least 44,000 nationwide civil consequences.¹ In New York State, as of 2015, The Bronx Defenders has cataloged hundreds of enmeshed civil consequences in our guide on the "Consequences of Criminal Proceedings in New York State" and continue to research the multitude of ways our clients are impacted.²

¹ See the U.S. Commission on Civil Right, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, at 13 (June 2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>

² The Bronx Defenders, *The Consequences of Criminal Proceedings in New York State* (Apr. 2015), <https://www.reentry.net/ny/search/attachment.265297>

II. The War on Drugs is Not Over

Hundreds and thousands of people are swept into the criminal legal system every year due to the criminalization of drugs. In fact, nationally, drug-related arrests are on the rise again.³ After experiencing an all-time low in 2015, drug-related arrests have increased every year since then.⁴ According to the F.B.I, there were 1,654,282 arrests for drugs in 2018, over 80% of which were for possession and involving small quantities.⁵ In New York State, there were 75,897 arrests for drug felonies and misdemeanors in 2018.⁶ In New York City, according to the Division of Criminal Justice Services, there were 34,611 drug felony and misdemeanor adult arrests in 2018 and in the Bronx, where the communities we serve reside, there were 9,298 drug felony and misdemeanor adult arrests.⁷ The racial disproportionality of these arrests at the federal, state and city levels are appalling; for example, in New York State, while Black people and Brown people make up about 18% and 19% of the population in 2018 respectively, they account for 37% and 25% of all drug-related arrests.⁸ This despite national research indicating that people of all races use drugs at the same rates.⁹ The people of color disproportionately targeted by drug-related arrests also often experience intersecting or compounding forms of

³ Susan Stellen, “Is the ‘War on Drugs’ Over? Arrests Statistics Say No” *New York Times*, Nov. 5, 2019 <https://www.nytimes.com/2019/11/05/upshot/is-the-war-on-drugs-over-arrest-statistics-say-no.html>

⁴ *Id.*

⁵ *Id.* (referring to the FBI’s Uniform Crime Reporting program). UCR is a “nationwide, cooperative statistical effort of nearly 18,000 city, university and college, county, state, tribal, and federal law enforcement agencies voluntarily reporting data on crimes brought to their attention.” Bureau of Justice Statistics, “About the Uniform Crime Reporting Program,” <https://www.bjs.gov/ucrdata/abouttheucr.cfm> (accessed Dec. 10, 2019).

⁶ Stellen, *supra* fn. 3.

⁷ Division of Criminal Justice Services, 2018 adult arrests, New York City, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf>; Bronx County, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/Bronx.pdf>

⁸ Stellen, *supra* fn. 3.

⁹ *Id.*

discrimination on the basis of their age, sex, health status, disability or vulnerability to ill health, sexual orientation or gender identity, and nationality, asylum or migration status.¹⁰

III. Consequences of Drug-Related Arrests and Convictions

In addition to the trauma and stigma connected to being prosecuted in criminal court for a drug-related arrest, a person may be saddled with court debt, in the way of fines and fees and the cost of rehabilitative programs, and then also will continue to suffer legal restrictions, forfeitures and disabilities that create numerous social and economic barriers lasting a lifetime. These “collateral” consequences are not limited to convictions; rather, a person begins to experience these punishments at the moment of arrest.

As holistic public defenders in the Bronx, we have seen how drug-related arrests have led to the loss or suspension of city-regulated occupational licenses or clearance (for example, by the NYC Taxi and Limousine Commission, the NYC Department of Consumer Affairs,¹¹ or the NYC Department of Education), the denial of an application to or termination from or permanent exclusion of family members in New York City Housing Authority public housing, and the seizure of cash and other important property by the New York City Police Department, just to name a few of the direct consequences of an arrest. When faced with such a consequence, we have seen how individuals stand to lose their income, homes, licenses and livelihoods without the right to counsel to represent them in the civil court or civil administrative proceeding and with less constitutional protections than are available in criminal court.

¹⁰ United Nations and World Health Organization, Joint United Nations statement on ending discrimination in health care settings (June 27, 2017), <https://www.who.int/en/news-room/detail/27-06-2017-joint-united-nations-statement-on-ending-discrimination-in-health-care-settings>

¹¹ DCA regulates over 50 business and professional licenses, ranging from horse drawn cab drivers, locksmiths, newsstands, and tow truck drivers. Dep’t of Consumer Affairs, “List of DCA License Industries,” (accessed Dec. 10, 2019), <https://www1.nyc.gov/site/dca/businesses/licenses-apply.page>

To illuminate the far-reaching effects, we highlight the following client stories.

Client BD – Clearance to work as a classroom paraprofessional was affected.

Mr. BD works as a paraprofessional in a District 75 school, helping provide specialized instructional support for students with significant challenges, including emotional special needs, cognitive disabilities, physical handicaps, and autism. One evening after work, he was conversing outside in his neighborhood with a friend who was smoking. Both he and his friend were arrested after an officer alleged that the friend passed him the cigarette – believed to be marijuana – which was dropped to the ground. The NYC Department of Education was notified through the Division of Criminal Justice Services at the time of arrest, and Mr. BD was immediately suspended from work without pay pending the outcome of his case. Two months after he was arraigned, at his next court date, he was offered an Adjournment in Contemplation of Dismissal. Because this allowed him to return to work, he accepted this outcome rather than continue to fight the case to full acquittal.

Client AW - clearance to work as an art teacher

Mr. AW worked as an art teacher in a New York City public school where he had been a founding faculty member. On morning he was making chalk drawings on the sidewalk in front of his building when police officers approached him. He was arrested after an officer alleged that he recovered a cigarette - believed to be marijuana - which had been dropped to the ground. The NYC Department of Education was notified through the Division of Criminal Justice Services at the time of arrest, and Mr. AW was immediately suspended from work pending the outcome of his case. Many months after he was arraigned, he was offered an Adjournment in Contemplation of Dismissal. Because this allowed him to return to work, he accepted this outcome rather than continue to fight the case to full acquittal. Mr. AW missed over a year of classes at the school he loved as a result of the arrest.

Client AS – Faced eviction from his NYCHA Apartment of 25 years.

AS lived with his elderly mother in their New York City Housing Authority apartment for over 25 years. When his mother passed away, AS had to fight for succession rights to his mother's tenancy and get a lease in his name. When he was younger, AS went undiagnosed with mental health impairments and had various interactions with the criminal legal system related to the use of drugs, which he used to self-medicate. AS, now in his 50's and clinically diagnosed, still struggled with substance use. One day he was arrested for buying a pill from an individual who turned out to be an undercover officer. While fighting his criminal court case, NYCHA stated this arrest was the reason he should not get a lease in his name. The criminal court diverted his case and he participated in mandated treatment; nevertheless, NYCHA sought to evict him and prevent him from getting a lease.

After AS connected with The Bronx Defenders, we were able to successfully challenge his lease denial and also successfully defend against his eviction. However, many public housing residents and their family members are not as lucky to obtain representation and

stand to lose their housing based on drug arrests—even those deemed related to a substance abuse problem.

Client JH – Monthly retirement benefits withdrawn from prepaid card presumed to be proceeds of a drug sale.

Mr. JH pled guilty to misdemeanor drug possession and agreed to a six-month sentence to run concurrently with a parole violation. But while he was incarcerated at Riker’s Island, he was unaware that a civil forfeiture lawsuit was filed against him to confiscate the approximately \$1,500 in cash that was seized at the time of his arrest. As is presumed of many unbanked people in NYC, including the Bronx where one in five people do not have access to a bank account, law enforcement believed that the money must be the proceeds of a drug sale. Before Mr. JH was released from Rikers, the government had already sought to obtain a default judgment to keep the money because he never responded to the lawsuit. After he was released, The Bronx Defenders represented him in the civil proceeding, and demonstrated that the seized cash represented the New York State retirement benefits he received as the beneficiary of his deceased father. At the time he was arrested, he had one month’s benefits in cash after withdrawing the sum from a prepaid ATM card where the money was deposited.

IV. We Support a City-Wide Audit

Given the vast number of civil consequences and punishments that exist, we very much support an amendment to the New York City Charter that would mandate a citywide audit of collateral consequences for drug arrests and convictions. This would allow for a full assessment of how the lives of individuals accused of drug crimes are impacted at the City level and would give a bigger picture of the scope of barriers that exist. Our hope is that such an audit would be comprehensive and far reaching. We hope that impacted communities will be consulted towards these ends. The results of any audit should be made publicly available and accessible on an annual basis. And once such data is collected, our hope is that the city will commit to eradicating these practices that unjustly and disproportionately harm marginalized communities of color and those who struggle with substance use – the spirit of which is antithetical to the important criminal justice reforms that have passed to improve the lives of impacted individuals.

V. Conclusion

The time is now to build the inventory of city-wide civil consequences of drug-related arrests and convictions. The Bronx Defenders would be happy to support this endeavor. Those who have been impacted, those who continue to be impacted, and those who will be impacted deserve this information, and hopefully, armed with this data, the City will be able to make changes to remove these barriers and hurdles. Thank you for your consideration of this matter.

**THE COUNCIL
THE CITY OF NEW YORK**

Admin

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____
 in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Melissa Davis

Address: _____

I represent: Mayor's Office of Criminal Justice

Address: _____

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Appearance Card

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 in favor in opposition

Date: _____

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Name: Lindsey Smith

Address: _____

I represent: Brooklyn Defender Services

Address: _____

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Name: Adam Mansky

Address: 520 8th Ave

I represent: Center for Court Innovation

Address: _____

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Name: Joanna Weiss

Address: 215 Adams St. Brooklyn NY

I represent: Fines and Fees Justice Center

Address: 185 W. Broadway NY NY

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Name: Dr. Denise Poane

Address: Director of Research

I represent: DOHMH

Address: _____

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Name: Mitali Nagrecha

Address: 1515 Mass Ave, Cambridge MA

I represent: Harvard Law School Criminal Justice Policy

Address: Program

◆ Please complete this card and return to the Sergeant-at-Arms ◆

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Date: 12/11/2019

(PLEASE PRINT)

Name: Ivan Bohorquez

Address: 360 E. 161st Street - Bronx, NY 10451

I represent: Bronx Defenders

Address: 360 E. 161st St. - Bronx, NY 10451

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Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 12/11/19

(PLEASE PRINT)

Name: JOHN W BROWN, FDC-Admin ^{Supervising}

Address: 100 Church Street NY NY

I represent: Office of Administrative Trials & Hearing

Address: 100 Church

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THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 12/11/19

(PLEASE PRINT)

Name: DAVID GOLDIN, MOCJ

Address: 1 CENTRE ST

I represent: MAYOR'S OFFICE

Address: 1 CENTRE ST.

Please complete this card and return to the Sergeant-at-Arms