Graduating Economic Sanctions According to Ability to Pay

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ABSTRACT: There is growing recognition that economic sanctions—fines, surcharges, fees, and restitution—are routinely imposed at rates many people have no meaningful ability to pay, which can exacerbate financial instability and lead to the perception that economic sanctions are unfairly punitive to people of limited means. Concerns triggered primarily by highly punitive tactics, including incarceration and long-term probation of low-income debtors for the failure to pay, have led to increasing calls for reform. While much attention is now being paid to the back-end of the system, and particularly limitations on punitive responses for the failure to pay due to poverty, this Article considers the problem from the front-end. In particular, this Article focuses on a potential reform with increasing bipartisan support: the graduation of economic sanctions according to a person's financial circumstances.

To that end, this Article explores several key considerations essential to designing a system of graduation, relying heavily on a largely-forgotten experiment in seven geographically, demographically, and politically diverse jurisdictions in the United States with the "day-fine." A day-fine is calculated using a penalty unit assigned based on the seriousness of the offense of conviction. The penalty unit is then multiplied by the defendant's adjusted daily income to determine the day-fine amount. The result is an economic sanction adjusted to offense seriousness and simultaneously graduated to the defendant's financial condition. This Article mines the historical record of the American day-fines experiments—complemented by recent interviews with people involved in the design and implementation of the projects and experiences with means-adjustment in the consumer bankruptcy, tax, and

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public benefits contexts—for lessons on the design of graduating economic sanctions. What emerges from this review is promising evidence that a properly designed and implemented system for graduation is consistent with efficient court administration, revenue generation, and equality in sentencing.

I. INTRODUCTION

Mounting evidence shows that criminal justice systems are widely employing myriad forms of economic sanctions—fines, surcharges, fees, and restitution—often assessing unmanageable sanctions on people who have no meaningful ability to pay and then imposing further punishment for the

failure to do so.[1] As the national scope of these practices has come to light,[2] an increasing and bipartisan array of constituents have called for a possible reform: the graduation of economic sanctions according to a defendant's ability to pay.[3] Graduation would constitute a major shift in jurisdictions where there is no mechanism to consider a defendant's financial condition,[4] as well as in jurisdictions where judges may consider capacity to pay but are afforded little guidance on how to do so.[5]

Neither the problems created by highly punitive practices related to economic sanctions nor the prospect of graduation according to ability to pay as a remedy are new. Tariff-fines, which are set at a specified amount or range for each offense, have long served as the primary form of economic sanction used in the United States.[6] Tariff-fines are inherently regressive, having a greater effect on the financial condition of a person of limited means than on a person of wealth.[7] Concerns that the use of tariff-fines were unfairly punitive for people with financial instability, similar to those expressed today,[8] garnered attention in the late 1980s when the ripple effect of tough-on-crime legislation left jurisdictions across the United States with a burgeoning mass incarceration and mass probation crisis.[9] In that landscape, a push began for the development of intermediate sanctions that would reside between prison on one end of the punitive spectrum and simple probation on the other.[10] Economic sanctions, understood as being "unambiguously punitive," could serve that intermediate role.[11] The tariff-fine design, however, contributed to

1. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. nn.1–38 and accompanying text (forthcoming 2018).

2. *See infra* notes 44–45 and accompanying text.

3. *See infra* note 46 and accompanying text.

4. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 285–89 (2014) (describing current practices related to the imposition of economic sanctions, including restrictions on judicial discretion).

5. *See, e.g.*, MO. ANN. STAT. § 558.004(1) (West 2017) ("In determining the amount and method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of an individual.").

6. UNITED STATES DEP'T OF JUSTICE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION 1 (1996), https://www.ncjrs.gov/pdffiles/156242.pdf.

7. *See id.* ("When tariffs are set at low levels, the fines have little punitive or deterrent effect on more affluent offenders. When they are set at higher levels, collecting the fine amount from poor defendants is difficult or impossible, and, in many cases, these defendants are eventually given jail sentences.").

8. *See* SUSAN TURNER & JOAN PETERSILIA, DAY FINES IN FOUR U.S. JURISDICTIONS 1–2 (1996) (describing judicial concerns about the use of economic sanctions as including the risk of "unduly penalizing the poor").

9. Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 99–100 (1996).

10. TURNER & PETERSILIA, *supra* note 8, at 1.

11. Douglas C. McDonald, *Introduction: The Day Fine As a Means of Expanding Judges' Sentencing Options*, *in* DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS 1, 1 (Douglas McDonald ed., 1992); *see also* Judith A. Greene, *Structuring Criminal Fines: Making an*

the problem of mass incarceration in two ways. First, many judges imposed fines for all defendants, regardless of financial condition, at the low-end of the sentencing range to ensure a greater number of defendants would have some capacity to pay. By depressing the amount of tariff-fines overall, it "constrict[ed] the range of offenses for which judges view[ed] a fine as an appropriate sanction," thereby pushing judges to select incarceration at sentencing for a wider array of offenses.[12] Second, in cases where either tariff-fines or other forms of punishment were available, the perception that a given defendant had a limited ability to pay could push judges to opt for a sentence of incarceration or probation.[13]

Researchers and lawmakers in the late 1980s looked to the use of "day-fines," an economic sanction mechanism used in several European and Latin American countries,[14] as a possible solution to both the need for an intermediate sanction and to problems associated with the regressive qualities of tariff-fines.[15] The day-fine model involved a two-step process.[16] First, criminal offenses were assigned a specific penalty unit or range of penalty units that increased with crime severity and were set without any consideration of a defendant's ability to pay.[17] Second, the court would establish the defendant's adjusted daily income, in which income was adjusted downward to account for personal and familial living expenses.[18] The final day-fine

"Intermediate Penalty" More Useful and Equitable, 13 JUST. SYS. J. 37, 39–40 (1988) (noting that economic sanctions are "compatible with a desert-based rationale for sentencing").

12. TURNER & PETERSILIA, *supra* note 8, at 4–5; *see also* Greene, *supra* note 11 at 40 ("Survey research indicates that, although patterns of fine use are highly variable from court to court, American judges generally impose fines well below statutory limits . . . .").

13. Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 65 (1990); *see also infra* notes 301–04 and accompanying text.

14. *See* EDWIN W. ZEDLEWSKI, NAT'L INST. OF JUSTICE, ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE 3–5 (2010) (describing the use of day-fines in Europe and Latin America); Hillsman, *supra* note 13, at 77–82 (detailing the history of the day-fine systems in Europe).

15. *See* UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at iii (describing day-fines as producing benefits "in regard to offender accountability, fairness, deterrence, and revenue generation").

16. Before the day-fines experiment began in the United States, at least some courts had the ability to consider a defendant's financial condition, but the means of doing so were largely informal. *See* GEORGE F. COLE ET AL., THE PRACTICES AND ATTITUDES OF TRIAL COURT JUDGES REGARDING FINES AS A CRIMINAL SANCTION 11–16, 33 (1987) (describing how judges often had discretion to impose economic sanctions but did so "in a rough sort of way" due to limited information regarding a defendant's economic circumstances); *see also* Hillsman, *supra* note 13, at 64 (noting that modifications for ability to pay "tend to be on a case-by-case basis and may or may not conform with notions of due process or be demonstrably fair"); Barry Mahoney & Marlene Thornton, *Means-Based Fining: Views of American Trial Court Judges*, 13 JUST. SYS. J. 51, 61–62 (1988) (describing these systems as "'embryonic' day-fines systems" and the consideration of ability to pay in some courts as "relatively unstructured").

17. Susan Turner & Judith Greene, *The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County*, 21 JUST. SYS. J. 1, 3 (1999).

18. *See infra* Table 2.

amount was calculated by multiplying the penalty units by adjusted daily income.[19] By setting penalty units according to crime seriousness, day-fines attended to the desire for offender accountability and deterrence.[20] At the same time, day-fines were understood to be more equitable because they accounted for the defendant's finances.[21] In addition, day-fines offered the possibilities of improving the administration of court systems overburdened by ineffective collections processes and reducing the use of incarceration.[22]

In 1987, the Vera Institute of Justice joined with the National Institute of Justice[23] to establish the first pilot day-fines project for use in misdemeanor sentencing in Staten Island, New York.[24] On the heels of the Staten Island project's success, additional day-fines pilot projects launched in a handful of other jurisdictions that were diverse geographically, demographically, politically, and in terms of the types of cases for which day-fines would apply: Maricopa County, Arizona; Bridgeport, Connecticut; Polk County, Iowa; four counties in Oregon; and Milwaukee, Wisconsin.[25] A seventh project was designed, but ultimately not implemented, in Ventura County, California.[26]

This Article mines existing records of the design, implementation, and outcomes of these largely forgotten American experiments with day-fines,[27]

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19. UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 1.

20. TURNER & PETERSILIA, *supra* note 8, at 6 ("[T]he basic idea assures routine imposition of variable, but equitable, fine sentences, the punitive impact of which [is] in proportion to the crime . . . .").

21. *Id.*

22. *Id.*

23. VERA INST. OF JUSTICE, STRUCTURED FINES: DAY FINES AS FAIR AND COLLECTABLE PUNISHMENT IN AMERICAN COURTS 3, 19 (1995) (same); *see* UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at iii; McDonald, *supra* note 11, at 2–3 (describing the partnership between the National Institute for Justice and the Vera Institute).

24. Greene, *supra* note 11, at 41–43.

25. *See infra* Appendix: Day-Fines Project Overviews.

26. *See id.*

27. This Article adds to limited existing scholarship in which the American day-fines experiments are mentioned. *See, e.g.*, 2 Lance R. Hignite & Mark Kellar, *Day Fines*, *in* THE ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 544, 547 (Jay S. Albanese ed., 2014); Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1656 (2000); Martin H. Pritikin, *Fine-Labor: The Symbiosis Between Monetary and Work Sanctions*, 81 U. COLO. L. REV. 343, 408 (2010); R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1801, 1831, 1833 (2015); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtor's Prisons*, 75 MD. L. REV. 486, 527 (2016); Lilith Houseman, Note, *Reducing Reliance on Incarceration in Texas: Does Finland Hold Answers?*, 46 TEX. INT'L L.J. 209, 226 (2010); Michael L. Vander Giessen, Note, *Legislative Reforms for Washington State's Criminal Monetary Penalties*, 47 GONZ. L. REV. 547, 561 (2011–2012); Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55 AM. CRIM. L. REV. (forthcoming 2018) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947196. *See generally* ZEDLEWSKI, *supra* note 14 (considering day-fines as an alternative to incarceration and parole). This Article also focuses exclusively on the use of economic sanctions outside of the juvenile court system. Juvenile courts routinely impose economic sanctions against juveniles, and there is growing evidence that such practices undermine the rehabilitative aims of the juvenile system. *See, e.g.*, JESSICA FEIERMAN ET AL., JUVENILE LAW CTR., DEBTORS' PRISON FOR KIDS?

complemented by recent interviews of several people involved in the day-fines pilots[28] and experiences with means-adjustment in the consumer bankruptcy, tax, and public benefits contexts. This examination provides a basis for assessing the viability of graduating economic sanctions according to ability to pay as a solution to the current crisis caused by regressive economic sanctions.[29] To that end, Part II begins by addressing likely concerns about the administrability of graduating economic sanctions for ability to pay and that graduation will result in a revenue downturn. The outcomes of the day-fines pilot projects, along with data from other sources, offers promising evidence that a properly designed and operated system for graduation can result in highly accurate data upon which the ability to pay can be efficiently and effectively calculated,[30] and that graduation can result in stable, and even improved, fiscal outcomes.[31] Part III then turns to the question of design. The Part explores several key issues related to devising mechanisms for assessing

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THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 4 (2016). Due to the unique nature of punishment in the juvenile court context, as well as implications of mandatory school and labor laws on the capacity of juveniles to have financial resources, however, the possibility of using graduated economic sanctions in the juvenile court setting is outside of the scope of this Article.

28. Locating people who worked in the day-fines projects in the early 1980s and 1990s was difficult due to a lack of records documenting relevant names and due to the fact that several key administrators are either retired or deceased. I am fortunate, however, to have had an opportunity to interview several administrators, project planners, and researchers that were involved in the projects. *See* Telephone Interview with Arnold Berliner, former Criminal Bureau Chief, Staten Island Dist. Attorney's Office (July 17, 2017); Telephone Interview with Barbara Broderick, former Chief Adult Prob. Officer, Maricopa Cty., Ariz. (June 15, 2017); Telephone Interview with David Factor, former Exec. Dir. of Or. Criminal Justice Council (June 28, 2017); Telephone Interview with Judith Greene, former Dir. of Court Programs, VERA Inst. of Justice (Apr. 3, 2017); Telephone Interview with Gordon Griller, former Maricopa Cty. Superior Court Adm'r (June 15, 2017); Telephone Interview with Barry Mahoney, formerly of Justice Mgmt. Inst. (June 6, 2017); Telephone Interview with Douglas McDonald, Principal Assoc., ABT Assocs. (June 1, 2017); Telephone Interview with Tom O'Connell, former Prob. Officer, Superior Court of Ariz., Maricopa Cty. (July 26, 2017); Telephone Interview with Ronald Reinstein, former Presiding Criminal Judge, Superior Court of Ariz., Maricopa Cty., and Assoc. Presiding Judge, Superior Court of Ariz., Maricopa Cty. (July 26, 2017); Telephone Interview with Charles Worzella, formerly of Wis. Corr. Serv. (June 1, 2017). I am grateful to each of them for their time.

29. By positing that the graduation of economic sanctions can serve as a meaningful reform, I do not mean to say that other reform efforts are unnecessary. For example, while this Article focuses on sentencing, and while graduation would significantly reduce the frequency of default by limiting economic sanctions to payable amounts, lawmakers should take seriously calls to eliminate the use of improperly punitive collection methods on the back end of the system. *See, e.g.*, CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 15–18 (2016) (calling for restrictions on public licenses and benefits for the failure to pay economic sanctions). *See also generally* Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917 (2017) (calling for reform of bankruptcy rules to allow for discharge of criminal debt); Neil L. Sobol, *Fighting Fines and Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841 (2017) (calling for federal act to combat abuses in debt collection in criminal justice system).

30. *See infra* Part II.A.

31. *See infra* Part II.B.

the ability to pay, including the need to avoid artificial inflation,[32] whether and how to include family resources or income derived from criminal activity or off-the-books work,[33] and the role of statutory maximum caps.[34] This Article shows that the development of a meaningful system for graduating economic sanctions according to ability to pay is both feasible and desirable.

While this examination documents the potential benefits of graduating economic sanctions according to ability to pay, the day-fines pilot projects themselves failed to catch on due in no small part because they were conceived at the height of the tough-on-crime furor of the late 1980s and early 1990s.[35] This furor was sustained both by an "economic boom" that took the pressure off of the "need for [] balanced, principled, and more budget-conscious" sentencing[36] and the increasing use of surcharges and administrative fees imposed on defendants to pay for the costs of more punitive criminal justice policies.[37] Neither the tough-on-crime movement[38]

32. *See infra* Part III.A.1.

33. *See infra* Part III.A.2.

34. *See infra* Part III.B.

35. *See* Joe Pinsker, *Finland, Home of the $103,000 Speeding Ticket*, THE ATLANTIC (Mar. 12, 2015), https://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484 (noting that day-fines failed to catch on in America in the 1980s because of attitudes about crime); Tina Rosenberg, *Instead of Jail, Court Fines Cut to Fit the Wallet*, N.Y. TIMES: OPINIONATOR (Oct. 9, 2015, 3:21 AM), https://opinionator.blogs.nytimes.com/2015/10/09/scaling-fines-to-what-offenders-can-pay (noting the failure of day-fines in the 1980s). The importance of the tough-on-crime movement is evident from the nature of criminal laws enacted at the time the day-fines pilot projects would have been renewed or, in Ventura County's case, initiated. A review of enacted laws within two years of the termination date of each pilot project shows that, with few exceptions, lawmakers expanded the criminal law, reduced procedural protections for defendants, imposed harsher penalties, and increased the scope of economic sanctions. *See, e.g.*, 2002 Ariz. Sess. Laws. 835–40 (expanding the list of crimes for which pre-trial bail is restricted); 1995 Cal. Stat. 460–62 (increasing terms of incarceration and economic sanctions for the offense of theft or unlawful driving or taking of a vehicle); 1995 Iowa Acts 235 (creating weapons enhancement carrying a five-year mandatory minimum); 1995 Or. Laws 11–12 § 1 (mandating juveniles aged 15 and older be tried as adults and establishing mandatory minimum sentences for certain offenses); 1993 Conn. Acts 594 (Reg. Sess.) (creating new offense of carjacking with mandatory minimum sentence); 1991 N.Y. Laws 3489 (allowing law enforcement agencies to seek restitution in drug cases); Milwaukee, Wis., Ordinance § 106-36 (1990) (creating new crime prohibiting possession, manufacture, sale, delivery, or advertisement of drug paraphernalia and requiring incarceration for failure to pay prosecution costs); *infra* notes 380–91 and accompanying text. *But see, e.g.*, 1994 Conn. Acts 94-2 § 6 (Spec. Sess.) (providing a mechanism for juveniles now subject to transfer under extended provision to contest transfer to criminal court).

36. RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM, at xiii (2013).

37. *See* COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2–5 (2015).

38. *See generally, e.g.*, MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015).

nor the pressure to generate revenue[39] have dissipated in their entirety since the end of the day-fines projects. The risk remains that "'[h]e just voted to reduce fines by 30% on sex offenders' becomes the next campaign flier."[40] Likewise, the use of economic sanctions to fund not just court systems, but also to serve as a substitute for taxes that would otherwise need to be generated for a wide variety of public works, has increased in the years since the day-fines pilot projects.[41] As a result, a wide range of stakeholders have a financial interest in maintaining the status quo,[42] or even increasing dependency on economic sanctions.[43]

Yet, the political landscape today is increasingly conducive to adopting policies allowing for the graduation of economic sanctions according to ability to pay. In the wake of revelations that courts in Ferguson and other municipalities in Missouri were routinely sentencing people to economic sanctions they had no meaningful ability to pay and then incarcerating them for the failure to do so,[44] and that jurisdictions across the country were doing the same,[45] bipartisan support for reforms has grown. Liberal organizations such as the ACLU, conservative groups such as ALEC, and non-partisan entities such as the Conference of State Court Administrators and the drafters of the Model Penal Code, are now united in calling for the graduation of economic sanctions to account for a defendant's ability to pay.[46]

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39. *See generally, e.g.*, Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171 (2017) (examining the efforts of Ferguson Missouri's municipal government to use its municipal court system as a revenue stream).

40. Steven Andersson, Ill. State Representative, Presentation at Harvard Law School Convening: Maintaining Momentum for Criminal Justice Debt Reform (Apr. 21, 2017).

41. *See, e.g.*, COUNCIL OF ECON. ADVISORS, *supra* note 37, at 2–3.

42. For example, after the Missouri Legislature passed a law capping the percentage of municipal court revenue that could be collected from traffic fines, several municipalities joined together in a lawsuit challenging the action. *See St. Louis County Cities Fighting Traffic Fine Limits in Court*, KMOV.COM (Feb. 13, 2016, 3:13 PM), http://www.kmov.com/story/31212119/st-louis-county-cities-fighting-traffic-fine-limits-in-court. Private companies also routinely lobby in relation to practices related to economic sanctions. *See, e.g.*, Celia Perry, *Probation Profiteers: In Georgia's Outsourced Justice System, a Traffic Ticket Can Land You Deep in the Hole*, MOTHER JONES (July/Aug. 2008), http://www.motherjones.com/politics/2008/07/probation-profiteers (describing lobbying efforts in Georgia).

43. *See, e.g.*, Doug Richards, *Atlanta to Hike Traffic Fines*, TALLAHASSEE DEMOCRAT (May 4, 2015, 6:45 PM), http://www.tallahassee.com/story/news/local/2015/05/04/atlanta-traffic-fines-politics/26891137 ("Mayor Kasim Reed proposes raising $7 million dollars in fiscal year 2016 by increasing traffic fines."). For example, when a reform bill regarding the use of surcharges in Illinois included the removal of a surcharge used to raise money for the purchase and maintenance of firetrucks, the state's fire districts pushed back and the bill lost support, causing sponsors to amend the bill to add back in the fire truck fund. *See* Andersson, *supra* note 40.

44. *See* Colgan, *supra* note 39, at 1183–1220 (detailing the criminal justice system in Ferguson, Missouri, and its emphasis on revenue generation).

45. *See, e.g.*, *id.* at 1178 n.26 (providing examples of the use of economic sanctions to generate revenue in systems across the United States).

46. *See* ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADM'RS, THE END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS 22 (2016) (calling for consideration of the use of day-fines); *Ending Modern-Day*

As detailed herein, there is great promise that a properly designed and implemented system for graduation can serve as a key tool in reforming the use of economic sanctions in a manner consistent with efficient court administration, revenue generation goals, and fair sentencing.

II. OVERCOMING KEY CONCERNS REGARDING GRADUATION

Though the prospect of reforming the use of economic sanctions is gaining political traction,[47] lawmakers and commentators have at various times suggested that graduation according to ability to pay is administratively infeasible[48] or would result in significant revenue losses.[49] Yet, as the following discussion shows, a well-designed system for graduating economic sanctions can be implemented so as to provide a reliable calculation of ability to pay and to maintain or even improve fiscal outcomes.

A. CAPTURING AND EMPLOYING VALID FINANCIAL DATA

Proposals to graduate economic sanctions according to ability to pay are often met with concerns that obtaining financial information will be too difficult,[50] that defendants will inaccurately self-report financial data,[51] or that performing ability-to-pay calculations will overburden busy court staff.[52] As detailed below, these concerns are inconsistent with existing court practices, studies on self-reporting, and data from the day-fines pilot projects, each of which suggests that systems for graduation can be designed to effectively capture and employ valid financial data.

Debtors' Prisons, ACLU, https://www.aclu.org/feature/ending-modern-day-debtors-prisons (last visited Sept. 10, 2017) (describing the ACLU's campaign to reform economic sanctions practices); Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1750–51 (2015) (stating that "[o]n principle, the [Model Penal Code] regards revenue generation as an illegitimate purpose of the sentencing process," and describing collection efforts as "[d]ysfunctional"); *Resolution on Criminal Justice Fines and Fees*, AM. LEGIS. EXCHANGE COUNCIL (Sept. 12, 2016), https://www.alec.org/model-policy/resolution-on-criminal-justice-fines-and-fees (stating that ALEC supports "ensuring that fines and fees imposed by the criminal justice system are reasonable, transparent, and proportionate" and that "when imposing fines and fees the offender's ability to pay should be taken into account as one factor"). The fact that economic sanctions have come to be seen as a form of "taxation by citation" may bring additional lawmakers into the fold. *See, e.g.*, Eric Schmitt, *"Taxation by Citation" Undermines Trust Between Cops and Citizens*, WALL ST. J. (Aug. 7, 2015, 6:43 PM), https://www.wsj.com/articles/taxation-by-citation-undermines-trust-between-cops-and-citizens-1438987412. As Illinois State Representative Steven Andersson has explained, if couched as a form of tax decrease, conservative lawmakers who are opposed to high taxes are more likely to support reforms. *See* Andersson, *supra* note 40.

47. *See supra* note 46 and accompanying text; *infra* notes 329–31 and accompanying text.

48. *See infra* notes 50–53 and accompanying text.

49. *See infra* notes 81–82 and accompanying text.

50. *See, e.g.*, Reitz, *supra* note 46, at 1754–56.

51. *See, e.g.*, David K. Byers, Admin. Dir. of the Ariz. Supreme Court, Presentation at Harvard Law School Convening: Maintaining Momentum for Criminal Justice Debt Reform (Apr. 21, 2017).

52. *See, e.g.*, Reitz, *supra* note 46, at 1754.

Using defendant self-reporting as the primary source of financial information can avoid complications that are created by federal restrictions on obtaining financial data through tax and bank records.[53] Self-reporting of financial data is quite common in criminal justice systems: It is used to assess whether a defendant qualifies for indigent defense representation,[54] in presentence investigations,[55] and increasingly to set monetary bail.[56] Jurisdictions like Ohio have relied on their experience with these other forms of self-reporting to create systems for assessing ability to pay economic sanctions.[57] It was not unusual, then, that the day-fines pilot projects obtained financial information primarily through defendant self-reporting.[58] The pilot projects in jurisdictions that were already using self-reporting for other purposes merely extended the practice to day-fines eligible defendants.[59]

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53. *See* Ruback, *supra* note 27, at 1807 (arguing that difficulties in obtaining tax and bank records renders graduation infeasible). The presumption that graduation of economic sanctions is limited by restrictions on tax and bank records often includes comparisons to Western European countries where governments have easier access to income information. While that is correct to varying degrees, see UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 23 (describing different levels of access to financial data between Sweden and Germany); and Hillsman, *supra* note 13, at 81 (same), both Sweden and Germany have also relied upon self-reporting to calculate income. Judith Greene, *The Staten Island Day-Fine Experiment*, *in* DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS 13, 25 (Douglas C. McDonald ed., 1992); Hillsman, *supra* note 13, at 81–82.

54. *See* Maureen O'Connor, Chief Justice, Supreme Court of Ohio, Presentation at Harvard Law School Convening: Maintaining Momentum for Criminal Justice Debt Reform (Apr. 21, 2017).

55. *See, e.g.*, STATE OF VT. AGENCY OF HUMAN SERVS. DEP'T OF CORRS., PRE-SENTENCE INVESTIGATION (PSI) REPORTS 5 (2011), http://doc.vermont.gov/about/policies/rpd/correctional-services-301-550/335-350-district-offices-general/copy_of_342-01-pre-sentence-investigation-psi-reports.

56. *See infra* note 117 and accompanying text.

57. *See* O'Connor, *supra* note 54.

58. Defendant self-reporting raises a question as to whether mandating a defendant to reveal information in this context implicates the Fifth Amendment privilege against self-incrimination, which protects information that is testimonial, compelled, and incriminating, Fisher v. United States, 425 U.S. 391, 408 (1976), and applies at sentencing. Mitchell v. United States, 526 U.S. 314, 316–17 (1999); Estelle v. Smith, 451 U.S. 454, 462–63 (1981). A full assessment of this issue is outside of the scope of this Article, but because so many defendants are indigent, and the information requested would serve to reduce the penalty, many defendants would likely consent to participating in a means-interview process. Where a defendant does not consent, the court would have the ability, consistent with the Fifth Amendment, to seek records narrowly targeted at establishing a defendant's means. *See Fisher*, 425 U.S. at 409–13 (holding that documents created prior to the court's request—like pre-existing tax-records—are not compelled and determining that documents created by a third-party, like an accountant or employer, are not testimonial communications by the defendant, at least so long as the order requesting the documents is sufficiently specific). The privilege against self-incrimination may be at issue, however, should policymakers choose to incorporate illicit income into the calculation of base income, as discussed in Part III.A.2.ii.

59. *See, e.g.*, JODY FORMAN & DAVID FACTOR, INTEGRATING STRUCTURED FINES IN FOUR OREGON COUNTIES 16 (1995); SALLY T. HILLSMAN & JUDITH A. GREENE, VERA INST. OF JUSTICE, IMPROVING THE USE AND ADMINISTRATION OF CRIMINAL FINES: A REPORT OF THE RICHMOND

While court staff in Bridgeport reported some difficulties obtaining income information,[60] personnel from the other pilot projects reported that the process of gathering financial data was easy and did not interfere with case processing.[61]

Though incongruent with the reliance on self-reporting in other contexts,[62] a concern repeatedly expressed by court personnel is that defendants will not accurately report on their financial condition.[63] While of course there will be some degree of inaccuracy in self-reporting,[64] research has shown that people who are surveyed regarding income data typically "provide consistent, although not necessarily perfect, estimates of their legal income."[65] Additional studies suggest that self-reporting is largely reliable even with respect to illegal income sources,[66] though at least some researchers have found that people may over-estimate illegal income.[67]

Studies finding high levels of accuracy in self-reporting are consistent with the day-fines experiments. Documentation from the Staten Island, Milwaukee, and Oregon projects included verification results, and each showed a substantial degree of accuracy.[68] Staten Island's system allowed defendants to decline verification with their employers out of concern that contacting an employer regarding a conviction might lead to a loss of employment, however, intake staff were able to seek verification in 80% of cases in which defendants were employed.[69] They found that those defendants

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COUNTY CRIMINAL DAY-FINE PLANNING PROJECT 70–73 (1987); TURNER & PETERSILIA, *supra* note 8, at 67, 76; Greene, *supra* note 53, at 26–27; Hillsman, *supra* note 13, at 90–91.

60. GEORGE COPPOLO, CONN. GEN. ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH, 96-R-1577, DAY FINES IN CONNECTICUT (1996); 2 Hignite & Kellar, *supra* note 27, at 546. As detailed below, administrative problems in Bridgeport were in part due to difficulties regarding technological problems, staffing changes, and procedural restrictions set out in state law. *See infra* notes 134–38 and accompanying text.

61. *See, e.g.*, FORMAN & FACTOR, *supra* note 59, at 25, 28, 35–36; TURNER & PETERSILIA, *supra* note 8, at xxii, 10, 13; VERA INST. OF JUSTICE, *supra* note 23, at 15.

62. *See supra* notes 54–56 and accompanying text.

63. *See* Byers, *supra* note 51 ("We know from experience that people don't tell the truth.").

64. *See* Greene, *supra* note 53, at 25 (reporting that an assessment of the German day-fines system showed that people with higher incomes were more likely to inaccurately report their income than those at lower-income levels).

65. Holly Nguyen & Thomas A. Loughran, *On the Reliability and Validity of Self-Reported Illegal Earnings: Implications for the Study of Criminal Achievement*, 55 CRIMINOLOGY 575, 577 (2017).

66. *See id.* at 578, 597. *But see id.* at 578 (describing a study finding self-reporting of illegal income was unreliable, but which was based on an "unusually lengthy recall period (5 to 10 years) [that] may have affected the respondents' recall in general and of earnings in particular").

67. *See id.* at 579. For a discussion of whether to include illegal income in an ability to pay calculation, see *infra* Part III.A.2.ii.

68. Bridgeport planners also built in verification testing, but the outcome of that testing is not recorded in contemporaneous reports on the project, other than notations that court staff excluded from the project any defendants for whom they were unable to verify financial data. *See* TURNER & PETERSILIA, *supra* note 8, at 54–55 & n.9; UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 26.

69. *See* HILLSMAN & GREENE, *supra* note 59, at 74.

provided truthful information 90% of the time, and that inaccuracies were primarily tied to a defendant's lack of knowledge about some of the information requested.[70] Likewise, Milwaukee court personnel verified as accurate income data provided by defendants in 90% of cases.[71] Documentation of the Oregon projects does not include quantitative data on accuracy, but court personnel in Coos County reported that "accuracy was high[,]" which they attributed to the fact that defendants knew the information provided was subject to verification.[72] Considering the experience in these jurisdictions, the Department of Justice's Bureau of Justice Assistance suggested that spot-checking could be a cost effective way of assuring accuracy given that the value of verification comes in the defendant's knowing that verification is possible.[73]

An additional concern regarding graduation of economic sanctions—albeit one which is also belied by the standard practice of engaging in ability to pay calculations in the contexts of appointment of counsel, presentence investigations, and bail[74]—may be that the calculations will overburden busy court staff. Again, the day-fines experiments show that such calculations can be efficiently completed. In the pilot projects, simple forms and tables aided in the computation of adjusted daily income.[75] When combined with tables setting out the penalty units for the offense of conviction,[76] these forms rendered the process of setting the day-fine amount quite simple. The ease of calculating adjusted daily income is perhaps best exemplified by Staten Island judges, who had the option of imposing ungraduated tariff-fines instead of day-fines, but chose day-fines in 70% of cases involving economic sanctions.[77] That figure would have been higher but for the fact that some cases dropped out of day-fines consideration due to plea bargaining or the rare case where a penalty unit had not been assigned to the charged offense,[78] and because

70. *See id.* at 74–75.

71. Charles Worzella, *The Milwaukee Municipal Court Day-Fine Project*, *in* DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS 58, 67 (Douglas McDonald ed., 1992). Milwaukee also allowed defendants to decline verification for good cause—for example, if the court's contact with the defendant's employer might result in a loss of employment—but only 1.2% of defendants interviewed declined verification. *Id.*

72. FORMAN & FACTOR, *supra* note 59, at 25.

73. *See* UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 26. Ventura County planned to use a verification system based on spot-checking. *See* BARRY MAHONEY, JUSTICE MGMT. INST., THE VENTURA DAY FINE PILOT PROJECT 30 (1995).

74. *See supra* notes 54–56 and accompanying text.

75. *See, e.g.*, FORMAN & FACTOR, *supra* note 59, at 38; *see generally* DOUG PILCHER & MARILYNN WINDUST, DAY FINE DEMONSTRATION PROJECT (FARE PROBATION) (1991); UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 67–69; Greene, *supra* note 53, at 28.

76. *See, e.g.*, Greene, *supra* note 53, at 23–24.

77. *Id.* at 39–40; McDonald, *supra* note 11, at 6.

78. *See* Sally T. Hillsman, *Day Fines in New York*, *in* INTERMEDIATE SANCTIONS IN OVER-CROWDED TIMES 21, 23 (Michael Tonry & Kate Hamilton eds., 1995).

when judges trained to use day-fines were ill or on vacation, substitute judges exclusively imposed tariff-fines.[79]

The foregoing demonstrates that a system for graduating economic sanctions can be designed to capture data through self-reporting akin to that used in other routine court processes, that self-reported data is likely to have high levels of accuracy, and that ability to pay calculations can be accomplished in a straightforward manner,[80] resulting in a reliable determination of a defendant's ability to pay.

B. MAINTAINING OR IMPROVING FISCAL OUTCOMES

In many jurisdictions, economic sanctions are not only a means of punishment, but a source of revenue generation,[81] and therefore a key concern expressed by lawmakers relates to the fiscal effect of graduation of economic sanctions.[82] Further, the misconceptions about the administrability of capturing and using financial data addressed in the previous section lead to additional concerns that graduation will create administrative inefficiencies and therefore an uptick in expenditures.[83] There are strong indications, however, that graduation according to ability to pay can keep stable, and perhaps even improve, revenue intake,[84] while also leading to reduced expenditures overall.[85]

1. Revenue Generation

Proponents of graduation according to ability to pay have suggested that the practice will result in stable, or even increased, revenue intake as economic sanctions become more manageable for people of limited means.[86]

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79. LAURA A. WINTERFIELD & SALLY T. HILLSMAN, VERA INST. OF JUSTICE, THE EFFECTS OF INSTITUTING MEANS-BASED FINES IN A CRIMINAL COURT: THE STATEN ISLAND DAY-FINE EXPERIMENT 19 (1991).

80. As detailed below, a system for accurately assessing a defendant's financial condition will need more play in the joints than the calculations used in the day-fines pilot projects, *see supra* Part III.A, but standard forms can be designed to meet that need. For example, Michigan has developed an ability to pay calculator for use during collections that has greater precision than the day-fines pilots. *See Appendix F: Payment Plan Calculators*, http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/ATP-AppendixF.pdf (last visited Sept. 10, 2017).

81. As I have discussed in other work, the goal of revenue generation has implications for the Eighth Amendment's Excessive Fines Clause and may separately violate the Due Process Clause if the desire for revenue generation interferes with fair adjudication, but graduating economic sanctions to ability to pay would aid in ensuring that economic sanctions were constitutionally employed. *See* Colgan, *supra* note 1, at nn.61–62; Colgan, *supra* note 39, at 1185–92.

82. *See, e.g.*, Andersson, *supra* note 40.

83. *See, e.g.*, Reitz, *supra* note 46, at 1756.

84. *See infra* Part II.B.1.

85. *See infra* Part II.B.2.

86. *See, e.g.*, JUSTICE FOR ALL: REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON FAIR JUSTICE FOR ALL: COURT-ORDERED FINES, PENALTIES, FEES, AND PRETRIAL RELEASE POLICIES 13 (2016) [hereinafter JUSTICE FOR ALL].

While there is a need for further study as to why reduced fiscal burdens would promote payment, that result would be consistent with theories posited in both psychology and law. For example, Albert Bandura's pioneering work in social cognitive theory includes the concept of self-efficacy, in which a person's belief as to whether she can achieve a desired result has a direct impact on the person's level of effort toward achieving that goal.[87] A person may believe, for example, that she cannot pay economic sanctions because doing so would preclude her from obtaining basic necessities or because she cannot reduce the principal debt due to accruing interest and collections costs.[88] Self-efficacy theory would suggest that such a belief would result in the abandonment of attempts to pay.[89] The graduation of economic sanctions to a manageable amount, in contrast, should promote a belief that the debt is surmountable, leading to higher levels of self-efficacy and greater efforts at completing payment.[90] Separately, increased payments following graduation according to ability to pay would be commensurate with Tom Tyler and Tracey Meares's work regarding procedural justice theory, in which they suggest that when people feel they have been treated fairly they are more likely to adhere to the law.[91] Because graduation is a process by which court personnel work with a defendant to ensure economic sanctions are within their means, procedural justice theory would suggest that the sense of fairness generated through that process would promote payment.[92]

Along with the theories of self-efficacy and procedural justice, the experience of the day-fines pilot projects strongly supports the prediction that graduation will result in improved payments in jurisdictions where sanction amounts decrease overall. For example, because the majority of defendants in Maricopa County were indigent, the mean economic sanction amount

87. *See generally* Albert Bandura, *Self-Efficacy: Toward a Unifying Theory of Behavioral Change*, 84 PSYCHOL. REV. 191 (1977).

88. *See* Colgan, *supra* note 4, at 291–95.

89. *Cf.* JUSTICE FOR ALL, *supra* note 86, at 13 (stating that the imposition of sanctions where a person has no meaningful ability "to pay may promote frustration, despair, and disrespect for the justice system" and therefore lead to reductions in payment); Ruback, *supra* note 27, at 1806.

90. *See* Bandura, *supra* note 87, at 193–94; *see also* John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. SOC. JUST. 439, 467–68 (2005) (suggesting levels of payment toward economic sanctions may be explained by self-efficacy theory).

91. *See generally, e.g.*, Andrew V. Papachristos et al., *Why Do Criminals Obey the Law?: The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM L. & CRIMINOLOGY 397 (2012); Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095 (2013–2014). Monica Bell's legal estrangement theory—which expands procedural justice theory in part by looking to the ways in which observations of the treatment of others' experiences with legal systems can result in vicarious alienation—provides another potential area of inquiry, particularly in communities where substantial numbers of people have been subject to unmanageable economic sanctions. *See generally* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).

92. *See infra* notes 94–97 and accompanying text.

dropped with the use of day-fines.[93] At the same time, however, probation officers, who had been aggravated by their role as "bill collectors," experienced a cultural shift once assigned to the day-fines project.[94] As explained by Barbara Broderick, the Chief Adult Probation Officer in Maricopa County during the day-fines pilot, the project generated "this idea that if you treat people with respect you can motivate them and they will attempt to pay what they can."[95] For people assessed day-fines, the process provided an opportunity to receive an explanation of how their income impacted the day-fine amount and supportive treatment during the collections process.[96] Data gathered during Maricopa County's day-fines pilot project showed that defendants receiving day-fines paid an average of $669 as compared to defendants receiving tariff-fines, who paid an average of just $344 despite day-fines being set at a lower-dollar amount.[97] Further, these improvements appear to be driven primarily by Maricopa County's low-income defendants; wealthy defendants were unlikely to receive day-fines because their attorneys advised them to plead to standard probation, which had only a $50 monthly fee and therefore would cost less than a day-fine set according to their income.[98]

Like Maricopa County, graduation of economic sanctions also resulted in increased payments during the Bridgeport and Polk County pilot projects. While dollar values for the Bridgeport project were not documented, nearly 82% of all day-fines were collected within one year of sentencing, with 76.3% of defendants convicted of felonies and 79.7% of those convicted of misdemeanors paying in full.[99] Similarly, in Polk County, average sanction amounts declined but collections rose.[100] In particular, for the five most common offenses that made up 89% of cases adjusted during the pilot period, the average amount of economic sanctions dropped from $509 to $469, but the average amount collected jumped from $197 to $360.[101]

The Milwaukee experiment further suggests that graduation according to ability to pay can result in improved payment rates where average economic sanctions decrease, regardless of collection efforts. In Milwaukee, average fines dropped from $112 to $72[102] despite the inclusion of a $30 mandatory

93. Turner & Greene, *supra* note 17, at 14.

94. *See* Telephone Interview with Barbara Broderick, *supra* note 28.

95. *Id.*

96. *See id.*; *infra* notes 351–52 and accompanying text.

97. *See* Turner & Greene, *supra* note 17, at 14.

98. Telephone Interview with Barbara Broderick, *supra* note 28.

99. *See* TURNER & PETERSILIA, *supra* note 8, at 59–60.

100. *Id.* at 48–49. Average sanctions in Polk County dropped despite the continued use of certain administrative fees in addition to the day-fines amount. *See id.* at 47. Unfortunately, the project design did not allow for assessment of whether the imposition of those additional fees had an effect on collections.

101. VERA INST. OF JUSTICE, *supra* note 23, at 16.

102. Worzella, *supra* note 71, at 72.

minimum fine,[103] which artificially inflated day-fines in 36% of cases,[104] and which resulted in pre- and post-pilot default rates remaining essentially the same and quite high (61% compared to 59%).[105] People receiving day-fines in Milwaukee, however, were still more likely than those sentenced to tariff-fines to pay in full (37% to 25% respectively).[106] Because Milwaukee had no meaningful system for collections either before or during the pilot project, that result is likely attributable to graduation alone.[107]

Staten Island, in contrast, suggests that when graduation results in *increased* economic sanctions revenues may remain stable and even improve, though improvements may be dependent on the use of supportive collections mechanisms. In an attempt to make tariff-fines payable for all defendants, the Staten Island courts had depressed tariff-fines so significantly that the average amount of economic sanctions increased by 14% during the day-fines pilot period.[108] Staten Island's planners included a randomized sub-experiment within the project so that pre-pilot tariff fines could be compared to day-fines with enhanced collection mechanisms (the "experimental" group) as well as collections in a second set of day-fines cases using preexisting collections processes (the "control" group).[109] Despite the increases in average sanction amounts, the differential among people subjected to pre-pilot tariff-fines and those sentenced to day-fines was statistically insignificant when measuring the percentage of cases in which economic sanctions were paid in full.[110] Likewise, despite increased sanction amounts, the distinction between tariff-fines and the day-fines control group with respect to the number of people who paid

103. Telephone Interview with Charles Worzella, *supra* note 28.

104. Worzella, *supra* note 71, at 72.

105. TURNER & PETERSILIA, *supra* note 8, at 13.

106. *Id.*

107. Worzella, *supra* note 71, at 72, 77.

108. WINTERFIELD & HILLSMAN, *supra* note 79, at 20–21. If statutory maximum caps had been eliminated, day-fine amounts would have been even higher in 25% of the Staten Island cases. *See* Greene, *supra* note 53, at 40–42 (explaining that the mean would have been 65% higher with total fine-dollars increasing by 79%). *See also* LAURA A. WINTERFIELD & SALLY T. HILLSMAN, THE STATEN ISLAND DAY-FINE PROJECT 3 (1993). Like Staten Island, the use of day-fines in Oregon resulted in an increase in the amount of economic sanctions imposed. *See infra* Part III.A.1.i. Also like Staten Island, the four counties reported improvements in collections during the pilot period. *See* FORMAN & FACTOR, *supra* note 59, at 19, 25–26 (reporting that Coos County collections rose to 60-70% paid in full from a prior rate of 50%); *id.* at 20, 27 (reporting that in Josephine County the previous tariff-fine system resulted in 67% of people defaulted or were sent to collections for failure to pay, as compared to 73% of people sentenced to day-fines remaining in good standing); *id.* at 30 (noting improved collections in Malheur County); *id.* at 34 (noting reduced use of warrants for failure to pay in Marion County). However, due to serious deficiencies in data collection both before and during the pilot period, see TURNER & PETERSILIA, *supra* note 8, at xx, and because its design flaws led many indigent defendants to opt-out of day-fines sentences, see *infra* note 176 and accompanying text, the improved collection rates in Oregon are of only limited value.

109. WINTERFIELD & HILLSMAN, *supra* note 108, at 2–3.

110. WINTERFIELD & HILLSMAN, *supra* note 79, at 22.

something toward their fines was statistically insignificant.[111] People in the day-fines experimental group who received enhanced collections, however, were significantly more likely to pay something toward their fines as compared to either the day-fines control group or those who received pre-pilot tariff fines (94.3%, 74.3%, and 78.8% respectively).[112] In other words, despite average increases in economic sanctions with the introduction of graduation according to ability to pay, payment rates remained effectively constant as compared to artificially depressed tariff-fines where the court made no changes to collections processes, and significantly exceeded those for ungraduated tariff-fines when combined with supportive collections mechanisms. As a result, within less than one year of the initiation of Staten Island's pilot program, 77% of all day-fines were collected,[113] "generat[ing] substantial additional revenues."[114]

In short, graduation according to ability to pay can maintain and even improve revenue generation. The day-fines pilot projects suggest that for jurisdictions where ability to pay calculations result in a decrease in sanction amounts, revenue benefits may be obtained even without improved collections services. For jurisdictions where graduation results in increased sanction amounts, however, improved revenue generation may require the introduction of supportive collections practices.

2. Expenditures

The use of economic sanctions not only implicates the revenue side of the ledger, but the expenditure side as well, something that is often overlooked by lawmakers when considering the overall financial effect of using economic sanctions.[115] Of course the addition of a system for graduation will result in some administrative expenditures due to the necessity of having staff to intake and verify financial information and perform the ability-to-pay calculation.[116] This may be duplicative, however, in light of several recent successful constitutional challenges to money-bail systems resulting in requirements that courts determine ability to pay in

111. *Id.*

112. *See id.*

113. Turner & Greene, *supra* note 17, at 3. Similarly, collection periods increased with the use of day-fines in Bridgeport, but collection rates also significantly improved, with day-fines defendants defaulting at a rate of only 6% as compared to 22% for tariff-fine defendants. COPPOLO, *supra* note 60.

114. Susan Turner, *Day-Fine Projects Launched in Four Jurisdictions*, *in* INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 26, 26 (Michael Tonry & Kate Hamilton eds., 1995).

115. *See, e.g.*, ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 11 (2010) ("To the extent that states evaluate fee collection processes at all, they seem to look only at one side of the ledger—the money brought in—without taking into account the costs of collection incurred by various governmental entities . . . .").

116. *See supra* notes 59–61 and accompanying text.

setting bail,[117] as well as means assessments used in determining eligibility for indigent defense representation and in pre-sentencing assessments.[118] Further, there is substantial evidence from the day-fines experiments and more recent studies that expenditures could be significantly offset by other savings, particularly as the result of a decreased need to oversee and respond to delinquent accounts,[119] declines in often costly punitive measures related to failures to pay,[120] and even potential reductions in costs as a result of reduced recidivism rates.[121]

A significant amount of court resources are expended on judicial and administrative oversight of delinquent accounts.[122] For example, court dockets are often clogged by hearings where courts require people with outstanding debt to appear periodically, as well as hearings triggered when debtors fall behind on payments.[123]

The day-fines pilot projects provide strong evidence that graduation can decrease the number of delinquent accounts and related expenditures. In Maricopa County, only 77% of defendants sentenced to tariff-fines paid something toward their fines, as compared to 96% of day-fine defendants.[124] Timeliness of payments also improved; 21.4% of day-fines defendants paid in full within three months, 31.9% within six months, 40.1% within nine months, and 52.7% within 12 months—as compared to the mere 20.3% of defendants with tariff-fines who completed payment within a year.[125] As a result, probation staff had fewer delinquent accounts to oversee and reduced caseloads because probation terminated upon full payment.[126] Similarly, in Polk County, when compared to collections of tariff-fines, the number of cases paid in full jumped from 31.5% to 72.2%, and the percentage of defendants paying at all increased from 45% to 84.6%.[127] While improved collections techniques did create an increased workload in Polk County,[128] those

117. *See, e.g.*, Timothy C. Evans, *General Order No. 18.8A - Procedures for Bail Hearings and Pretrial Release*, CIR. CT. COOK COUNTY (July 17, 2017), http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2562/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release.aspx (effective September 18, 2017 for felony cases and January 1, 2018 in all other matters).

118. *See supra* notes 54–55 and accompanying text.

119. *See infra* notes 122–32 and accompanying text.

120. *See infra* notes 139–43 and accompanying text.

121. *See infra* notes 144–49 and accompanying text.

122. *See, e.g.*, BANNON ET AL., *supra* note 115, at 11 (noting the costs of collection include salary and time for "clerks, probation officers, attorneys, and judges").

123. *See, e.g.*, CHRISTIAN HENRICHSON ET AL., THE COSTS AND CONSEQUENCES OF BAIL, FINES AND FEES IN NEW ORLEANS 29–34 (2017).

124. TURNER & PETERSILIA, *supra* note 8, at 34.

125. *Id.*

126. *Id.* at 32.

127. *Id.* at 48–49.

128. *Id.*

increases were likely offset given improvements in the timeliness of collections, with 17.7% of defendants paying their day-fines in full within one week, nearly a third within three months, over half within six months, and nearly 90% within a year.[129]

Like Maricopa and Polk Counties, Staten Island saw improvements in expenditures related to delinquent accounts despite the increase in average sanction amounts during the pilot period.[130] Because of the increase, the timeliness of its collections actually dropped: To pay pre-pilot tariff-fines in full, it took defendants an average of 55 days whereas it took nearly double the time for day-fines defendants to pay.[131] Yet researchers found that the increase in collection times did not require any increase in court time and reduced the use of court resources that had previously been expended issuing warrants for non-appearances at post-sentencing collections hearings to a statistically significant degree.[132]

The pilot projects suggest that these positive outcomes are likely to be realized so long as jurisdictions design systems for graduation to avoid technological, procedural, or staffing issues that could impede potential efficiencies from taking hold. For example, in Bridgeport, defendants paid nearly 40% of day-fines in felony cases and 50% in misdemeanor cases on the date of sentencing, and "[t]he vast majority of payments [were] made within the first three months following sentencing."[133] The project experienced setbacks, however, because the computer system that tracked day-fines could not link to other systems the courts used, and to add insult to injury, the records for several hundred cases were deleted and had to be reentered into the computer system.[134] Further, Bridgeport's income verification procedure required defendants to come in for an extra court appearance,[135] and due to statutory complexities in Connecticut, the case of any person placed on a payment plan was subject to a process that required imposition, vacation, and then reimposition of the day-fine.[136] To make matters worse, the sole judge trained to use day-fines rotated to a different court.[137] Given these technological problems, procedural issues, and personnel shifts, it is no wonder that Bridgeport court staff determined that its day-fines system was "too labor intensive and costly to administer" despite improved collections.[138]

129. *Id.* at 48.
130. *See infra* note 108 and accompanying text.
131. WINTERFIELD & HILLSMAN, *supra* note 108, at 5.
132. *Id.* at 5; TURNER & PETERSILIA, *supra* note 8, at 11.
133. TURNER & PETERSILIA, *supra* note 8, at 60.
134. *See id.* at 79.
135. UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 26.
136. TURNER & PETERSILIA, *supra* note 8, at xvi.
137. *See id.* at 78.
138. COPPOLO, *supra* note 60.

In addition to the potential for reducing expenditures related to collections, graduation may improve expenditures by reducing the use of costly punitive measures related to the failure to pay. The United States Supreme Court has required an evidentiary hearing regarding whether a failure to pay is willful or due to indigency prior to the use of incarceration for that failure,[139] and the need for and expense of such hearings undoubtedly increases where the imposition of unmanageable economic sanctions results in increased delinquencies in payment.[140] Some jurisdictions avoid the costs of such hearings by ignoring the Supreme Court's dictate,[141] but doing so may actually be more expensive. For example, a recent study of expenditures in New Orleans, Louisiana, showed that its use of incarceration to address the inability to pay bail, fines, and fees created a $1.9 million annual deficit.[142] Additionally, civil rights litigation challenging the failure to adhere to the hearing requirement is proliferating, and can result in significant damage awards.[143]

There is also increasing evidence that graduation according to ability to pay can result in reductions in crime, and therefore criminal justice system costs overall. Recent studies suggest that the tariff-fines model of ungraduated economic sanctions promotes recidivism by pushing people toward criminal activity as a means of obtaining funds to satisfy economic sanctions.[144] Further, unmanageable economic sanctions—along with penalties for failure to pay that restrict access to occupational and drivers' licenses and public benefits

139. Bearden v. Georgia, 461 U.S. 660, 672 (1983).

140. *See* Colgan, *supra* note 39, at 1223 n.302 (noting that the need for *Bearden* hearings would decrease if courts imposed economic sanctions within a person's ability to pay in keeping with the Eighth Amendment's Excessive Fines Clause).

141. *See id.* at 1199–1205 (describing the failure of the Ferguson, Missouri municipal court to provide *Bearden* hearings).

142. MATHILDE LAISNE ET AL., VERA INST. OF JUSTICE, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 22–24 (2017); *see also, e.g.*, Scott Dolan, *Taxpayers Lose as Maine Counties Jail Indigents Over Unpaid Fines*, PORTLAND PRESS HERALD (May 31, 2015), http://www.pressherald.com/2015/05/31/taxpayers-lose-as-maine-counties-jail-indigents-over-unpaid-fines ("The total cost to taxpayers [in Cumberland County, Maine] to jail 13 individuals for a combined total of 232 days was $25,990—to recoup $10,489 in fines or restitution.").

143. *See* Colgan, *supra* note 39, at 1221–27 (arguing that civil damages can shift the cost–benefit of crime policy decisions); Spencer Hsu, *Town Near Ferguson, Mo., Agrees to Pay $4.7 Million to Settle 'Debtors Prison' Case*, WASH. POST (July 14, 2016), https://www.washingtonpost.com/local/public-safety/town-near-ferguson-mo-agrees-to-pay-47-million-to-settle-debtors-prison-case/2016/07/14/37b42078-49db-11e6-acbc-4d4870a079da_story.html.

144. *See* FOSTER COOK, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 11–12 (reporting that 17% of participants admitted to criminal activity for the purpose of paying economic sanctions); Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1785 (2010) ("[S]everal respondents indicated that [monetary sanctions] encourage them to return to crime. Although only a few of our respondents raised this issue, it is conceivable that legal debt creates an incentive to seek illegal means to support themselves and, ironically, to make [] payments, a pattern that would further increase the risk of criminal justice involvement.").

that provide basic necessities like food and housing—drain defendants' and their families of necessary resources, thus creating or exacerbating financial instability.[145] Such instability has also been linked to increases in recidivism and participation in crime.[146] These studies are in keeping with recidivism data incidentally collected in Maricopa County.[147] Researchers documented a positive effect, determining that only 11% of defendants sentenced to pay day-fines were rearrested as compared to 17.3% of those with tariff-fines.[148] In short, by ensuring that economic sanctions are within a defendant's meaningful ability to pay, graduation has the potential to undermine criminogenic pushes and result in a decrease in system costs.[149]

III. DESIGNING GRADUATION SYSTEMS

To obtain the potential benefits detailed in Part II, the mechanism for graduation must accurately capture a defendant's financial condition. Therefore, the focus of what follows is on key issues that arise in designing a system for graduation of economic sanctions.[150] In addition, because the

145. *See* Colgan, *supra* note 1, at Part II.D.

146. *See id.*

147. The Bridgeport, Oregon, and Polk County projects did not collect data relevant to recidivism. *See* TURNER & PETERSILIA, *supra* note 8, at xx–xxi (describing the general type of information that was successfully collected during the projects, not including recidivism data). Data incidentally collected in Staten Island showed a minor increase in the use of incarceration for drug offenses during the pilot period but researchers attributed the change to increased policing of crack cocaine use. *See* WINTERFIELD & HILLSMAN, *supra* note 108, at 3. In contrast, researchers found no effect on recidivism rates in Milwaukee. Worzella, *supra* note 71, at 76. The project's failure to operate as a true day-fines system due to the use of mandatory minimum sanctions that artificially inflated day-fines for the lowest-income defendants, however, undermines the value of this finding. *See id.* at 72 (describing the project planners' inclusion of a $30 mandatory minimum day-fine).

148. TURNER & PETERSILIA, *supra* note 8, at 35.

149. While the use of economic sanctions as a sole punishment for violent offenses may remain politically infeasible in the United States, a recent survey suggests a willingness among the public to consider economic sanctions as a substitute for incarceration for property offenses. *See* Voula Marinos, *Thinking About Penal Equivalents*, 7 PUNISHMENT & SOC'Y 441, 444–47 (2005). Given increasing support for reforms that would reduce mass incarceration, lawmakers should keep graduated economic sanctions in mind as a potential alternative to incarceration. When Germany moved to a day-fines system in 1975, for example, it was prompted both by prison over-crowding, *see* Greene, *supra* note 53, at 16, and because studies had suggested that the substitution would at worst have no effect on recidivism rates, see Hillsman, *supra* note 13, at 53, and may even make it less likely that people would reoffend, see Greene, *supra* note 53, at 16. German lawmakers incorporated day-fines as an alternative to incarceration for crimes that would otherwise be subject to a term of incarceration of six months or less, and they quickly came to replace more than two-thirds of sentences in such cases. *See* 2 Hignite & Kellar, *supra* note 27, at 545.

150. The full scope of issues that may arise in designing a system for graduating economic sanctions is beyond the scope of this Article, and I focus here instead on specific issues raised by the day-fines pilot project experience. For example, I do not detail methods for dividing income to establish a "daily" income amount, though typically this would be done by merely dividing it by the number of days in the relevant income period. Some commentators have suggested this determination is unduly onerous, particularly in cases where a defendant's work is seasonal. *See*

adoption of a system of graduation may be hampered by pushback from wealthy defendants who may experience significantly increased economic sanctions, this Part contemplates the role statutory maximum caps might play at the high-end of the economic spectrum in order to make the benefits of graduation for people of limited means politically palatable.[151]

A. ABILITY TO PAY DETERMINATIONS

The day-fines projects provide a useful starting point for crafting a mechanism for graduating economic sanctions according to ability to pay because they provide an example of balancing the use of standardized formulas with individualized consideration. As detailed above, the use of standardized formulas provided a straightforward method of calculating ability to pay.[152] The formulas suffered, however, from the artificial inflation of a defendant's ability to pay by requiring imputation of income to defendants who had none, allowing for ungrounded speculation of a defendant's financial condition, or failing to provide sufficient flexibility regarding a defendant's obligations.[153] Further, the ability-to-pay calculation in most jurisdictions applied to only certain economic sanctions, leaving some sanctions ungraduated, thus increasing the full scope of the debt beyond a manageable amount.[154] Additionally, standardization triggers the need to consider important questions regarding what constitutes income, particularly regarding family resources and income derived from criminal activity or otherwise legal but off-the-books work.

To set the stage for considering these design issues, the following is a brief description of the day-fines projects' standard formulas for calculating

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2 Hignite & Kellar, *supra* note 27, at 545. Oregon handled this by dividing seasonal salaries not by the day, but on average over the course of the year. *See* FORMAN & FACTOR, *supra* note 59, at 21, 31. I also do not address here the ways in which a jurisdiction might account for assets in assessing ability to pay, though doing so is certainly possible. Not only did the Bridgeport and Oregon models allow for consideration of assets, *see supra* Table 1, the Swedish and German day-fines models allow for assets to be considered if the defendant is above a particular income threshold by making small adjustments upward depending on asset value. *See* UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 21; Kantorowicz-Reznichenko, *supra* note 27, at 10–11; *see also, e.g.*, JOEL F. HANDLER & ELLEN JANE HOLLINGSWORTH, THE "DESERVING POOR": A STUDY OF WELFARE ADMINISTRATION 75–79 (1971) (regarding consideration of assets in the public welfare context). Similarly, several of the day-fines programs allowed for post-sentencing modifications. *See* TURNER & PETERSILIA, *supra* note 8, at xv, 43; PILCHER & WINDUST, *supra* note 75, at 5; Greene, *supra* note 53, at 35; Worzella, *supra* note 71, at 68. I do not, however, address how lawmakers might best design a back-end system for reassessing a defendant's ability to pay should circumstances change unexpectedly, such as emergency medical issues or a fire destroying one's home. *See* JOEL F. HANDLER & MICHAEL SOSIN, LAST RESORTS: EMERGENCY ASSISTANCE AND SPECIAL NEEDS PROGRAMS IN PUBLIC WELFARE 8–10 (1983) (regarding the development of emergency and special needs programs to supplement public benefits programs).

151. *See infra* Part III.B.

152. *See supra* notes 59–61, 68–73, 75–79 and accompanying text.

153. *See infra* Table 2.

154. *Id.*

adjusted daily income.[155] As set forth in Table 1, each of the projects began by establishing a defendant's base income depending on whether the defendant was employed, received public benefits, or had neither source of income. Two of the projects also allowed for expansion of base income to account for non-income assets.[156]

Table 1: Computation of Base Income

Project	Employed	Public Benefits	Unemployed/ Unreported Income	Assets/Other Income
Bridgeport[157]	Gross daily income with deduction of 33% for defendants who have taxes withheld; up to 15% adjustment if income suspected to be underestimated	Benefit amount	Equivalent of general welfare benefit	Up to 15% increase to account for assets or for income from spouse or other person
Maricopa[158]	Net daily income	Benefit amount	Set at estimated rates dependent upon category of labor: unskilled, clerical, sales, construction/ maintenance/ production, managerial, technical, or professional	n/a
Milwaukee[159]	Net daily income	Benefit amount	Equivalent of general welfare benefit	n/a

155. Because the Ventura County project was still in the planning stages when abandoned and therefore its formula may have changed, it is not included in Tables 1 or 2. *See generally* MAHONEY, *supra* note 73.

156. *See infra* notes 157, 160; *see also infra* note 163.

157. TURNER & PETERSILIA, *supra* note 8, at 55–56.

158. PILCHER & WINDUST, *supra* note 75 tbl.3; TURNER & PETERSILIA, *supra* note 8, at 19–25; Turner & Greene, *supra* note 17, at 4–8.

159. TURNER & PETERSILIA, *supra* note 8, at 12–14; Worzella, *supra* note 71, at 67–68.

Project	Employed	Public Benefits	Unemployed/ Unreported Income	Assets/Other Income
Oregon[160]	Net daily income; for defendants who did not provide income but whose occupation was known, "wage figures for over 300 occupations in Oregon were used to estimate income"[161]	Benefit amount	Estimated at $10 per day based on calculation of state minimum wage; retirees with substantial assets were handled through the asset surcharge	Court could apply a surcharge representing a percentage of net asset value
Polk[162]	Net daily income	Benefit amount	Equivalent of minimum wage for 30 hours/ week	n/a
Staten Island[163]	Net daily income	Benefit amount	Unemployed adults: estimation of likely salary based on regional salaries; Housemakers, dependent students, and disabled adults: estimated family income; Unreported or illicit income: estimate based on evidence of lifestyle and nature of crime	*Deferred until project expanded to felonies.

The second step for establishing ability to pay in the day-fines pilots involved the use of standardized deductions designed to account for a defendant's cost of living, the cost of living of the defendant's family, if any, and other expenses project planners sought to accommodate, as set forth in Table 2.

160. FORMAN & FACTOR, *supra* note 59, at 12–13, 16–17, 21; TURNER & PETERSILIA, *supra* note 8, at 66–69.

161. TURNER & PETERSILIA, *supra* note 8, at 67.

162. *Id.* at 41.

163. *Id.* at 9–12; Greene, *supra* note 53, at 27–29, 31, 33, 37.

Table 2: Computation of Adjusted Daily Income

Project	Self-Support	Family-Support	Flat Deduction	Other
Bridgeport[164]	15%	15% for 1st dependent 10% for 2nd dependent 5% each for remaining dependent up to 6 total	n/a	Up to 15% deduction for exceptional expenses (e.g., child care, medical)
Maricopa[165]	Range between 15-33% depending on amount of base income	Range depending on amount of base income for up to 7 dependents	n/a	n/a
Milwaukee[166]	15%	15% for spouse 15% for 1st child 10% each for next 2 children 5% each additional child	33% if above federal poverty line 50% if below federal poverty line	n/a
Oregon[167]	15%	5% each for up to 4 dependents	35% if above federal poverty line 50% if below federal poverty line	n/a

164. TURNER & PETERSILIA, *supra* note 8, at 53–56.

165. PILCHER & WINDUST, *supra* note 75 tbl.1. One report regarding the Maricopa County program stated that "net daily income is furthermore given a general discount for offenders with incomes falling below the National Poverty level." TURNER & PETERSILIA, *supra* note 8, at 22. The actual forms used in the Maricopa day-fines program, however, do not include this type of flat deduction as part of the income calculation. *See generally* PILCHER & WINDUST, *supra* note 75.

166. Worzella, *supra* note 71, at 67–68.

167. FORMAN & FACTOR, *supra* note 59, at 12–13; TURNER & PETERSILIA, *supra* note 8, at 67–68.

Project	Self-Support	Family-Support	Flat Deduction	Other
Polk[168]	40% for housing 20% for basic needs 40% from adjusted base for additional needs (e.g., transportation)	10% each for first 4 dependents 5% each for next 2 dependents	n/a	n/a
Staten Island[169]	15%	15% for spouse 15% for 1st child 10% each for next 2 children 5% each additional child	33% if above federal poverty line 50% if below federal poverty line	n/a

1. Avoiding Artificial Inflation

The goal of graduation is to design a system which captures each defendant's financial condition in order to impose economic sanctions she has a meaningful ability to pay. Yet, contrary to this goal, each of the day-fines pilot projects allowed for the imputation of income defendants did not have,[170] lacked flexibility in accommodating defendants' actual needs and obligations,[171] and, in some projects, added ungraduated economic sanctions on top of the day-fines amount, thereby undermining the effect of graduation.[172] Because these problems ultimately led Oregon to abandon its day-fines project in favor of a more flexible graduation model, this Part begins with a discussion of the Oregon pilot project. Lessons learned from Oregon's experience—the need to avoid speculation, to allow for flexibility in deductions from base income, and to ensure that graduation applies to economic sanctions broadly—are then addressed.

i. The Oregon Example

Oregon's pilot project suffered from multiple design flaws that resulted in the artificial inflation of ability to pay. First and foremost, Oregon's ability

168. TURNER & PETERSILIA, *supra* note 8, at 41.
169. Greene, *supra* note 53, at 28–29.
170. *See supra* Table 1.
171. *See supra* Table 2.
172. *See infra* Part III.A.1.iv.

to pay determination required the imputation of minimum wage to any unemployed defendant, even though the defendant did not actually have those wages.[173] In light of the jurisdiction's high unemployment rates,[174] this resulted in the artificial inflation of the day-fines amount in the majority of cases.[175] Day-fines were so elevated, in fact, that in Josephine County, where judges gave defendants the option between a jail sentence or a day-fine, only 5% of defendants chose the day-fine, both because overcrowding at the jail reduced the risk of the jail term actually being imposed and because low-income defendants saw the day-fines as out of reach.[176] Defendants who chose day-fines were likely "to be middle income employed defendants" who therefore had the capacity to pay the resulting day-fine.[177]

In addition to income imputation, Oregon placed limitations on deductions from base income. This artificially constricted deductions for defendants with more than five dependents, and—while incorporating a flat deduction based on whether the defendant fell above or below the poverty line—provided no additional flexibility for defendants with significant additional expenses or obligations.[178] While contemporaneous analyses of the project did not capture the extent to which these limitations resulted in inflations in the defendants' sentences, they necessarily constrained ability to pay calculations in any case in which a defendant had additional dependents or obligations that could not be accommodated by the standard deduction.

Oregon's failure to include all forms of economic sanction in the day-fines amount also exacerbated the problems created by income imputation and restrictive deductions. Oregon had statutory requirements that mandated the imposition of surcharges and fees in some cases.[179] Rather than incorporate those sanctions into and distribute required sanctions from the day-fine, pilot planners in Oregon added those extra sanctions on top of the day-fines amount.[180] This meant the total package of economic sanctions were not truly set according to a defendant's ability to pay.[181] Judges in Oregon found that these additional economic sanctions "tended to push the final amount to a relatively high figure for the average defendant who . . . is poor,"[182] leading Malheur County District Court Judge J. Burdette Pratt to call

173. *See* FORMAN & FACTOR, *supra* note 59, at 16.

174. *See id.* at 27.

175. *See id.* at 24–26, 31.

176. *See id.* at 26–27.

177. *See id.* at 27.

178. *See* TURNER & PETERSILIA, *supra* note 8, at 67–68.

179. FORMAN & FACTOR, *supra* note 59, at 38.

180. *Id.*

181. *See* FORMAN & FACTOR, *supra* note 59, at 35 (noting that Oregon's continued use of additional economic sanctions meant that "much of the potential for increased fairness through use of structured fines [was] lost").

182. *Id.* at 31.

for the incorporation of all forms of economic sanction, including restitution and all surcharges and fees, into the day-fines amount.[183]

The combination of these errors caused day-fines to be set above the ability of low-income defendants to pay. In fact, these design flaws caused the average fine to *increase* with the use of day-fines,[184] despite the fact that most defendants were indigent and should have qualified for a significant decrease.[185] As a result, judges and court staff in all four counties expressed reticence to using day-fines given that they left low-income defendants with no meaningful ability to pay.[186]

Unlike the other day-fines jurisdictions, Oregon had a ready alternative for accounting for a defendant's ability to pay stemming from statutes that predated the pilot project,[187] to which it could and did return. Though the statutes had so little guidance that the trial courts' determinations were not without their problems,[188] they neither mandated nor allowed the imputation of income or any other speculation regarding a defendant's income or obligations,[189] and they applied broadly to statutory fines, fees, and restitution.[190] While Marion and Malheur Counties, and at least one judge in Coos County, continued using a form of graduation based on the original

183. *Id.* at 30.

184. *See* TURNER & PETERSILIA, *supra* note 8, at 73–74.

185. *See* Telephone Interview with David Factor, *supra* note 28 (estimating that over 90% of people qualified as indigent).

186. FORMAN & FACTOR, *supra* note 59, at 24–27, 31, 36, 38. Judges in Josephine County also felt that the method of calculation of income did not sufficiently address retirees living on fixed incomes, resulting in artificially high day-fines. *Id.* at 27.

187. *See, e.g.*, OR. REV. STAT. § 137.106(2)(a)–(b) (1993) (requiring consideration of the defendant's financial resources in setting restitution); § 161.645(1) (1971) (mandating consideration of ability to pay when imposing fines); § 161.665(3) (1991) (prohibiting the imposition of costs where a defendant had no ability to pay); *see also* FORMAN & FACTOR, *supra* note 59, at 5–6 (describing the availability of Oregon ability to pay statutes).

188. Trial court impositions of ability to pay were overturned on occasion for: improperly deferring ability to pay considerations to probation personnel, *e.g.*, State v. Flynn, 747 P.2d 376, 377 (Or. 1987); failure to make an adequate record as to ability to pay, *e.g.*, State v. Armstrong, 692 P.2d 699, 700 (Or. 1984); reaching the conclusion that a defendant could pay that was not supported by the record, *e.g.*, State v. Martin, 642 P.2d 1196, 1197 (Or. 1982); or for failure to adequately consider ability to pay, *e.g.*, State v. Sharp, 635 P.2d 1388, 1389 (Or. 1981) (per curiam). Problems with trial court failures to make an adequate determination of ability to pay have continued in the present day. *See, e.g.*, State v. Runnels, 390 P.3d 1120, 1122 (Or. 2017) (holding that lower court erred in finding ability to pay where the "defendant lived with his parents, had been unemployed for the past six years, had no income, and had $5 in his checking account"). This suggests that the Oregon courts could use additional guidance of the kind provided through a standardized formula with appropriate flexibility. *See* Telephone Interview with David Factor, *supra* note 28 (describing the current statute as "a way to get at building a system" for determining ability to pay, but resulting in an "ad hoc" analysis, often without detailed inquiry).

189. *See* State v. Zepeda, 360 P.3d 715, 717–18 (Or. Ct. App. 2015).

190. *See* sources cited *supra* note 187.

pilot structure for at least two years following the initial pilot year,[191] in Marion County the court amended the day-fine structure to allow judges to depart downward if the defendant did not have capacity to pay,[192] and began incorporating some additional economic sanctions into the day-fines amount.[193] Ultimately, each of the counties returned to relying on the pre-existing statutory mechanism for assessing ability to pay.[194] Therefore, though the day-fines project as designed was short-lived in Oregon, it should not be understood as an abandonment of graduation, but rather as evidence of the need for a flexible system to assess a defendant's financial capacity.

ii. Eliminating Speculation

Since returning to a more flexible model for assessing future earnings, Oregon's courts have stressed the need to distinguish between reasonable inferences of a defendant's ability to pay based on existing or prospective employment and an unproven ability to pay grounded in "speculation and guesswork."[195] As set forth below, often there will be no need to speculate. For remaining cases, lawmakers should be wary of speculation generally, and particularly with respect to predictions of future employability.

In many cases, evidence of income or the lack thereof will be readily identifiable. Where the defendant has a source of income—whether through employment, public benefits,[196] business income, rental income, interest, dividends, royalties, pension or retirement income, etc.[197]—for which there is no anticipated interruption, there is no need to speculate as to the

191. The Oregon pilot project began in 1992. *See* TURNER & PETERSILIA, *supra* note 8, at 72–74. Marion and Malheur Counties and one judge in Coos County appeared to have continued to use some form of the day-fines project until at least 1995. VERA INST. OF JUSTICE, *supra* note 23, at 21; FORMAN & FACTOR, *supra* note 59, at 24.

192. *See* TURNER & PETERSILIA, *supra* note 8, at 68.

193. FORMAN & FACTOR, *supra* note 59, at 34.

194. *See, e.g.*, State v. Belen, 369 P.3d 438, 444–45 (Or. Ct. App. 2016) (regarding application of statutes requiring ability to pay determination in setting costs in Marion County).

195. State v. Zepeda, 360 P.3d 715, 718 (Or. Ct. App. 2015) (quoting State v. Bivins, 83 P.3d 379, 383 (Or. Ct. App. 2004)).

196. Project planners understood that economic sanctions were particularly perilous for those relying on public benefits, *see, e.g.*, Greene, *supra* note 53, at 27, and addressed that concern through adjustments of base income. *See supra* Table 2. A useful comparison for a more nuanced treatment of public benefits as base income can be found in Housing and Urban Development protocols for establishing income for purposes of setting rent under the Section 8 housing program. *See generally Chapter 5: Determining Income & Calculating Rent*, *in* HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS (2003), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35649.pdf.

197. *See, e.g.*, Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, https://www.id.uscourts.gov/Content_Fetcher/?ID=987 (listing sources of income for establishing debtor means for Chapter 13 bankruptcy proceedings); Greene, *supra* note 53, at 28 (noting that the ability to pay calculation in Staten Island may need to be adjusted to include interest and rental income if the project were extended to felony cases in which white-collar and other economic crimes were handled).

defendant's future income.[198] Similarly, if there is evidence identifying a change set to occur post-sentencing, assessment of the ability to pay should take into account such changes.[199] If, for example, there is evidence that the defendant will receive a raise in salary on a particular date, a court would not be prevented from considering that when establishing base income. Likewise, if an existing income source will be interrupted post-sentencing—as might be the case, for example, for a defendant with an employment contract that is set to terminate or a person sentenced to a term of incarceration[200]—it would be inappropriate to treat the income as ongoing.[201] Likewise, if an income source simply is not available, it cannot contribute to the defendant's ability to pay and therefore should be excluded from the base income amount. For example, in the consumer bankruptcy context, employer contributions to employee benefit plans, deferred compensation plans, and tax-deferred annuities are not treated as disposable income.[202] In other words, where there is strong evidence that employment or benefits will or will not be interrupted, that salaries or benefits award amounts will or will not change, or that the defendant can or cannot access a source of income, the determination of base income will be straightforward.

Avoiding ungrounded speculation is also uncomplicated. Courts merely need to refrain from predictions made without a meaningful evidentiary basis, such as hoping that the defendant will win the lottery or inherit money from

198. In theory, ability to pay determinations could reflect the complexity of individual income taxes, which allow individuals to report earnings in one time period and write-off the earnings in another, but doing so does not improve assessment of ability to pay and would unnecessarily complicate the income evaluation, 2 Hignite & Kellar, *supra* note 27, at 545, thereby reducing efficiencies that might otherwise be gained. *See supra* Part II.B.2.

199. If it appeared that a defendant was eligible for but not currently receiving a public benefit, the trial court could adjourn sentencing for a period of time sufficient to allow for an application of benefits, as was done in Milwaukee. Worzella, *supra* note 71, at 68.

200. Likely due to project designs that focused day-fines practices on defendants who would not also receive a sentence of incarceration, available documentation of the projects does not address calculation of income for those who may be employed during a term of incarceration. In theory, a jurisdiction could estimate income during the course of incarceration, though there are two serious constraints to doing so. First, there are no assurances of employment in jail or prison due to limited job availability or due to the inability of the individual to work as a result of developmental or physical disability or mental illness. *See, e.g.*, JENNIFER BRONSON ET AL., UNITED STATES DEP'T OF JUSTICE, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12, at 1, 1 (2015). Second, in many jurisdictions, prison wages can be as low as $0.12 per hour. Kanyakrit Vongkiatkajorn, *Why Prisoners Across the Country Have Gone on Strike*, MOTHER JONES (Sept. 19, 2016, 10:00 AM), http://www.motherjones.com/politics/2016/09/prison-strike-inmate-labor-work. As a result, even if a defendant obtained employment during incarceration, it likely would provide little income from which to base a graduated economic sanction. *See also* State v. Boss, 374 P.3d 1013, 1014 (Or. Ct. App. 2016) (noting that there was no evidence that the defendant would be employed during his term of incarceration).

201. *Cf.* Hamilton v. Lanning, 560 U.S. 505, 513 (2010) (interpreting bankruptcy statute's use of "projected" income used to establish payment plans to be forward-looking so that the calculation can "account [for] anticipated events that may change past trends").

202. 11 U.S.C. § 541(b)(7)(B) (2012).

a long-lost relative,[203] concepts so remote that courts have rejected such speculation in similar contexts.[204]

Where difficulties—and inefficiencies—may arise is when a defendant is unemployed at the time of sentencing, but there is some indication of employability. To address those situations, jurisdictions could establish a system that assesses the likelihood of future employment. In Oregon, for example, attention is paid to whether the defendant has a substantial work history and specific prospect of employment,[205] or instead has only limited employment history and no immediate prospects.[206] Oregon courts also take into consideration the effects of incarceration, which can both interrupt employment and reduce the chances of employability upon release.[207]

Lawmakers designing a system for assessing ability to pay should be wary, however, of engaging in employment predictions, as doing so can result in increased expenditures by creating a need for more onerous court processes. For example, in holding that the automatic revocation of probation for failure to pay statutory fines and restitution violated the Fourteenth Amendment, the Supreme Court required a hearing to determine whether the failure to pay was willful or due to a lack of resources despite bona fide efforts to obtain income.[208] Before remanding the case, the Court commented about the evidence presented at the probation revocation hearing, noting that a finding of a failure to make bona fide efforts to obtain employment could not be justified by the trial court's passing remark "on the availability of odd jobs such as lawn-mowing."[209] In other words, a hearing to assess bona fide efforts would need to include an opportunity for the defendant and other witnesses to explain efforts or inability to obtain employment, in which courts should refrain from considering generalized and unsupported evidence about job

203. *See, e.g.*, Ruback, *supra* note 27, at 1807.

204. *See, e.g.*, United States v. Porter, 41 F.3d 68, 72 (2d Cir. 1994) (Winter, J., concurring) (rejecting the imposition of "amounts that cannot be repaid without Hollywood miracles"); United States v. Rogat, 924 F.2d 983, 985 (10th Cir. 1991) ("The possibility of repayment . . . cannot be based solely on chance."); United States v. Mitchell, 893 F.2d 935, 936 n.1 (8th Cir. 1990) (rejecting prosecutor's request that restitution be set at a higher amount because the defendant might win the lottery); United States v. Mahoney, 859 F.2d 47, 51 n.6 (7th Cir. 1988) ("The prospect of the defendant's winning a lottery—present in any case—is too remote a possibility to justify the restitution order in this case.").

205. *See, e.g.*, State v. Dylla, 365 P.3d 662, 663 (Or. Ct. App. 2015) (upholding determination of ability to pay, in part due to the defendant's 18-year employment as a truck driver and pending job offer to work as a truck driver).

206. *See, e.g.*, State v. Tiscornia, 358 P.3d 326, 327 (Or. Ct. App. 2015) (overturning finding of ability to pay where defendant's work history involved only cleaning houses approximately two years prior to his arrest).

207. *See, e.g.*, State v. Boss, 374 P.3d 1013, 1014 (Or. Ct. App. 2016) (noting that there was no evidence that the defendant "would receive income during his lengthy incarceration, or that he plausibly would be able to obtain employment sufficient to pay the fees on his release").

208. Bearden v. Georgia, 461 U.S. 660, 670 (1983).

209. *Id.* at 673.

availability.[210] Were lawmakers to require an employability determination as a component of an ability to pay assessment at sentencing, a hearing of this nature would be needed, thereby undermining potential administrative efficiencies seen in the day-fines projects.[211]

Predicting future employment also creates a significant risk that, where employment does not materialize, economic sanctions will be unmanageable and the value of graduation will be lost. This problem is not unique to the sentencing context, and opens the door to issues that have plagued employability determinations in other arenas. For example, means-testing used in consumer bankruptcy proceedings relies on average monthly income for the six-month period prior to the filing date, a structure that has been widely criticized because it projects income even though the debtor may not be employed and therefore may "have little or no income at the time of filing or [be] unlikely to achieve that level of income" during the bankruptcy term.[212] Similarly, work requirements related to eligibility for public benefits have long been criticized[213] for obscuring the ways that the inability to obtain and maintain employment are affected by structural factors, including the changing nature of the job market,[214] economic downturns and inflation,[215] the effects of employment discrimination,[216] or the ways in which employment

210. *See also supra* notes 206–08 and accompanying text.

211. *See supra* Part II.B.2.

212. *See, e.g.*, DANIEL J. BUSSEL & DAVID A. SKEEL, JR., BANKRUPTCY 431 (10th ed. 2015).

213. Public benefits work requirements have been criticized for creating a dichotomy between the "deserving" and "undeserving" poor. *See, e.g.*, King v. Smith, 392 U.S. 309, 320–21 (1968) (discussing the concept of "worthiness" in welfare programs); HANDLER & HOLLINGSWORTH, *supra* note 150 (discussing the "deserving poor"); *see also* Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550, 550–55 (2012) (arguing that eligibility requirements necessarily carry with them questions of deservingness because they "call[] for allocating responsibility for a person's economic well-being among that individual, the labor market, family or other civic institutions, and the state"). These eligibility schemes sound in the rhetoric of personal responsibility in which only those who try hard enough to obtain employment are worthy of aid. *See, e.g.*, Robert J. Lampman, *Forward*, *in* THE "DESERVING POOR": A STUDY OF WELFARE ADMINISTRATION, at ix, ix–x (1971). An additional critique of work requirements is that they impose a requirement to work on the poor who are in need of public aid, but not on the idle wealthy, thus creating a moral regulation only on the poor. *See* JOEL F. HANDLER, REFORMING THE POOR: WELFARE POLICY, FEDERALISM, AND MORALITY 139 (1972); Zatz, *supra*, at 559–60. While policing targeted at low-income communities may raise similar concerns, in theory, a future employability analysis could apply to any unemployed person regardless of wealth for the purposes of establishing base income.

214. *See, e.g.*, HANDLER, *supra* note 213, at 140–41.

215. *See* Pascucci v. Vagott, 362 A.2d 566, 569–72 (N.J. 1976) (holding that providing lower levels of financial assistance to "employable" benefits recipients than those classified as "unemployable" did not adequately assess who was needy as a result of job unavailability, and noting the case was set against the backdrop of high unemployment and inflation in the costs of basic needs).

216. *See* JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 153–54, 167–68 (1991); *see also* Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y

difficulties are often exacerbated by precarious financial circumstances. For example, the lack of a stable address or phone number can make a job search difficult by rendering it impractical for an employer to contact an applicant to arrange an interview,[217] and a lack of access to professional attire or transportation can undermine the interview process and one's ability to retain employment.[218] And for those with other forms of instability, such as developmental or physical disability, chemical dependency, or mental illness, job prospects can be few and far between.[219]

Unlike the bankruptcy and public benefits contexts, where assessment of future employability may be a necessary evil for determining relief or levels of aid, the availability of alternative sanctions make an employability assessment unnecessary in the criminal context. The lack of employment should not, of course, render a person punishment-proof.[220] Indeed, a defendant may be unemployed, yet have other sources of income.[221] But even for those who are without income, punishment is not off the table. Instead, where a jurisdiction would have otherwise imposed an economic sanction but the defendant is without means, the court could turn to non-incarcerative alternatives such as community service or supportive services involving training or treatment.[222] While the development of these alternatives should be undertaken with care to ensure that they are not more punitive or invasive than the economic sanctions they are replacing,[223] lawmakers could reasonably decide to avoid

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REV. 93, 117–19 (2015) (arguing that the protections for willful nonpayment of economic sanctions afforded by the Court in the Fourteenth Amendment context is tinged with "[t]he rhetoric of personal responsibility" which "rings of barely disguised, and at times undisguised, racism") (footnotes omitted).

217. *See* KATHRYN J. EDIN & H. LUKE SHAEFER, $2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA 35–64 (2015).

218. *See id.*; *see also* Margy Waller, Brookings Inst., High Costs or High Opportunity Cost?: Transportation and Family Economic Success 3 (Nov. 28, 2005) (unpublished manuscript), https://www.brookings.edu/wp-content/uploads/2016/06/pb35.pdf.

219. *See, e.g.*, Christopher Prinz, *How Your Mental Health May Be Impacting Your Career*, PBS NEWSHOUR (June 28, 2013, 9:08 AM), http://www.pbs.org/newshour/rundown/how-mental-health-impacts-us-workers.

220. *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 244 (1970) (warning against a system in which a defendant, due to limited means, could escape punishment).

221. *See supra* note 197 and accompanying text.

222. *See, e.g.*, Hillsman, *supra* note 13, at 73 (explaining that in Germany community service is used as an alternative to the day-fine for defendants who are unemployed).

223. In particular, with respect to community service, it is important to ensure that it does not interfere with employment or child care, is credited at a fair wage rate for the labor involved, and includes labor protections related to, for example, workplace injuries. *See* Noah Zatz, *Get to Work or Go to Jail: Free Labor in the Shadow of Mass Incarceration*, ACSBLOG (Nov. 16, 2015), https://www.acslaw.org/acsblog/get-to-work-or-go-to-jail-free-labor-in-the-shadow-of-mass-incarceration; CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 29, at 21. Similarly, designers of supportive services alternatives should seek to avoid net-widening effects in state control over people's lives. *Cf.* Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 606 (2016). *See generally* Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004). While alternative sanctions do not bring in revenue, and therefore on the surface seem to cut against the goal

the difficulties of making an employability assessment in favor of alternative sanctions.

iii. Ensuring Flexibility

Establishing base income is only the first step in determining a defendant's actual ability to pay; a system for graduation also must account for a defendant's ability to meet basic necessities such as housing, food, hygiene, transportation, dependent care, medical care, and other preexisting debts and obligations. While this requires individualized consideration, it does not necessarily preclude the use of standard formulas. It may well be that the formulas set out in Table 2 are, in most cases, sufficient to render an accurate picture of a defendant's ability to pay economic sanctions, particularly if designed with sensitivity toward people living at low-income levels. For example, the day-fines projects used flat deductions dependent upon whether a defendant fell above or below the federal poverty line, thus recognizing that people living at low-income levels would be hardest hit by economic sanctions absent additional protection.[224] That type of model is consistent with the manner of establishing available income in other contexts, such as in setting federal financial aid, in which the government excludes income and assets for families at the lowest income levels.[225] A flaw in the day-fines project designs, however, was a lack of flexibility for cases where a defendant had financial needs or obligations that extended beyond what the standard formula captured.[226] In particular, the deduction models prevented courts from considering all dependents or accounting for exceptional needs or obligations.[227]

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of revenue generation, well-designed alternative sanctions may have positive fiscal outcomes. A meta-analysis by the Washington State Institute of Public Policy, for example, found that several non-incarcerative alternative sanctions had significant cost-benefits. *See Benefit-Cost Results*, WASH. ST. INST. PUB. POL'Y, http://www.wsipp.wa.gov/BenefitCost (last updated May 2017).

224. *See, e.g.*, *supra* Table 2.

225. *See* Danielle Douglas-Gabriel, *How Your Family Finances Factor into Financial Aid Calculations*, WASH. POST (Jan. 14, 2015), https://www.washingtonpost.com/news/get-there/wp/2015/01/14/how-your-family-finances-factor-into-financial-aid-calculations.

226. The failure of standard formulas to adequately capture a defendant's actual disposable income has been critiqued, albeit upheld as a matter of statutory interpretation, in the bankruptcy context. *See* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 78–79 (2011). In the context of economic sanctions, however, meaningful graduation may be necessary to achieve the benefits detailed in Part II.

227. *See supra* Table 2. While the Court has rejected an equal protection challenge related to caps on family size in the context of distribution of government benefits, such challenges are subject only to rational basis review. *See* Dandridge v. Williams, 397 U.S. 471, 486–87 (1970). The Court has applied heightened scrutiny to policies related to the use of economic sanctions, and in doing so required greater protection. *See, e.g.*, Bearden v. Georgia, 461 U.S. 660, 672–73 & n.12 (1983). For a discussion of how child support obligations can be set beyond a parent's ability to pay under various models and how low-income parents struggle with often sizeable child support arrears, see Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER, RACE & JUST. 617, 634–59 (2012).

The public benefits context provides fruitful guidance for designing a system that allows for standardization while retaining flexibility for individualized needs. As public benefits moved from an individualized determination of need to a standardized system in the 1970s, lawmakers created a system that provided for special or emergency needs.[228] Such programs could provide extra assistance in response, for example, to the need for a special diet due to medical issues that could not be accommodated by the standard formula.[229] A graduation mechanism designed to capture a person's financial condition for the purpose of graduating economic sanctions can similarly allow flexibility for expenses that go beyond standard deductions.

In considering the degree of flexibility to be allowed in recognizing a defendant's other financial obligations, lawmakers should keep in mind the tradeoffs created by the imposition of economic sanctions and other governmental aims. For example, unmanageable economic sanctions have been tied to reductions in child support payments.[230] Allowing greater flexibility to accommodate child support orders that extend a defendants obligations beyond those captured by a standard formula would promote comity and the government's interest in protecting the economic well-being of children. Similar tradeoffs exist between restrictive deduction formulas and the governmental interest in full payment of student loans,[231] avoidance of bankruptcy caused by medical expenses,[232] and the fulfillment of previously

228. *See* HANDLER & SOSIN, *supra* note 150, at 3–8.

229. *Id.* at 9. Special needs programs might also cover unexpected occurrences such as a fire rendering a family homeless or an eviction, *id.*, though such considerations arise after the initial income eligibility determination and therefore are more relevant to devising a system for post-sentence review of economic sanctions, which is outside of the scope of this Article. *Supra* note 150.

230. *See* RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS 8 (2007).

231. Nearly 7 million people with federal student loans are in default, with millions more struggling to pay loans. *See* Josh Mitchell, *School-Loan Reckoning: 7 Million Are in Default*, WALL ST. J., https://www.wsj.com/articles/about-7-million-americans-havent-paid-federal-student-loans-in-at-least-a-year-1440175645 (last updated Aug. 21, 2015, 6:56 PM).

232. Just under 2 million people per year declare bankruptcy due to medical debt, with an additional 56 million adults struggling with persistent debt related to health care. Dan Mangan, *Medical Bills Are the Biggest Cause of Bankruptcies: Study*, CNBC (June 25, 2013, 11:01 AM), https://www.cnbc.com/id/100840148. The bankruptcy code allows an adjustment of its standard formula for the continuation of "care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor)" where the person needing care is unable to pay for such expenses. 11 U.S.C. § 707(b)(2)(A)(ii)(II) (2012). Similarly, the Supplemental Poverty Measure includes within its calculation "contributions toward the cost of medical care, health insurance premiums, and other medical out-of-pocket expenditures." TRUDI WENWICK & LIANA FOX, U.S. CENSUS BUREAU, THE SUPPLEMENTAL POVERTY MEASURE: 2015, at 1 (2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-258.pdf.

imposed economic sanctions,[233] to name a few. Designing a system to allow for departure from standard formulas in the subset of cases where there is evidence that the defendant's actual ability to pay is not adequately captured through standardization can help balance competing governmental aims.[234]

iv. Applying Graduation Broadly

In addition to imputation of income and restrictions on deductions, Oregon's project resulted in artificial inflation of ability to pay because it graduated only a subset of economic sanctions, and then imposed ungraduated sanctions on top of the day-fines, rendering the overall package of sanctions unmanageable.[235] In contrast, Maricopa County incorporated all forms of economic sanction into its day-fine and then distributed the revenue to cover victim restitution, court costs, and probation costs, as well as to various state funds.[236] Day-fines defendants received one sanction, graduated

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233. In St. Louis County, Missouri, for example, people often found themselves unable to pay economic sanctions in one municipality in part due to economic sanctions previously imposed in other municipalities. Jeremy Kohler et al., *Municipal Courts Are Well-Oiled Money Machine*, ST. LOUIS POST-DISPATCH (Mar. 15, 2015), http://www.stltoday.com/news/local/crime-and-courts/municipal-courts-are-well-oiled-money-machine/article_2f45bafb-6e0d-5e9e-8fe1-0ab9a794fcdc.html.

234. *Cf.* Hamilton v. Lanning, 560 U.S. 505, 519 (2010) (rejecting an argument that the bankruptcy code's mechanical formula for assessing disposable income precludes actual assessment of defendant's needs because the formula will be sufficient in most cases and for "unusual cases . . . a court may go further and take into account other known or virtually certain information about the debtor's future income or expenses").

235. *See supra* notes 180–84 and accompanying text.

236. *See infra* notes 348–50 and accompanying text. Maricopa County's planners established this model to allow for testing of a single day-fines package, but doing so required the exclusion of cases in which the day-fines calculation could not accommodate full restitution as mandated by Arizona law. *See* Turner & Greene, *supra* note 17, at 6; *see also infra* notes 348–50 and accompanying text. Incorporating all economic sanctions into a single package forces a discussion of the state's role in making victims whole through restitution, and the reasonable concern that graduating restitution to a defendant's ability to pay "devalues the victim." Ruback, *supra* note 27, at 1806. In practical terms, incorporating restitution into a day-fines package likely has little effect; as the Supreme Court has explained, ordering a defendant to pay restitution she cannot pay does "not make restitution suddenly forthcoming." Bearden v. Georgia, 461 U.S. 660, 670 (1983). While a full examination of this issue is beyond the scope of this Article, it is possible to devise a system that both allows for graduation and accommodates victims' needs. Lawmakers could set as a distribution priority the population of a fund through which victims could be paid in full, even when the defendant in an individual case has insufficient means from which to compensate a direct victim. A structure that could accommodate such a distributive method is in place in all 50 states through the federal Crime Victim's Compensation program. *See generally Nat'l Assoc. of Crime Victim Compensation Boards*, NACVB, http://www.nacvcb.org/index.asp?sid=6 (last visited Sept. 10, 2017) (providing links to all 50 states' programs). Lawmakers, however, have often capped restitution awards or prioritized the distribution of economic sanctions for other purposes, and therefore may need to reprioritize distributions to prize restitution. *See, e.g.*, Daniel M. Fetsco, *Unpaid Restitution: An Under-Enforced Right of Victims and Suggestions to Improve the Collection of Restitution in Wyoming*, 12 WYO. L. REV. 367, 379–81 (2012). While this may reduce revenue coming into state coffers, it may also reduce expenditures related to state services and public benefits that accrue to crime victims who experience crime-related losses. *See* Colgan, *supra* note 1, at Part I.C.3.

to their ability to pay, resulting in improved payment rates as compared to tariff-fines.[237]

The incorporation of all economic sanctions into a single package aligns sentencing practices with the widely accepted notion that payment terms should be as short as possible to increase the likelihood of full payment.[238] A day-fines structure may be uniquely capable of addressing each of these needs because it includes a measurement of offense seriousness in its calculation. Recall that a component of the day-fine is the assignment of a penalty unit that is keyed to the seriousness of the offense.[239] In each of the day-fines projects, the judicial determination of how many penalty units to assign was made by considering only the seriousness of the crime of conviction, irrespective of the defendant's means.[240] This structure naturally lends itself to a mechanism for identifying reasonable length of payment terms that are responsive to offense seriousness. For a minor offense—jaywalking for example—which might carry only a fraction of a penalty unit, a payment plan, if needed at all, should include only one installment as the multiplication of that unit by the defendant's adjusted daily income would result in an amount within the defendant's ability to pay quickly. In contrast, a more serious offense for which a higher number of penalty units are assigned would require a longer payment term. If properly designed, the day-fines structure allows the court to adjust the amount of the entire package of economic sanctions to meet the defendant's ability to pay as well as establish a payment plan responsive to the seriousness of the offense.

2. Consideration of Income Sources

In addition to design flaws resulting in artificial inflation, a second set of issues created by standardized formulas relate to whether and how to consider family resources as well as income derived from illegal activities or otherwise legal but off-the-books work. Because the answers to these questions depend on a variety of policy preferences that may be contingent on specific jurisdictional circumstances, the following discussion is intended to raise the

237. *See supra* notes 124–25 and accompanying text.

238. *See, e.g.*, UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 30 (noting the "general principle[]" that installment payments should be minimized); Hillsman, *supra* note 13, at 70 ("Research on fine collection suggests that, to be effective, courts should first set fine amounts more closely to offenders' financial circumstances (as well as to their offenses) and then establish payment terms that are as short as possible given these conditions"); *see also* George F. Cole, *Monetary Sanctions: The Problem of Compliance*, *in* SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS 142, 145 (James M. Byrne et al. eds., 1992) (describing research showing that improved collections were associated with "setting the total amount of fines, costs, and fees at a level within the ability of the offender to pay, even though it might involve some hardship; making only limited use of installment plans; and allowing relatively short periods of time for payment").

239. *See supra* note 17 and accompanying text.

240. *See* TURNER & PETERSILIA, *supra* note 8, at xvii, 22, 41–42, 53–54, 66–67.

types of considerations lawmakers designing a system for graduation should consider, rather than provide definitive answers to these queries.

i. Family Resources

A concern raised during the pilot projects' planning related to the fairness of relying on family resources—and therefore the resources of people without criminal responsibility for the offense—as a component of base income.[241] In many ways, this issue is a red herring; graduated economic sanctions are no different from all forms of punishment, each of which have financial and social consequences for the families of those punished,[242] including the use of ungraduated tariff-fines that deprive families of shared resources.[243] The critical question is instead what constitutes a shared resource upon which a graduated economic sanction should be based. While the full range of options that a particular jurisdiction might consider in answering that question is beyond the scope of this Article, I address here two key considerations: whose income is considered within the "family," and what resources lawmakers might wish to protect from the income calculation to foster societal benefits beyond the criminal justice system.

The question of who should be considered part of the family against whom base income should be measured is particularly important in light of practices in many jurisdictions where courts presume distant family members or friends will provide resources where a defendant has no meaningful ability to pay.[244] What constitutes a family, or household, is a longstanding issue in calculating eligibility for public benefits,[245] and therefore that arena provides guidance for identifying competing concerns. On the one hand, failure to construe the household broadly enough could allow for intentional or inadvertent double dipping into benefit eligibility, thereby wasting scarce resources.[246] On the other, if an adult without a legal obligation to spouse or child were presumed to actually serve as a breadwinner without evidence that

241. *See* UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 20.

242. *See generally* NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2005); Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8 (2010).

243. *See* Colgan, *supra* note 1, at Part II.D.

244. State v. Zepeda, 360 P.3d 715, 719 (Or. Ct. App. 2015) (determining trial court erred because "the imposition of fees here appears to be based on the speculative possibility that defendant would somehow be able to pay the attorney fees because her family would provide her with the necessary financial support"); State v. Wallace, 311 P.3d 975, 978 (Or. Ct. App. 2013) (holding that the trial court "impermissibly imposed the fees based on the possibility that, through his family members, defendant would somehow be able pay [sic] the attorney fees"); O'Connor, *supra* note 54 ("There is a belief in the judiciary . . . that if you can borrow from family or a friend then you can pay. That is ridiculous.").

245. *See* HANDLER & HOLLINGSWORTH, *supra* note 150, at 76–78.

246. *See* Lyng v. Castillo, 477 U.S. 635, 642 (1986) (noting that Congress could have reasonably presumed that close relatives beyond the immediate family sharing a home also shared meals together for the purposes of setting eligibility for food stamp benefits).

"the bread is actually set on the table," there would be a failure to meet the goal of addressing the family's poverty.[247] As Noah Zatz has written, those competing concerns—between over- and under-inclusion—do not necessarily require that a line be drawn around a household at any particular place; lawmakers might limit the family to those actually supplying bread, or go so far as to include more distant relations who have "a loaf of bread and would willingly hand it over if asked, at least if she knew that her kin would otherwise go hungry."[248]

The concern that economic sanctions punish innocent family members provides one reason lawmakers might err toward a more restrictive interpretation of the "family" in setting base income. Indeed, cabining family resources to income in which the defendant has a shared interest, as opposed to monies for which the defendant has no legal claim, both links the punishment directly to the defendant and reduces the pool of people without culpability who are affected.

Lawmakers also may wish to restrict what constitutes a "family" due to the need to expand the deductions from base income as the meaning of family broadens. It is not immediately clear that adding the additional income of a distant relative or friend will result in an increased fine amount, given that the income would need to be adjusted downward for the needs of that person and her dependents.[249] More people included in the resource pool also raises the risk that a special need for extraordinary downward departure will exist.[250]

To address these issues, lawmakers might take a page from the consumer bankruptcy system, where a debtor's monthly income includes most amounts paid to the debtor by any person for use toward the family's household expenses,[251] as well as assets to which the defendant has a legal or equitable

247. Lewis v. Martin, 397 U.S. 552, 559 (1970) (striking down rule that treated income of a stepfather or man assuming the role of the house as family income even though no legal obligation to support the family existed). *Compare* Van Lare v. Hurley, 421 U.S. 338, 346 (1975) (same regarding adult lodgers), *and* King v. Smith, 392 U.S. 309, 329–30 (1968) (same regarding Alabama rule treating adult males as "substitute father[s]"), *with* Schweiker v. Gray Panthers, 453 U.S. 34, 45 (1981) (holding that Congress could reasonably presume that spouses share income and parents support children).

248. Zatz, *supra* note 213, at 574.

249. *See supra* Part III.A.1.iii.

250. *See supra* notes 225–34 and accompanying text; *cf.* Mila Hentzien, *Scenes from Judge Diment's Courtroom*, N.Y. TIMES: VIDEO (Sept. 3, 2015), https://www.nytimes.com/video/us/100000003888560/scenes-from-judge-diments-courtroom.html (showing a threat by Georgia municipal court judge to incarcerate a man unless he could come up with $150 that day); Shaila Dewan, *Offenders Who Can't, or Won't, Pay is a Conundrum for Courts*, ORANGE COUNTY REG. (Sept. 27, 2015, 5:00 AM), http://www.ocregister.com/2015/09/27/offenders-who-cant-or-wont-pay-is-a-conundrum-for-courts (reporting that the threatened defendant was forced to borrow money from his terminally ill mother who had ongoing and significant medical expenses to pay).

251. 11 U.S.C. § 101(10A)(B) (2012) (excepting social security benefits and payments to "victims of war crimes or crimes against humanity").

interest.[252] A similar model can be found in the Section 8 housing context, though with greater protections for monies earned by dependents within the household.[253] For example, in assessing family income to establish rent, Housing and Urban Development ("HUD") policies limit income to that earned by the head of household, spouse, or co-head of household, and benefits accruing to any member of the household.[254]

In addition, lawmakers should consider excluding from the concept of family income monies that are intended to promote societal benefits, such as education, the support and care of people with disabilities, or other particularized needs. Examples of such exclusions are often seen in the public benefits context. Income assessments for Section 8 housing eligibility includes only a small amount—less than $500—of earned income of dependent full-time students over the age of 18, and excludes income from disabled adults, if any, and the earned income of minors.[255] Applications for federal student aid count the income, savings, investments, and real estate of parents,[256] but prohibit touching any income generated by the student below a particular annual cap, at which point only 50% of income earned by the student is included.[257] Calculation of household income for the purposes of food stamp eligibility excludes not only income earned by a student under the age of 18, but also "all educational loans on which payment is deferred, grants, scholarships, fellowships, veterans' educational benefits, and the like" that are used to pay tuition and fees, but allow inclusion of such sources that are used for living expenses.[258] The general concept in these calculations is that certain income should be sheltered so that it can be used for educational purposes or to address the special needs of a person with disabilities, as opposed to family support.[259] Lawmakers contemplating what to protect within a families' resources might consider these, as well as other governmental goals, in establishing what components of household income should be used to determine ability to pay.

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252. *See* 11 U.S.C. § 541(a) (2012) (defining property of the estate for bankruptcy proceedings).

253. Though dependent income may be included in means-assessments in the consumer bankruptcy context, consumer bankruptcy laws do protect monies intended to be used for education in other ways. *See* 11 U.S.C. § 541(b)(5)–(6) (2012) (excluding from property of the estate "funds placed in an education individual retirement account" and funds used in relation to tuition credits). The bankruptcy code also protects funds set aside for disability-related expenses. *See* 11 U.S.C. § 541(b)(10) (2015).

254. HUD HANDBOOK 4350.3, *supra* note 196, at 5-6 to 5-8.

255. *Id.* Minors who are foster children are not deemed dependents. *Id.* While HUD appears to allow earned income of foster children to count as family income, it excludes from family income any monies received for the care of foster children. *Id.* at 5-7 to 5-8(A)(3)(g).

256. *FAFSA: Free Application for Federal Student Aid*, FEDERALSTUDENTAID, https://fafsa.ed.gov/fotw1617/pdf/PdfFafsa16-17.pdf (last visited Sept. 10, 2017)

257. Douglas-Gabriel, *supra* note 225.

258. 7 U.S.C. § 2014(d)(3) (2012).

259. *See id.*

ii. Unreported Income

An additional and complicated issue considered by the day-fines pilot project planners involved how or whether a calculation of a defendant's financial capacity should include income where the defendant is not legally employed but receives unreported income from either illicit activity such as drug dealing or prostitution, or from licit but off-the-books work.[260] For example, consider three women who each work 60 to 70 hours per week to support themselves and their families, and who are described in Sudhir Alladi Venkatesh's examination of the underground economy in Maquis Park, on Chicago's South Side:

> Bird . . . earns her living as a prostitute, plying her trade along Maquis Park's main thoroughfare as well as on busy downtown streets. Eunice works in the formal economy, cleaning offices at minimum wage, and supplements her income by selling homemade soul food to the local lunchtime crowd. Marlene has various off-the-books jobs in the service sector; she earns most of her underground money as a $9 per hour nanny for a white family in the neighboring upper-class university district.[261]

The work done by these three women raises critical questions for determining whether and how the money they earn should count toward base income for the purposes of graduating economic sanctions. Should income generated from these illegal activities—prostitution, food sales, and child care—be treated in the same manner as income generated from Eunice's janitorial work in the formal economy? Should the illicit act of prostitution be treated in the same way as the licit but off-the-books acts of food sales and child care? Is there a reason, for example, that judges in Staten Island's day-fines project were comfortable estimating income based on activities such as gambling, but balked at estimating future income for people who worked as prostitutes, because doing so would "reduce the court's role to that of a 'state pimp'"?[262] As in the previous section, the following does not provide explicit answers to these questions, but considerations for the design of a system for graduating economic sanctions, drawing from the treatment of work in the underground economy in the arenas of tax liability, public benefits, and criminal law.

There are three primary concerns that can be drawn from the tax and public benefits arenas that favor treating unreported income as base income. First, there is the notion that people should not be able to benefit from illicit behavior by having the gains of such behavior excluded. This is evident in the interpretation of tax laws and Social Security Insurance ("SSI") eligibility,

260. *See* TURNER & PETERSILIA, *supra* note 8, at 67.

261. SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 21–22 (2006).

262. *See* Greene, *supra* note 53, at 31.

which take into account illegal income to ensure people with lawful employment are not treated comparatively harshly.[263] For example, if Bird were to earn the same amount working as a prostitute or Marlene as an off-the-books nanny that Eunice earned cleaning offices, but only Eunice's formal income were to count as base income, then Eunice's calculated ability to pay—and, therefore, the graduated economic sanction imposed—would be higher not due to her culpability but only because her employment is on-the-books. Second, there is an interest in recognizing the "institutional similarity"[264] between work resulting in reported income and the skill and effort that can result in unreported income.[265] Eunice, for example, wakes at 5:00 every morning to cook, manages an intricate daily delivery and occasional catering operation, and protects her investment through negotiations with and payoffs to both local gangs and the police.[266] Not treating her earnings as income arguably demeans her efforts. Finally, treating all forms of income the same supports the underlying goal of the law. Just as the exclusion of illegal activities from the "substantial gainful activity" requirement would "destroy the purpose of the regulations . . . restrict[ing] eligibility for disability benefits to those who are not working" in the SSI context,[267] exclusion of illicit income earned by Bird, Eunice, and Marlene would undermine the goal of determining their actual ability to pay.

There are also, however, serious reasons to consider excluding illicit income from base income, as doing so may inadvertently promote illegal activity and other social ills. As noted above, there is increasing evidence that some people engage in criminal activity in order to pay off economic sanctions,[268] and related concerns led the Supreme Court to warn against treating people with debt from economic sanctions in a way that encourages

263. *See* United States v. Sullivan, 274 U.S. 259, 263 (1927) ("We see no reason . . . why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay."); *see also* Jones v. Shalala, 21 F.3d 191, 192 (7th Cir. 1994) (same concern for disability benefits); Corrao v. Shalala, 20 F.3d 943, 947 (9th Cir. 1994) (same concern for SSI eligibility).

264. *See* Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373, 393–94 (2006).

265. *See, e.g.*, Comm'r v. Groetzinger, 480 U.S. 23, 24–25, 33 (1987) (holding that a man's engagement in full-time legal gambling, which involved significant effort and time studying racing forms and strategizing bets, constituted a trade or business for purposes of the tax code); Barry v. Shalala, 840 F. Supp. 29, 30–33 (S.D.N.Y. 1993) (holding that a man's work as a panhandler, which included regular efforts involving the skill of convincing people to provide him money, constituted a trade and therefore earned income that was excluded from the calculation of his SSI benefit). Not all unreported income comes from such sustained activity; for many, working in the underground economy can involve engaging in several different types of work as opportunities arise, often netting very little income. *See, e.g.*, VENKATESH, *supra* note 261, at 35–36.

266. *See* VENKATESH, *supra* note 261, at 25, 33.

267. Bell v. Comm'r of Soc. Sec., 105 F.3d 244, 246 (6th Cir. 1996).

268. *See supra* notes 144–48 and accompanying text.

a violation of the law.[269] Bird, for example, "came to prostitution from low-wage but legal service sector work (and plans to return someday),"[270] but that goal could be delayed by the addition of economic sanctions to her bills. Additionally, because debt from economic sanctions may contribute to participation in off-the-books employment, it can promote illegal activity by those other than the debtor. For example, though Marlene has the goal of obtaining legal employment,[271] the imposition of economic sanctions may force her to remain in her informal child care position where she lacks labor protections, and therefore may be subject to exploitative working conditions that also violate the law.[272]

Further, there are implications for the credibility of the criminal justice system, particularly where the system is funded through revenues generated by economic sanctions. As noted by the Oregon Court of Appeals, including illicit income in ability to pay considerations "could be regarded as implicitly sanctioning, and benefitting from, unlawful conduct."[273] In rejecting a trial court's determination that an undocumented immigrant should pay restitution based on future ability to work—which, given her status, would have constituted illegal employment—the court provided "a more graphic, but analogous, hypothetical: A defendant with an established history of dealing drugs, or robbing banks, is ordered to pay restitution. Could the court, in imposing restitution, base its 'ability to pay' determination on a projection that the defendant will continue to sell drugs or rob banks in the future?"[274]

There are no options for calculating base income that satisfy both the reasons for and the reasons against including illicit income noted above, but there are second best alternatives. One option would be to include money or property obtained through criminal activity or off-the-books but otherwise licit work that the defendant possesses at the time of sentencing—which helps level the playing field between those in the formal and informal economies—but refrain from including within the income calculation future activity—which helps avoid the promotion of ongoing illegal behavior. The Supreme Court's sentencing doctrine provides some support for this outcome. The Court has treated assets illegally obtained prior to sentencing as subject to forfeiture for purposes of the Excessive Fines Clause because such forfeitures would "clearly [be] a form of monetary punishment no different, for Eighth

269. *See* Bearden v. Georgia, 461 U.S. 660, 670–71 (1983) (warning that revoking probation where a person is unable to pay restitution "may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation").

270. VENKATESH, *supra* note 261, at 26.

271. *See id.* at 39.

272. *Id.* at 13, 29.

273. State v. Pacheco, 42 P.3d 351, 354–55 (Or. Ct. App. 2002).

274. *Id.* at 355 n.4.

Amendment purposes, from a traditional 'fine.'"[275] The Court has also, however, emphasized the need to promote legal work in assessing ability to pay economic sanctions.[276] Of course, an additional second best option remains. As with attempts to predict employability,[277] lawmakers could reasonably choose to avoid the use of economic sanctions where they may lead to illegal activity by relying instead on non-incarcerative alternative sanctions.

B. STATUTORY MAXIMUM CAPS

In addition to devising a method for calculating ability to pay, a key consideration in designing a system for graduating economic sanctions is whether to employ statutory maximum caps on the sanction for any given offense. On the one hand, the use of maximum caps may undermine the goals of revenue generation[278] and deterrence.[279] In the Staten Island pilot, for example, the use of low caps resulted in reduced revenue in approximately a quarter of day-fines cases.[280] With respect to deterrence, studies have suggested that "wealthier individuals are less responsive to changes in [ungraduated] fine levels because fines are relatively less costly as income increases,"[281] and that people of sufficient means may come to see low economic sanctions as merely the price of the activity, rather than a

275. Alexander v. United States, 509 U.S. 554, 558 (1993).

276. *See* Bearden v. Georgia, 461 U.S. 660, 670–71, 673 (1983). Lawmakers would be well-served to consider the ways in which collateral consequences of conviction promote reliance on illicit work. The use of collateral consequences that undermine financial stability has grown over time and is now pervasive, see United States v. Nesbeth, 188 F. Supp. 3d 179, 180–86 (E.D.N.Y. 2016), including, across the country, over 36,000 restrictions on employment, occupational and business licensing, and government contracting, nearly 2,500 restrictions on government benefits and housing, over 2,000 restrictions on obtaining motor vehicle licenses, and nearly 700 restrictions on participation in or funding for educational programs. *See National Inventory of the Collateral Consequences of Conviction*, JUSTICE CTR., https://niccc.csgjusticecenter.org (last visited Sept. 10, 2017). The harder the government makes it for people to obtain and maintain employment or public assistance, the more people will fall into the category of those whose earnings are unreported.

277. *See supra* notes 222–23 and accompanying text.

278. *See supra* Part II.B.

279. Given these concerns, any jurisdiction that uses maximum caps to ensure the political palatability of graduating economic sanctions should make efforts to gather sufficient data to reassess that decision—and how it may be affecting revenue generation and deterrence—down the road. For example, in Staten Island, the courts calculated and recorded what the day-fine would have been for wealthier defendants who butted up against its caps so that the amount of revenue lost as a result of the caps was made plain. *See infra* notes 337–38 and accompanying text.

280. *See supra* note 108; *see also* UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 12 (stating that if the Staten Island pilot had not used low caps, "the total amount of fines imposed would have increased by about 50 percent"); McDonald, *supra* note 11, at 8 ("If such caps are eliminated, and if the assessment of day fines is permitted to occur unfettered, fine revenues may increase substantially.").

281. COUNCIL OF ECON. ADVISORS, *supra* note 37, at 4.

deterrent.[282] On the other hand, the use of statutory caps may be necessary to ward off concerns regarding whether a system for graduation strikes an appropriate balance between the formal equality offered by a specific and equal dollar amount imposed on all defendants regardless of means, and the substantive equality that attends to a punishment's financial effect, which necessarily depends on one's financial condition.[283] While the graduation of economic sanctions does not resolve the debate over whether formal or substantive equality is preferable, combining graduation with statutory maximum caps may provide a workable accommodation of both measures of equality.

The use of statutory maximum caps helps insulate a system of graduation based on ability to pay against concerns underlying notions of formal equality. Those favoring formal equality believe that graduation for ability to pay would "reflect an acceptance of class differentiation and economic redistribution, ideas that are repugnant to many Americans."[284] This concept is based on the notion that a defendant's financial condition is unrelated to culpability, and that equally culpable defendants should receive the same amount of punishment in order to avoid reverse wealth discrimination.[285] For example, shortly before the implementation of the Ventura County pilot project, a newly elected judge—who was expected to oversee a high percentage of day-fines eligible cases—proved to be "an outspoken adversary of the project,"[286] claiming that graduation constituted wealth discrimination in violation of the Equal Protection Clause.[287] Though this and other constitutional claims[288]

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282. *See* Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEG. STUD. 1, 13–14 (2000) (regarding a study where parents were fined for picking up their children late from daycare and concluding that many parents treated the fine as simply a price for additional childcare).

283. *Cf.* Colgan, *supra* note 1, at Part II.A.

284. 2 Hignite & Kellar, *supra* note 27, at 547.

285. *See, e.g.*, *Should Traffic Tickets Be Scaled to Personal Income Like Taxes?*, DEBATE.ORG, http://www.debate.org/opinions/should-traffic-tickets-be-scaled-to-personal-income-like-taxes (last visited Sept. 10, 2017) (providing an example of the debate over graduation according to ability to pay). References to reverse wealth discrimination are a persistent refrain in debates about the graduation of economic sanctions in the United States. Such discussions invariably include references, for example, to high-dollar traffic tickets assessed against people of considerable wealth in Finland. *See, e.g.*, 2 Hignite & Kellar, *supra* note 27, at 546; Telephone Interview with David Factor, *supra* note 28 (stating that rumors about a "$100,000 speeding ticket" came up on occasion during the development of the Oregon pilot project); Pinsker, *supra* note 35 ("In 2002, a Nokia executive was fined the equivalent of $103,000 for going 45 in a 30 zone on his motorcycle . . . ."); Rosenberg, *supra* note 35 (mentioning that a man was issued a $58,000 speeding ticket in Finland). Similarly, warnings often arise regarding the downfall of day-fines in Great Britain following the imposition of a £1200 fine "for tossing a potato chip bag on the ground." *See* David Moxon, *England Abandons Unit Fines*, *in* INTERMEDIATE SANCTIONS IN OVERCROWDED TIMES 36, 36–43 (Michael Tonry & Kate Hamilton eds., 1995).

286. MAHONEY, *supra* note 73, at 39.

287. *Id.*

288. The judge also raised two other claims that were not colorable. First, he claimed that because, as a pilot project, only Ventura County judges could apply day-fines, it created an

raised by the judge were not colorable,[289] the threat of constitutional challenge brought the project to a halt[290] and exemplified the concerns of formal equality proponents. Members of the private defense bar had previously complained that the use of gross family income as base income would result in an increase over tariff-fines for people in "two-income households[,]" at "middle-income" levels, or who were "affluent."[291] They further contended that those increased penalties were not adequately reined in by an "outrageous" $10,000 statutory cap for misdemeanors.[292] In contrast, project planners in Staten Island, where a $1,000 statutory cap for misdemeanor offenses was employed, received no resistance to the use of graduated economic sanctions despite the significant wealth of a portion of the community.[293] These competing experiences suggest that by flattening the adjustment based on income at the high-end of the economic scale, a statutory maximum cap set at a low enough rate to preclude high dollar fines for minor

unconstitutional geographic disparity between California's counties. *Id.* The United States Supreme Court had previously held, however, that "[t]erritorial uniformity is not a constitutional requisite," and therefore states may create geographic differences "at least on an experimental basis." Salsburg v. Maryland, 346 U.S. 545, 552–53 (1954). He also claimed that allowing judges to set penalty ranges constituted "an unlawful usurpation of legislative powers" in violation of the separation of powers doctrine. MAHONEY, *supra* note 73, at 39. The judiciary, however, can participate in establishing even binding sentencing ranges without violating either the separation of powers or nondelegation doctrines so long as the legislature provides sufficient guidance to cabin the work and the work is administrative, rather than judicial in nature. *See generally* Mistretta v. United States, 488 U.S. 361 (1989) (regarding judicial involvement in the development of the United States Sentencing Guidelines). Second, the judge claimed that requesting income information from defendants violated the Fourth Amendment prohibition on unreasonable searches and seizures. MAHONEY, *supra* note 73, at 39. This claim could not have been sustained, however, because although a broad order to disclose information unrelated to the day-fines inquiry could render a request unreasonable, see, for example, United States v. Dionisio, 410 U.S. 1, 11 (1973) (prohibiting overly broad grand jury subpoenas), a narrowly tailored order would not, particularly where the information has been shared or produced by third parties, as many financial records would be by necessity. *See* Fisher v. United States, 425 U.S. 391, 401 n.7 (1976) (stating that a summons narrowly drawn to capture documents directly relevant to a tax investigation would survive a Fourth Amendment challenge); *see also* People v. Crowson, 660 P.2d 389, 392 (Cal. 1983) (en banc) (holding that the California constitution is coextensive to the Fourth Amendment).

289. The judge's equal protection argument was not colorable because when made the Court had held that in some circumstances consideration of a defendant's means was necessary to comport with the Equal Protection Clause. *See* Bearden v. Georgia, 461 U.S. 660, 674 (1983) (striking down automatic revocation of probation for failure to pay without consideration of ability to do so); *see also* Fuller v. Oregon, 417 U.S. 40, 48 n.9 (1974) (upholding a statute that required consideration of a defendant's financial means in imposing a sentence and noting that if a defendant had raised an equal protection challenge on the basis of wealth discrimination it would have failed because the statute did not allow increased punishment for the failure to pay unless the failure was willful).

290. MAHONEY, *supra* note 73, at 38–40.

291. *Id.* at 42, 53.

292. *Id.* at 52.

293. *See* Telephone Interview with Arnold Berliner, *supra* note 28.

offenses can help avert claims that graduation will result in inappropriate class differentiation. Further, because caps can be adjusted upward or downward according to offense seriousness,[294] they can be directly linked to defendant culpability.[295]

At the same time that statutory maximum caps err toward formal equality at the high-end of the economic spectrum, and thus do not eliminate the perception that without full graduation fines may constitute a mere slap on the wrist of the wealthy,[296] graduation occurring underneath those caps allows for improved substantive equality for defendants at the low-end of the financial spectrum where substantive harms are greatest. It is at that low-end where people saddled with unmanageable economic sanctions experience a qualitatively different form of punishment than people who can easily pay.[297] Even setting aside problematic practices such as incarceration for the failure to pay, people burdened with economic sanctions beyond their means often must make choices about whether and how to fulfill basic needs such as food, housing, and hygiene or meet child support obligations under the constraint of the requirement to pay economic sanctions.[298] Ongoing debt has also been linked to difficulties in obtaining and maintaining employment and housing.[299] For many, the inability to pay off debts, particularly when exacerbated by interest and collections fees, renders the punishment perpetual.[300] By placing economic sanctions within a defendant's reach, graduation for ability to pay increases substantive equality by shrinking the difference in punitive experience between those who can easily pay and those of limited means.

Graduation for ability to pay may also improve substantive equality by reducing informal considerations of financial condition at sentencing that can be obscured by the purported formal equality of ungraduated tariff-fines. Shortly before the first day-fines project launched in Staten Island, a survey of 1261 judges across the United States[301] revealed that a defendant's financial condition was taken into account in many cases where no system for graduation existed. Survey respondents considered two hypothetical cases:

294. In several jurisdictions, statutory maximum caps were graduated according to offense seriousness. *See* TURNER & PETERSILIA, *supra* note 8, at 20 tbl.4.1, 39 tbl.5.1, 52 tbl.6.1, 64 tbl.7.1.

295. In addition to graduation for ability to pay in and of itself, the use of a day-fines model may be useful for further tempering concerns about formal equality of treatment because, in a day-fines system, penalty units are imposed based exclusively on the defendant's culpability and the seriousness of the offense. *See supra* note 17 and accompanying text. Therefore, it provides a component of formal equality to the sentence, which, when multiplied by the defendant's adjusted daily income, meets the desire for substantive equality as well.

296. *See, e.g.*, UNITED STATES DEP'T OF JUSTICE, *supra* note 6, at 2; COLE ET AL., *supra* note 16, at 30.

297. *See* Colgan, *supra* note 4, at 290–95.

298. *Id.* at 293–94.

299. *See* State v. Blazina, 344 P.3d 680, 684–85 (Wash. 2015) (en banc).

300. *See* Colgan, *supra* note 4, at 291.

301. COLE ET AL., *supra* note 16, at iii.

one involving "a janitor (who had a prior bad check conviction and two larceny convictions)" and who was convicted of "the theft of a $40 pair of slacks from a department store," and the other involving "a middle-class accountant (who had one prior DWI conviction)" and who was convicted of "embezzling $25,000 from his employer."[302] The survey respondents were more likely to sentence the janitor to a term of imprisonment and the accountant to pay a tariff-fine.[303] While limited jurisdiction judges who handled lower-level offenses for which tariff-fines were a primary means of punishment were less likely to opt for incarceration, "most of the judges responding to the survey indicated that they would be less likely to impose a fine if the defendant was unemployed or on public assistance."[304]

In addition to evidence that many judges informally consider financial condition in sentencing low-income defendants more harshly, other judges may err in the opposite direction. Researchers found that prior to the implementation of the day-fines pilot project, when faced with a defendant unable to pay Staten Island judges would often impose a sentence of "adjournment in contemplation of a dismissal"—essentially a sentence that allows the defendant to complete a particular act, such as community service—at which point the case would have been dismissed, even where a fine would have otherwise been imposed.[305] In other cases, judges simply dismissed the charge, apparently due to the judge's perception that the court lacked the ability to impose a suitable punishment as a result of the defendant's precarious financial circumstances rather than a lack of evidence in support of conviction.[306]

The survey and the Staten Island results indicate that judges were already—albeit informally and perhaps unconsciously—considering ability to pay when imposing sentences, or even when adjudicating guilt or innocence. In some cases, this meant people with limited means were incarcerated when they would have otherwise received a fine if they had greater wealth, and in other cases it meant they received a reduced sentence or avoided punishment entirely. In other words, despite the supposed formal equality of ungraduated tariff-fines, the actual treatment of defendants can depend on financial capacity.

By surfacing the consideration of financial capacity, graduation of economic sanctions according to ability to pay can help undo the unequal treatment of defendants hidden within formally equal economic sanctions. For example, though stressing that the number of cases in the Staten Island day-fines pilot were few enough that significant testing on this issue was not

302. Hillsman, *supra* note 13, at 65.
303. *Id.*
304. COLE ET AL., *supra* note 16, at 30.
305. WINTERFIELD & HILLSMAN, *supra* note 79, at 28.
306. *Id.* at 27.

possible,[307] researchers determined that 31% of day-fines cases would have received an adjournment in contemplation of a dismissal under the tariff-fines system,[308] and that 28% of the cases in which judges imposed day-fines would have been dismissed outright if day-fines had not been available.[309]

In reality, these tradeoffs between the formal equality offered by statutory maximum caps at the high-end of the economic spectrum and the substantive equality graduation affords at the low-end will skew in favor of substantive equality due to the overrepresentation of low-income individuals subjected to ticketing and sentencing processes. Defendants fell below existing statutory caps in approximately 75% of cases in Milwaukee and Staten Island,[310] and in apparently all cases in the other day-fines projects.[311] That would likely remain true today, as a conservative estimate based on eligibility for individual defense services in current criminal cases would place approximately 80% of defendants at the low-end of the financial spectrum.[312] Further, while in some jurisdictions fines for minor violations such as traffic offenses may be more evenly distributed across income levels, many low-income communities are heavily policed, and thus low-income residents of those neighborhoods are more likely to be fined.[313] In other words, despite concerns about the implications of statutory maximum caps on revenue generation and deterrence,[314] the improved palatability created by statutory maximum caps may justify their implementation in order to obtain the benefits of graduation for ability to pay for the financially vulnerable upon whom economic sanctions are most likely to be imposed.

IV. CONCLUSION

Today, as on the eve of the American day-fines experiment, we are faced with a system dominated by regressive tariff-fines, which take an incredible toll on people living in precarious financial conditions. The graduation of

307. *See id.* at 24 n.4.

308. *Id.* at 28.

309. *Id.* at 27; *see also* COPPOLO, *supra* note 60 (noting that a positive aspect of the day-fines program is that it resulted in some punishment for defendants whose cases otherwise would have been dismissed because judges would have seen tariff fines as unworkable given a defendant's indigency).

310. *See supra* note 108; Worzella, *supra* note 71, at 72.

311. *See infra* notes 347, 364–65, 378, 397 and accompanying text.

312. *See* Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html. This figure is a conservative estimate of those who would benefit from graduation because in some states indigency cut-offs for appointed counsel are so low that a person may qualify for public benefits but not a public defender. *See, e.g.*, Alex Stuckey, *In Missouri, Public Defenders Describe Mountains of Work, Low Pay*, ST. LOUIS POST-DISPATCH (Oct. 19, 2015), http://www.stltoday.com/news/local/crime-and-courts/in-missouri-public-defenders-describe-mountains-of-work-low-pay/article_c46b8f10-4f97-5a19-932e-c4c229a3b722.html.

313. *See, e.g.*, Colgan, *supra* note 39, at 1183–1220.

314. *See supra* notes 278–82 and accompanying text.

economic sanctions according to ability to pay has the potential to serve as a much needed reform.

Perhaps no state better exemplifies the changing political tides in favor of adopting a system for graduating economic sanctions than Arizona. Like the nation as a whole, Arizona politicians embraced the tough-on-crime movement of the 1980s and 1990s.[315] At the same time, Arizona was becoming increasingly reliant on its courts to generate revenue.[316] Though Arizona had used economic sanctions for that purpose since the late 1960s, its employment of sanctions as a substitute for tax revenue increased through laws passed by its Legislature and through voter initiative over time.[317] By the economic crash of the early 2000s, Arizona was not just using economic sanctions to fund its courts, but also to finance myriad unrelated expenditures, such as a fund for political candidates established through Arizona's "Clean Elections" program.[318] With the increasing use of surcharges and administrative fees helping to prop up Arizona's economy and mandatory minimum fines and restitution in play,[319] it became more difficult to use the day-fines model through which all economic sanctions were to be distributed from the calculated amount, and the Maricopa County day-fines program ultimately folded.[320]

Following years of decline in the efficacy of its use of economic sanctions, in 2016 Arizona Supreme Court Chief Justice Scott Bales established a task force made up of judges, probation personnel, prosecutors, public defenders, and civil rights advocates, to study economic sanctions practices in its courts.[321] In reporting on the results of its examination, the task force warned that in light of high poverty rates, "[i]f justice in Arizona is to be administered fairly, the justice system must take account of the challenges that court-ordered sanctions pose for those living in poverty or otherwise struggling economically."[322]

Arizona's task force ultimately recommended numerous reforms, including adopting a method to assess ability to pay,[323] as well as developing

315. *See* Telephone Interview with Barbara Broderick, *supra* note 28 (explaining that the day-fines project occurred around the same time that Arizona was expanding three strikes laws and the ability to try juveniles as adults); *supra* note 35 and accompanying text.

316. *See, e.g.*, Janet Napolitano, Surcharges on Local Administrative Fees and Forfeitures, Arizona Attorney General's Office Opinions I00-015 (2000).

317. *Id.*

318. *See* ARIZ. REV. STAT. § 16-954(C) (2015).

319. *See infra* note 357 and accompanying text.

320. Telephone Interview with Barbara Broderick, *supra* note 28 (explaining that "[a]s we moved into 2000 and money started to dry up at the state and county levels," the use of such economic sanctions increased, interfering with the day-fines model).

321. *See* JUSTICE FOR ALL, *supra* note 86, at 1.

322. *Id.* at 9.

323. *Id.* at 2.

and expanding non-incarcerative, non-economic, alternative sanctions.[324] While attempts at legislative reform in 2016 passed in the Arizona Senate only to be held up in its House,[325] and those entities that have become dependent on funds generated through economic sanctions may resist,[326] the support of Arizona's Governor, Administrative Office of the Courts, and bipartisan organizations is moving the legislative effort forward.[327] In the meantime, the courts have sought to institute reforms through rule changes.[328]

Arizona's task force is not alone in recognizing that graduation of economic sanctions according to ability to pay is a promising reform. The number of jurisdictions mandating ability to pay determinations is expanding, including in tough-on-crime bastions such as Louisiana,[329] Nebraska,[330] and Texas.[331] An increasingly diverse bipartisan coalition is calling for similar reforms nationwide.[332]

As reform efforts progress, lawmakers should take heed of the lessons from America's day-fines experiment and other mechanisms for means-adjustment when developing the design and operation of graduation methods to ensure that benefits of such systems may accrue to the government, and especially to people of limited means for whom reforms are critical. A properly designed and implemented system for graduation—one that accurately assesses ability to pay and applies that assessment to graduate all forms of economic sanction—can be administered effectively and efficiently, keep stable or even improve fiscal outcomes, and promote equality and fairness in sentencing.

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324. *See id.* at 3, 19.

325. *See* Byers, *supra* note 51.

326. *See, e.g.*, Megan Cassidy, *How a $95 Phoenix Speeding Ticket Becomes $243*, REPUBLIC (Jan. 28, 2016, 8:38 AM), http://www.azcentral.com/story/news/local/phoenix/2016/01/27/how-95-phoenix-traffic-ticket-becomes-243/79375008 (quoting Kim MacEachern of the Arizona Prosecuting Attorneys' Advisory Council as expressing concern that it could not compete with other public services for tax dollars if it lost funding from surcharges).

327. *See* Katie Campbell, *Age of "Tough-On-Crime" Policies Is Fading in Arizona*, ARIZ. CAPITOL TIMES (June 2, 2017), http://azcapitoltimes.com/news/2017/06/02/age-of-tough-on-crime-policies-is-fading-in-arizona; *see also* Telephone Interview with Tom O'Connell, *supra* note 28 (stating that reform legislation is likely to be reintroduced in the next legislative session).

328. *See id.*; Byers, *supra* note 51.

329. *See* 2017 La. Acts 260 (requiring financial hardship determination for economic sanctions).

330. *See* 2017 Neb. L.B. 259 §§ 5–13 (providing for ability to pay hearings at sentencing and during post-sentencing collections processes); *see also* Julia Shumway, *New Nebraska Law Aims to Keep Poor People Out of Jail*, U.S. NEWS & WORLD REP. (May 28, 2017, 9:45 AM), https://www.usnews.com/news/best-states/nebraska/articles/2017-05-28/new-nebraska-law-aims-to-keep-poor-people-out-of-jail (describing the bill as having "little opposition").

331. *See* TEX. CODE CRIM. PROC. ANN. art. 14.06(b) (West 2015) (amended 2017) (requiring an ability to pay determination prior to imposing fines for lower-level offenses, allowing judges to lower fines or substitute community service, and prohibiting jail as a response to an inability to pay economic sanctions).

332. *See supra* note 46 and accompanying text.

APPENDIX: DAY-FINES PROJECT OVERVIEWS

The following provides a brief overview of the structures of each pilot project during the American day-fines experiment.

A. STATEN ISLAND, NEW YORK

Staten Island pilot project planners anticipated that the use of day-fines would ultimately expand to felony cases,[333] but chose to initiate the project in Staten Island's limited jurisdiction court in which the court had jurisdiction over misdemeanor offenses for which tariff-fines were a primary form of punishment.[334] In Staten Island, judges were free to employ day-fines in any defendant's case, and though day-fines were seen as a priority in most cases, judges had authority to combine day-fines with other forms of punishment, including rehabilitative services and incarceration.[335] It appears that all forms of economic sanctions, including restitution and surcharges, were incorporated into the day-fines amount, so that the court imposed a single economic sanction.[336] Judges were, however, prevented from imposing full day-fines on wealthier defendants due to pre-existing statutory maximum caps.[337] For purposes of assessing the effect of these caps, court personnel calculated and documented the day-fine amount, and then imposed what would be the lower statutory maximum sentence.[338] Staten Island's planners also employed two modes of collections methods during the pilot: One set of day-fines defendants received the court's standard collection practices, and a second group received enhanced collection services, which included payment reminders and more robust communication with debtors during the collections process.[339]

A decision to use VERA Institute researchers to conduct financial screening of defendants[340] may have inadvertently contributed to the demise

333. Rose McBrien, *Tailoring Criminal Fines to the Financial Means of the Offender—A Richmond County Judge's View*, 72 JUDICATURE 42, 43 (1988). In developing the project, planners devised penalty units for felonies so that the use of day-fines could easily expand; serious felonies carried a maximum of 360 units. *See* Greene, *supra* note 53, at 22; Hillsman, *supra* note 13, at 84.

334. *See* Greene, *supra* note 11, at 42–43.

335. *See* McBrien, *supra* note 333, at 43.

336. In Staten Island, restitution and a related surcharge were possible penalties, N.Y. CRIM. PROC. LAW § 420.10(1) (McKinney 1994), and planners considered including those sanctions within the scope of the day-fines amount so that the sanction imposed would be within a defendant's means. *See* HILLSMAN & GREENE, *supra* note 59, at 44–45. Later analyses of the project as implemented, however, do not confirm whether day-fines ultimately included all economic sanctions. *See generally* Greene, *supra* note 53.

337. *See* Greene, *supra* note 53, at 34.

338. *See* WINTERFIELD & HILLSMAN, *supra* note 108, at 2.

339. *See id.* at 2–3; Nadine Brozan, *In S.I. Court, Each Is Fined to Fit Means*, N.Y. TIMES (Sept. 17, 1988), http://www.nytimes.com/1988/09/17/nyregion/in-si-court-each-is-fined-to-fit-means.html; Greene, *supra* note 53, at 34–35.

340. *See* Hillsman, *supra* note 78, at 24.

of the program. That design meant that when the pilot project ended, a staffing gap was created in the misdemeanor court.[341] That, and any expansion of the project to felony cases, would have created a need for additional staffing to engage in intake and the ability to pay calculation.[342] Therefore, in addition to general difficulties institutionalizing new practices in New York at that time,[343] county legislators were reticent to expend money on staffing in the short term, despite evidence that day-fines likely would lead to revenue increases and decreased expenditures in the long-term.[344]

B. MARICOPA COUNTY, ARIZONA

The Maricopa County pilot project allowed day-fines for probation-eligible felony offenses so long as defendants did not have significant supervision or treatment needs that could not be accommodated through the day-fines model.[345] Day-fines were imposed in combination with simple probation, where the probation terms were limited to remaining crime-free and paying the day-fine, and which terminated upon full payment.[346] In theory, day-fines imposed in this program were subject to statutory caps, however, the caps were high enough that it appears they did not affect the court's ability to impose day-fines in any case.[347]

Maricopa County's project planners were sensitive to the way economic sanctions imposed in addition to the day-fines amount would undermine the value of graduating the day-fine to ability to pay,[348] and so chose to include all economic sanctions—including restitution, surcharges, and fees—into a single package from which monies would be distributed to satisfy various sanctions mandated by the state, with any leftover monies going to support the day-fines program.[349] Pre-existing mandatory minimum sentencing requirements in Arizona's code, however, prevented the full employment of this model, and meant that some defendants were disqualified where mandatory restitution would be too high to be accommodated within the day-fines amount.[350] While this limited the use of day-fines as a sentencing option,

341. *See id.*; Telephone Interview with Judith Greene, *supra* note 28.

342. *See* Telephone Interview with Arnold Berliner, *supra* note 28.

343. *See id.*; Telephone Interview with Douglas McDonald, *supra* note 28.

344. *See* Telephone Interview with Arnold Berliner, *supra* note 28; *see also supra* notes 108–14 and accompanying text.

345. *See* TURNER & PETERSILIA, *supra* note 8, at 22–23.

346. Turner & Greene, *supra* note 17, at 4.

347. *See* TURNER & PETERSILIA, *supra* note 8, at 20.

348. JUDITH A. GREENE, THE MARICOPA COUNTY FARE PROBATION EXPERIMENT: AN EFFORT TO INTRODUCE A MEANS-BASED MONETARY SANCTION AS A TARGETED FELONY-LEVEL INTERMEDIATE SANCTION 17 (1996).

349. *See id.* at 21–27; TURNER & PETERSILIA, *supra* note 8, at 21.

350. *See* TURNER & PETERSILIA, *supra* note 8, at 77; Turner & Greene, *supra* note 17, at 6. In addition to mandatory restitution, the Arizona code also required judges to impose mandatory statutory fines in some cases, but rather than disqualify these defendants entirely, the Maricopa

it allowed planners to test the imposition of day-fines under the established calculation mechanism and the distribution of a single package of economic sanctions to different funds.

In addition, the Maricopa County day-fines experiment involved the use of supportive collections methods, which were incorporated into the simple probation imposed with the day-fine.[351] These enhanced methods were designed to provide clear instructions regarding payment plans, payment reminders, and payment methods, such as pre-addressed envelopes that made payment straightforward. Probation officers also sent delinquency letters and reached out to defendants by phone or in person when payments were overdue.[352]

The Maricopa County pilot project's success at increasing collection rates,[353] decreasing probation expenditures,[354] and reducing recidivism,[355] led to the continuation of the project for several years.[356] By the mid-2000s, however, Arizona's increased use of mandatory fines and surcharges, particularly in drug and DUI cases, as well as a statute mandating full restitution awards, exacerbated difficulties in incorporating all economic sanctions within the day-fines amount.[357] That, combined with pressure on lawmakers to appear tough-on-crime,[358] and periodic staffing changes that created a barrier to full institutionalization of the day-fines method,[359] ultimately led to the end of Maricopa County's use of day-fines. Today, however, Arizona is seeing renewed pressure to create a system for graduating economic sanctions according to ability to pay.[360]

C. BRIDGEPORT, CONNECTICUT

The Bridgeport pilot project employed day-fines in misdemeanor and low-level felony cases.[361] Though the project was hamstrung by statutory restrictions that precluded combining day-fines with probation sentences,

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County project was designed to allow judges to calculate the day-fine and then impose the overage from the mandatory minimum in a separate order that would remain as an outstanding obligation after the day-fine was paid and the linked probation period terminated. *See* Greene, *supra* note 348, at 26–27.

351. *See* Telephone Interview with Barbara Broderick, *supra* note 28 (describing the supportive collection methods used during the day-fines period).

352. *See* PILCHER & WINDUST, *supra* note 75, at 4.

353. *See supra* notes 97–98, 124–25 and accompanying text.

354. *See supra* note 126 and accompanying text.

355. *See supra* notes 147–48 and accompanying text.

356. *See* Telephone Interview with Barbara Broderick, *supra* note 28.

357. *See id.*; Telephone Interview with Judith Greene, *supra* note 28; Telephone Interview with Tom O'Connell, *supra* note 28; Telephone Interview with Ronald Reinstein, *supra* note 28.

358. *See* Telephone Interview with Judith Greene, *supra* note 28

359. *See* Telephone Interview with Barbara Broderick, *supra* note 28.

360. *See supra* notes 321–28 and accompanying text.

361. TURNER & PETERSILIA, *supra* note 8, at 56.

defendants were otherwise eligible for day-fines sentences unless the court believed the defendant failed to provide accurate income data needed for the day-fine calculation.[362] Existing records are unclear as to whether economic sanctions such as surcharges and fees were incorporated into the day-fines amount, but Bridgeport planners excluded restitution awards.[363] Connecticut law mandated statutory maximum fines,[364] but the caps were sufficiently high that there is no indication that its courts had to reduce calculated day-fines to fit within those parameters.[365] Further, prior to implementing the pilot projects, Bridgeport had essentially no meaningful system of collections, so part of the pilot included development of basic collections practices.[366] Despite improved collections rates during the pilot period,[367] Bridgeport abandoned the project due to a series of technological problems related to the computer systems used to track day-fines amounts, the need to engage in complicated court procedures brought on by complexities in Connecticut law, and the rotation of the judge trained to use day-fines to another court.[368] None of these problems, however, were inherent to the day-fines model.[369]

D. POLK COUNTY, IOWA

Like Bridgeport, the Polk County pilot project made both aggravated misdemeanors and low-level felonies day-fines eligible.[370] In practice, however, day-fines were primarily employed in cases involving driving with a suspended license, driving while intoxicated, and drug possession.[371] Polk County prosecutors screened defendants for the day-fines program, a process which involved analyzing the defendant's criminal history and determining the need for supervision or treatment.[372] Polk County planners excluded any cases in which the prosecutor recommended a term of incarceration.[373] Additionally, the Iowa Legislature suspended mandatory minimum fines during the pilot period,[374] and incorporated a significant surcharge into the day-fines amount.[375] Polk County judges were still mandated to impose court costs, interest, fees for public defense services, and other assessments in

362. *Id.*
363. *Id.* at 55 n.10.
364. *Id.* at 52 tbl.6.1.
365. *See generally id.*
366. *See id.* at 52, 59.
367. *See supra* notes 99, 133 and accompanying text.
368. *See supra* notes 134–38 and accompanying text.
369. *See* TURNER & PETERSILIA, *supra* note 8, at xvi.
370. *Id.* at 42.
371. *Id.* at 49–50.
372. *Id.* at 42.
373. *Id.*
374. 1993 Iowa Acts 157–58 § 2.
375. *Id.*; TURNER & PETERSILIA, *supra* note 8, at 43.

addition to the day-fine.[376] Overall, however, nearly 80% of all economic sanctions imposed during the pilot period were incorporated into the day-fines amount.[377] Iowa also had statutory maximum fines, though there is no indication in contemporaneous analyses of the project that the court had to reduce day-fines to accommodate those caps.[378] Polk County's pilot project also included the development of collections mechanisms, which, like Bridgeport, were effectively non-existent prior to the project's implementation.[379]

Polk County's experience with day-fines provides a key example of the difficulties faced in renewing such a project at the height of the tough-on-crime movement. A bill to continue the day-fines program was introduced in 1995, but did not make it through the legislature.[380] Laws that were enacted expanded the substantive criminal law by adding new crimes or relaxing actus reus requirements or mens rea standards;[381] raising offense levels;[382] reducing opportunities for pre-trial bail;[383] creating a sex offender registry;[384] and automatically excluding juveniles over the age of 16 from juvenile court.[385] There had been hope that legislation reinstituting the day-fines project would be renewed in 1996,[386] but lawmakers again turned their attention to establishing new criminal offenses and higher penalties,[387] and expanding the scope of the sex offender registry.[388] Iowa lawmakers also restricted the definition of indigency to make it more onerous for low-income defendants to receive the assistance of defense counsel in criminal matters,[389] increased the amount of money the state would seek to recoup from indigent defendants through economic sanctions,[390] and expanded the scope of crimes which were subject to restitution.[391] With an increased emphasis on both

376. *See* TURNER & PETERSILIA, *supra* note 8, at 43, 47 tbl.5.5.

377. *See id.* at 47 tbl.5.5.

378. *See id.* at 39–40.

379. *Id.* at 39, 43, 48–49.

380. *Id.* at 80.

381. 1995 Iowa Acts 164–65, 235. *But see* 1995 Iowa Acts 469–70 § 49 (amending the definition of assault to exclude school district employees who intervene in fights on school grounds).

382. 1995 Iowa Acts 184–85, 470 § 50.

383. *Id.* at 160.

384. *See id.* at 265–71.

385. *See id.* at 462 § 5.

386. *See* TURNER & PETERSILIA, *supra* note 8, at 80.

387. *See* 1996 Iowa Acts 1–2, 4, 18–27, 86–87, 156, 174–75, 184–84 § 4, 316–21 §§ 26–30, 410 § 5.

388. *See id.* at 300–01.

389. *See id.* at 513 § 10.

390. *See id.* at 511–19.

391. *See id.* at 516–17 § 21. Lawmakers also shifted the response to a failure to pay restitution by restricting the use of civil judgments and preserving the courts' ability to hold people in arrears in contempt of court. *See id.* at 517–19 §§ 22–23.

getting tougher on crime and increasing the availability of economic sanctions, it is no wonder that the day-fines experiment fell by the wayside.

E. COOS, JOSEPHINE, MALHEUR, AND MARION COUNTIES, OREGON

Oregon used day-fines for misdemeanors and low-level felonies.[392] Like Polk County, eligibility for day-fines was dependent on the defendant's criminal history and need for supervision or treatment.[393] The Oregon day-fines amount incorporated statutory fines and some other economic sanctions, but excluded specific surcharges and fees linked to particular offenses.[394] If the day-fines package was too low to accommodate a mandatory restitution award, defendants were excluded from the day-fines project.[395] If the day-fine was lower than a statutory mandatory minimum fine, however, state law allowed the court to impose the mandatory minimum and then suspend the portion of the fine above the day-fine amount.[396] While Oregon had statutory maximum caps that may have forced a reduction of day-fines in some cases, no actual reductions were captured in the contemporaneous evaluations of Oregon's pilots.[397] Finally, Oregon had long-standing, serious deficiencies in its collections process, which remained a problem during the pilot[398] despite improvements in each county.[399]

As detailed in Part II, design flaws in Oregon's model for calculating ability to pay and its decision to impose ungraduated sanctions in addition to the day-fines amount led to increases in total economic sanctions imposed despite high rates of poverty that should have resulted in decreased sanctions.[400] Therefore, the day-fines model was abandoned in favor of a preexisting statutory model for calculating ability to pay that allowed judges greater flexibility in graduating economic sanctions for people of limited means.[401]

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392. *See* TURNER & PETERSILIA, *supra* note 8, at 66. Marion County only used day-fines in misdemeanor cases. *See id.* at xvii.

393. *See id.* at 66.

394. FORMAN & FACTOR, *supra* note 59, at 34; TURNER & PETERSILIA, *supra* note 8, at 68.

395. TURNER & PETERSILIA, *supra* note 8, at 66.

396. *Id.* at 68.

397. *Id.* at 68–69; FORMAN & FACTOR, *supra* note 59, at 24–34.

398. FORMAN & FACTOR, *supra* note 59, at 28–29, 32, 39–40.

399. *See id.* at 25, 27–29, 31–32, 39. Court staff also struggled with computer systems used in the day-fines pilots, having only recently converted from storing data on "3x5 cards." Telephone Interview with David Factor, *supra* note 28.

400. *See supra* notes 173–86 and accompanying text.

401. *See supra* notes 187–94 and accompanying text. Even if proponents of graduation in Oregon had sought to extend the day-fines program, the end of the Oregon pilot projects coincided with a ballot measure that started the move toward mandatory minimum sentencing, which ultimately overwhelmed other criminal justice projects and pushed day-fines off the "radar." Telephone Interview with David Factor, *supra* note 28.

F. MILWAUKEE, WISCONSIN

Milwaukee employed its pilot project in municipal court cases with at least one non-traffic municipal violation.[402] Like Staten Island, Milwaukee's program did not mandate or preclude the use of any other form of punishment.[403] Milwaukee did exclude, however, people who negotiated a plea with prosecutors prior to an initial appearance in court, people the court believed did not provide accurate income data, people held in pretrial detention,[404] corporate defendants, and defendants who refused to pay fines of any sort "for political reasons."[405] Although the existing record lacks clarity, it appears that planners may have combined all sanctions within the day-fines amount because they established penalty units by calculating the tariff-fine plus other fees and surcharges.[406] Additionally, preexisting statutory maximum caps,[407] as well as the decision to protect revenues by requiring courts to set aside the day-fines calculation for the lowest-income defendants in order to impose a $30 mandatory minimum fine,[408] both hampered Milwaukee's use of day-fines. Milwaukee also had longstanding collections issues, and there appears to have been little or no attempt to fix those problems during the pilot period.[409]

The Milwaukee day-fines experiment provides a prime example of how myopia regarding the desire for revenue generation can impede reform.[410] Milwaukee's municipal court judges were initially enthusiastic about the day-fines pilot project in part because it was seen as a cost-savings mechanism given the expense the municipality was incurring incarcerating people who had no meaningful ability to pay economic sanctions.[411] While the use of day-fines did result in improved collections overall,[412] the $30 mandatory minimum fine caused artificial inflation of day-fines in 36% of cases,[413]

402. Worzella, *supra* note 71, at 63–64.

403. *See id.*

404. Exclusion of people in pretrial detention was due solely to logistical issues that made it difficult for researchers to collect financial information from those defendants. *See* Telephone Interview with Charles Worzella, *supra* note 28.

405. Worzella, *supra* note 71, at 63–64. Juveniles were also excluded from the project, *id.*, because their cases were handled in juvenile court. Telephone Interview with Charles Worzella, *supra* note 28.

406. *See* Worzella, *supra* note 71, at 64–65.

407. *Id.* at 72.

408. *Id.*; Telephone Interview with Charles Worzella, *supra* note 28.

409. *See* McDonald, *supra* note 11, at 8; Worzella, *supra* note 71, at 77; *see also* TURNER & PETERSILIA, *supra* note 8, at 78.

410. *See also supra* Part II.B.2.

411. *See* Telephone Interview with Charles Worzella, *supra* note 28.

412. *See supra* notes 102–06 and accompanying text.

413. Worzella, *supra* note 71, at 72.

leading to default rates that echoed the preexisting tariff-fines system.[414] Because the statutory maximum cap was also triggered in 22% of cases,[415] revenue generation dropped,[416] something that "was unwelcome news in a jurisdiction that was having budget difficulties at the time of the experiment."[417] Therefore, apparently focusing primarily and perhaps exclusively on the revenue side of the ledger—and not the cost savings that could be gained by avoiding jail expenditures, arrest warrants, court appearances, and more if sanctions imposed on the lowest income defendants were made manageable—Milwaukee abandoned the project at the conclusion of the twelve week pilot period.[418]

G. *VENTURA COUNTY, CALIFORNIA*

In the early 1990s, inspired by European models as well as the Staten Island and Maricopa County projects, the California State Assembly set out to create a day-fines pilot project because, in their view, "fine punishment should be proportionate to the severity of the offense but equally impact individuals with differing financial resources."[419] The pilot project was intended to apply to misdemeanors.[420] Assembly members chose to eliminate mandatory minimum fines, directed that mandatory penalty assessments be incorporated within the day-fines amount, and capped day-fines at a maximum of $10,000.[421] After passing the day-fines legislation, however, it took over a year to find a county willing to take on the project, and then only after the legislation was amended to increase a guarantee of revenue generation.[422] Even so, when Ventura County signed on to serve as the pilot site in 1994, it faced a requirement–unique among the day-fines jurisdictions–to remit at least as much in revenue from economic sanctions to the state as it had in the prior year.[423] Therefore, even the guaranteed revenue amount did not provide much protection against an overall loss of funds.[424] Consequently, even though Ventura County planners were aware of the promising results of the Staten Island and Maricopa County pilots,[425] revenue generation concerns

414. *See* TURNER & PETERSILIA, *supra* note 8, at 13 (reporting that people sentenced to pay day-fines defaulted in 59% of cases as compared to 61% of cases in which people were sentenced to pay tariff-fines).

415. Worzella, *supra* note 71, at 72.

416. *See id.*

417. McDonald, *supra* note 11, at 7.

418. *See* Worzella, *supra* note 71, at 70.

419. *See* 1991 Cal. Stat. 4031; MAHONEY, *supra* note 73, at 7.

420. *See* 1991 Cal. Stat. 4031–32 § 2(b).

421. *See id.* at 4031 § 2(b).

422. 1994 Cal. Stat. 1906–07 § 2(a); MAHONEY, *supra* note 73, at 1–2, 9–10.

423. MAHONEY, *supra* note 73, at 23.

424. *Id.* at 2–3, 23.

425. *See id.* at 1–2.

"significantly inhibited the entire project."[426] Ultimately, the project planners abandoned development of the day-fines model after a newly elected judge who would have overseen most of the day-fines cases pushed back against the use of day-fines.[427]

426. *Id.* at 41.

427. *See supra* notes 286–90 and accompanying text.