



**Fines and Fees and Jail Time  
in New York  
Town and Village Justice Courts:  
The Unseen Violation of Constitutional  
and State Law**

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The Fund for Modern Courts  
200 East 42<sup>nd</sup> Street, 16<sup>th</sup> Floor  
New York, New York 10017  
[justice@moderncourts.org](mailto:justice@moderncourts.org)  
[www.moderncourts.org](http://www.moderncourts.org)

## INTRODUCTION<sup>1</sup>

For many New Yorkers, their first, and sometimes only, encounter with the justice system is an appearance before a judge in the town and village justice courts.<sup>2</sup> There are almost 1,300 justice courts in all 57 counties of New York State outside New York City. Across the state, these courts adjudicate over 2 million cases each year.<sup>3</sup> The courts have broad jurisdiction over criminal and civil issues. An adverse judgment in a justice court is no small matter. Every day, justice court judges render decisions that lead to evictions, orders of protection, debt collection, arraignments, suspensions of drivers' licenses, building violations, imposition of significant fees and fines and imprisonment. The matters that they hear and decide are critical to the everyday lives and safety of New Yorkers.

The financial importance of the justice courts to the state and the localities is likewise significant. In 2017, New York's justice courts collected nearly \$250 million in revenues through fines, fees and other exactions.<sup>4</sup> While those revenues are shared between the relevant jurisdiction and the state according to a series of complex formulas,<sup>5</sup> the monies directed to the jurisdiction are often a critical source of funding for town and village government operations. Many jurisdictions look to that revenue to support local budgets for police protection, sanitation, road maintenance and other key municipal functions.<sup>6</sup>

Despite the important role that the justice courts play, there is limited supervision over how they function and whether their actions and decisions comport with the U.S. Constitution and New York law. While the justice courts are part of the New York State Unified Court System, unlike other trial courts, the justice courts are functionally independent from the state judiciary.<sup>7</sup> Each municipality funds and operates the courts in its jurisdiction, and the residents elect the local judges who preside over the courts' matters.<sup>8</sup> The Office of Court Administration

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<sup>1</sup> The authors of this report include Denise Kronstadt, Esq., Deputy Executive Director and Director of Advocacy at the Fund for Modern Courts in New York, and Amelia T.R. Starr, Esq., Vice Chair of the Fund for Modern Courts with the assistance of Fatima Carrillo, Alejandro Hernandez, Elizabeth Johnson and Elizabeth Reba Tobierre.

<sup>2</sup> For simplicity's sake, the town and village courts will be referred to herein as "justice" courts unless it is relevant to the point being made to distinguish between town or village.

<sup>3</sup> See New York State Unified Court System, "City, Town & Village Courts." December 5, 2013. Accessed September 10, 2018. <https://www.nycourts.gov/courts/townandvillage/introduction.shtml>.

<sup>4</sup> Office of the New York State Comptroller, "Justice Court Fund Town and Village Court Revenue Report." 2017. Accessed September 10, 2018. <http://www.osc.state.ny.us/localgov/finreporting/jcef/index.htm>.

<sup>5</sup> Office of the New York State Comptroller, Report on the Justice Court Fund (August 2010). Accessed September 10, 2018. <https://osc.state.ny.us/localgov/pubs/research/justicecourtreport2010.pdf>.

<sup>6</sup> Id. at 12, 13; see also "The State of Colonie Town Justice Court" (May 1, 2018) at 2, 4. Accessed October 5, 2018. <https://www.colonie.org/departments/justice/documents/SOTC2017-REDACTED.pdf>.

<sup>7</sup> Id. at 2.; see also Action Plan for the Justice Courts (November, 2006) at 1. Accessed October 19, 2018. <http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/ActionPlan-JusticeCourts.pdf>.

<sup>8</sup> Id.

(“OCA”) which manages all the state courts, does not have the same direct administrative supervision over the justice courts as it does over all other courts.<sup>9</sup>

The intersection between the role of justice courts as the decision-maker in individual cases and the pressures imposed on the courts to generate revenue for the local municipality, aggravated by the lack of centralized supervision, can sometimes lead to practices that compromise the quality of justice experienced by New Yorkers. A comprehensive discussion of all the problems that arise is beyond the scope of this paper. The focus of this report is limited to an area of concern that arises from the processes that justice courts follow when they impose and enforce fines and fees for misdemeanors and violations.

The law governing the enforcement after non payment of fines is clear. The U.S. Supreme Court in *Bearden v. Georgia* ruled that before a court may imprison a person for non payment of a fine, the court must first make a factual determination based on evidence as to whether that person has the ability to pay.<sup>10</sup> If the person is unable to pay, then an alternative must be found. The Fourteenth Amendment does not permit a defendant to be jailed because he or she is indigent.<sup>11</sup> New York’s highest court made similar findings in *In re Hamel*.<sup>12</sup> The legislature enacted the ability to pay requirement in New York Criminal Procedure Law Section 420.10(5) (hereinafter referred to as “CPL 420.10(5)”).<sup>13</sup>

Modern Courts has studied both the legal framework and the practical implementation of imposing and collecting fines in the justice courts. Modern Courts facilitated a focus group composed of seven town and village judges from around New York State, and conducted more than 25 interviews, a survey of public defenders and defense attorneys, freedom of information requests to 25 county jails and other forms of data collection. Based on that research, we conclude that when defendants prove unable to pay the fines imposed, rather than conduct an ability to pay inquiry and consider alternate remedies (including reducing or revoking the fine), some justice courts issue bench warrants and jail defendants for what could be viewed as the “crime” of indigence. Respondents in Modern Courts’ survey of public defenders and defense lawyers report that all over the state, justice court judges are putting defendants who cannot pay fines in jail without considering their ability to pay.<sup>14</sup> This practice violates the U.S. Constitution, which requires courts to conduct an ability to pay inquiry prior to jailing an individual for unpaid fines. It is also contrary to the guidance provided to justice courts by the U.S. Department of

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<sup>9</sup> Id. While outside the scope of this report, one of the questions that should be considered by the task force Modern Courts recommends is whether the justice courts should be placed under the direct supervision of the OCA. Such supervision would likely improve consistency and the overall quality of the rulings issued in the justice courts.

<sup>10</sup> See *infra* Section IV.A.1 note 39.

<sup>11</sup> Id.

<sup>12</sup> See *infra* Section IV.A.2 at note 46.

<sup>13</sup> CPL 420.10(5) differs from *Bearden* in that it only applies if the defendant asks for resentencing due to inability to pay. *Bearden* does not include such a requirement. See *infra* Section IV.A.3.

<sup>14</sup> See Schedule A of Survey Results.

Justice (“DOJ”),<sup>15</sup> OCA<sup>16</sup> and the American Bar Association (“ABA”).<sup>17</sup> On a human level, it subjects indigent individuals who are incarcerated to serious harm and does not improve the likelihood of payment.

In this report, we provide a background discussion of how the justice courts function, how they collect fines, and the requirements for proper collection and enforcement of fines required by the Constitution and New York statutes, as well as guidance from the DOJ, OCA and ABA. We summarize the views collected from a focus group of New York town and village judges who shared their best practices for fines and fees. We then describe how fees and fines are treated in the village court of Spring Valley,<sup>18</sup> illustrating how ability to pay can, as a practical matter, be integrated into the court’s daily workload. We also look at examples of courts in other New York counties<sup>19</sup> that have regularly jailed defendants without consideration of their ability to pay.<sup>20</sup>

In the final section of the report, we make several recommendations as to how to address this issue. The recommendations include: (1) amend CPL 420.10(5) to do three things: (a) require courts to conduct an ability to pay hearing automatically before sentencing a defendant to incarceration rather than placing the burden on defendants to ask; (b) require courts to consider ability to pay before fines are imposed, and not just after a payment has been missed; and (c) give courts discretion to modify the fines in the first instance; (2) increase training and direction for justice courts regarding constitutional and statutory requirements and best practices for imposition and payment of fines; (3) better data collection on a centralized basis to monitor the imposition and collection of fines, including data concerning the imposition of jail time for failure to pay; and (4) formation of a judicial task force to study the imposition and enforcement of fines in justice courts and suggested improvements to ensure that the law is followed and there is a more just and fair process.

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<sup>15</sup> See *infra* note 57.

<sup>16</sup> Memorandum from the NY State Unified Court System, *Collection of fines and fees in local courts*: A memorandum in response to the Department of Justice Letter of March 14, 2016 (Sept. 13, 2016).

<sup>17</sup> American Bar Association, *ABA Ten Guidelines on Court Fines and Fees* (August 2018).

<sup>18</sup> See Interview with Judge David Fried, Spring Valley Village Court (May 29, 2018); notes of the court observation on file with author.

<sup>19</sup> See *infra* Section V.B.

<sup>20</sup> This report does not address practices in New York City which does not have justice courts. However, based on the New York City Council Committee on Justice System Oversight hearing on the Cost of Justice on September 27, 2018, New York City faces similar issues. At the hearing, speakers including several public defenders discussed specific examples of fines, fees and surcharges imposed on criminal defendants and the collateral consequences for defendants’ lives, including incarceration and financial insecurity. See New York City Council. Accessed November 29, 2018. <https://councilnyc.viebit.com/player.php?hash=on7vtHK6Bo89>.

## II. Methodology

Over a period of several months, we gathered and carefully reviewed information on the law governing the imposition and enforcement of fines and fees and on the practices of New York's town and village justice courts. We reviewed state and federal law, guidance published by the OCA, DOJ and the ABA and training materials for judges. We sat in on proceedings in the Spring Valley Village Court, submitted FOIL requests to New York jails and reviewed newspaper articles, county publications and other reports on this topic. We conducted a survey of New York public defenders practicing in town and village courts and held a focus group of seven town and village court judges from across the State of New York.<sup>21</sup> Finally, we interviewed town and village court judges, public defenders and individuals researching fines and fees in the nonprofit sector. The legal doctrine, secondary sources and first-hand accounts all informed the observations and conclusions detailed in this report.

## III. Description of the Justice Courts

As of 2017, there are approximately 1,300 justice courts spread across New York State. For civil matters, justice courts are limited to small-claims matters and other actions involving \$3,000 or less, as well as landlord-tenant disputes that can involve sums (for example, back rent) well in excess of \$3,000.<sup>22</sup> On the criminal side, jurisdiction extends to misdemeanors, violations and traffic infractions, as well as arraignments and preliminary hearings in felony cases.<sup>23</sup>

Defendants are subject to a variety of monetary penalties as a result of violations and misdemeanors in the justice courts. One example of how an order for a fine and fee may result in a bench warrant for an indigent defendant is a single reckless driving offense, which may be no more than operating a motor vehicle in a manner that unreasonably interferes with the free and proper use of a public highway.<sup>24</sup> If a defendant pleads guilty to reckless driving as a first offense, he or she will have to pay a fine between \$100 and \$300 dollars, plus a state surcharge of \$88 or \$93 depending on where the ticket was issued. For many, that may well exceed their ability to pay. Reckless driving results in 5 points on a driving record. Further, if the defendant has one additional point of driving violations in an 18-month period, then he or she must pay the statutorily mandated Driver Responsibility Assessment ("DRA"). That brings the cost to \$488.88 to \$693.00. And an additional \$75 for every point of violation above six points is added. Someone without money will serve time when they cannot pay, but someone with money will never face that risk.<sup>25</sup>

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<sup>21</sup> Notes taken at the focus group on file with the author (December 10, 2018).

<sup>22</sup> See *supra* note 7 at 1-2.

<sup>23</sup> *Id.*

<sup>24</sup> N.Y. Vehicle and Traffic Law 1212.

<sup>25</sup> Like reckless driving, most of the misdemeanors and violations heard by the justice courts will result in a variety of fees, fines, and other charges. For ease in this report, we will categorize fines, surcharges, and other miscellaneous fees, like the DRA fee, under the heading "fines."

Serving in those courts are some 1,848 justice court judges.<sup>26</sup> Of those judges, less than half, or approximately 712 serving judges, are lawyers.<sup>27</sup> The balance of the justice court judges are non-lawyers working in a wide variety of professions. Non-lawyer judges are required to attend training sessions and take a test prior to commencing service as a judge, while lawyers are not.<sup>28</sup> Whether or not the judge is an attorney, the jurisdiction of the town or village court is the same.<sup>29</sup> It should be noted that while most courts have at least some administrative support, one judge from our focus group reported that 12% of town and village courts have no clerks or administrative support.<sup>30</sup>

Justice courts occupy a different position from all of the other courts in New York State. On a day-to-day basis, they are subject only to supervision and oversight of the town or village government in their locality.<sup>31</sup> In addition, OCA has overall supervision over the operations of all courts in New York State.<sup>32</sup> However, that supervisory responsibility does not give OCA any direct control over the justice courts. For the most part, OCA acts in an advisory capacity to justice courts, providing a Justice Resource Center and other types of guidance available upon request.<sup>33</sup>

The main body charged with the ability to investigate, sanction and, if necessary, remove, justice court judges is the New York Commission on Judicial Conduct (the “Judicial Conduct Commission”), which has jurisdiction over all judges in the Unified Court System.<sup>34</sup> In 2017, the Judicial Conduct Commission received 280 complaints about justice court judges.<sup>35</sup> In that year, the Judicial Conduct Commission ultimately took actions, ranging from cautions to public discipline, in approximately 37 instances.<sup>36</sup> While the efforts of the Judicial Conduct Commission are laudable, it is unrealistic to expect that it has the capacity to review the actions

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<sup>26</sup> New York State Commission on Judicial Conduct Annual Report 2018 at 4.

<sup>27</sup> *Id.*

<sup>28</sup> See N.Y. Uniform Justice Ct. Act 105(a).

<sup>29</sup> See *Justice Most Local: The Future of Town and Village Courts in New York State*, The Special Commission on the Future of New York State Courts (September 2008) at 29.

<sup>30</sup> See *supra* note 21.

<sup>31</sup> See *supra* note 27 at 33.

<sup>32</sup> *Id.*

<sup>33</sup> See *supra* note 27 at 33; see also Interview 12 (August 3, 2018).

<sup>34</sup> See New York State Commission on Judicial Conduct homepage. July 25, 2018. Accessed September 12, 2018. <http://www.scjc.state.ny.us/>.

<sup>35</sup> See *supra* note 24 at 3.

<sup>36</sup> *Id.* Of all 16 judges who were publically disciplined in 2017, 13 were from justice courts. *Id.* at 8.

of over 1,800 judges.<sup>37</sup> The oversight available is not enough to ensure that justice court judges are complying with U.S. Constitutional and New York law, including those laws that govern the imposition of fines.

#### **IV. Laws Governing Collection and Enforcement of Fines**

Justice courts have the power to impose and collect fines for a wide range of offenses: misdemeanors, traffic violations, and municipal violations.<sup>38</sup> Under New York law, for those proceedings within the jurisdiction of the justice courts, the courts are able to exercise the same powers as the New York Supreme Court.<sup>39</sup> Consequently, the justice courts can issue bench warrants for the failure to pay fines or fees imposed by their orders.<sup>40</sup> The courts can also impose mandatory surcharges. Over the years, legislative changes have increased the amount as well as the number of violations that carry mandatory surcharges.<sup>41</sup> Judges do not have discretion to determine the amount of the surcharge.

Failure to pay fines can result in significant consequences for a defendant. For example, a defendant can be imprisoned until the fine is collected.<sup>42</sup> Judges can also impose a civil judgment for the amount of the fine, which can have serious negative consequences to a defendant's credit status and ability to obtain employment, housing, and other benefits.<sup>43</sup> This section describes the Constitutional requirements, statutes, case law, and guidance from the DOJ, OCA and ABA regarding how justice courts should proceed when a defendant is unable to pay.

##### **A. Federal and State Governing Authority**

###### **1. U.S. Supreme Court Constitutional Requirements**

The Due Process and Equal Protection Clauses of the 14th Amendment require that any court that seeks to imprison a person for non payment of a fine must first make a factual determination based on appropriate evidence as to whether the person has the ability to pay. In *Bearden v. Georgia*,<sup>44</sup> the Court held that a state cannot “impose a fine as a sentence and then

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<sup>37</sup> Decisions of the Commission on Judicial Conduct are appealable, with ultimate decision making power resting with the Court of Appeals.

<sup>38</sup> See *supra* note 4.

<sup>39</sup> See Uniform Justice Court Act, § 212, Additional Jurisdiction and Powers (“Except as otherwise provided by law, in the exercise of its jurisdiction the court shall have all of the powers that the supreme court would have in like actions and proceedings.”).

<sup>40</sup> See CPL 420.10(3).

<sup>41</sup> See *supra* note 4.

<sup>42</sup> See CPL 420.10(5).

<sup>43</sup> See Interview with Judge David Fried, Spring Valley Village Court (May 29, 2018).

<sup>44</sup> 461 U.S. 660 (1983).

automatically conver[t] it into a jail term solely because the [individual] is indigent and cannot . . . pay the fine in full.”<sup>45</sup> Rather, a court must make evidence-based findings that the individual willfully failed to pay the fine or that alternative forms of punishment could not meet the state’s interest.<sup>46</sup> *Bearden* expressly held that a defendant cannot be punished solely for his or her indigence.<sup>47</sup>

The Supreme Court recently reaffirmed this principle in *Turner v. Rogers*.<sup>48</sup> In *Turner*, the Court held that a court violates due process if it jails a parent for civil contempt for failure to pay child support, without first inquiring into the parent’s ability to pay.<sup>49</sup> In short, all trial judges have an affirmative obligation to perform an ability to pay analysis before sentencing a defendant to jail for the failure to pay a fine, fee or civil judgment. Due process further requires courts to consider alternatives to imprisonment in such cases, such as extending the time for payment, reducing the debt, requiring the defendant to attend traffic or public safety classes, or imposing community service.<sup>50</sup>

## 2. New York Jurisprudence

Consistent with constitutional requirements, New York courts have held that a judge’s failure to determine the defendant’s ability to pay the fine or inform the defendant of his or her right to apply for resentencing is contrary to *Bearden* and clearly established New York law. For example, in *In re Hamel*, the Court of Appeals held that the Champlain Town Court judge wrongly failed to follow *Bearden* because he did not perform an ability to pay analysis before issuing an arrest warrant for an unpaid speeding ticket; indeed, the facts suggested that the defendant might be indigent because he had been charged subsequently with issuing a check with insufficient funds.<sup>51</sup>

In 2018, a trial court in Dutchess County Supreme Court held that failure to consider a defendant’s financial situation when imposing bail violates the defendant’s due process and equal protection rights under the United States and New York Constitutions.<sup>52</sup> The court ordered

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<sup>45</sup> Id. at 667.

<sup>46</sup> Id. at 674 (“By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.”).

<sup>47</sup> See also *Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that the state could not convert defendant’s unpaid fine for a fine-only offense because that would subject him “to imprisonment solely because of his indigency”).

<sup>48</sup> 564 U.S. 431 (2011).

<sup>49</sup> Id. at 2518-19.

<sup>50</sup> *Bearden v. Georgia*, 61 U.S. at 672.

<sup>51</sup> 88 N.Y.2d 317, 320 (1996).

<sup>52</sup> See *People ex rel. Desgranges v. Andersen*, 72 N.Y.S. 3d 328, 332 (N.Y. Sup. Ct. 2018); see also Ben Nandy, “Dutchess County DA Won’t Appeal Fair Bail Ruling.” Spectrum News, March 12, 2018. Accessed September 12, 2018. <http://spectrumlocalnews.com/nys/hoodson-valley/news/2018/03/12/dutchess-district-attorney-will-not-appeal-judge-s-order-on-fair-bail>; (“Dutchess County Public Defender Thomas Angell is quoted as saying (...continued)



that “when imposing bail the court must consider the defendant’s ability to pay and whether there is any less restrictive means to achieve the state’s interest in protecting individuals and the public and to ‘reasonably assure’ the accused returns to court.”<sup>53</sup> Although bail differs from fines, the underlying problem is the same and the court relied on *Bearden* in reaching its decision.<sup>54</sup>

### 3. New York’s Criminal Procedure Law Section 420.10(5)

Implementing the *Bearden* rule, CPL 420.10(3) requires judges to inform defendants who are required to pay a fine as part of their sentence for a conviction of a crime or violation that if the defendant is unable to pay the fine, the defendant has a right to submit an application to the court for resentencing.<sup>55</sup> Once the defendant’s resentencing application is received, under 420.10(5) a court has the authority to adjust the terms of payment, lower the fine, or revoke the fine altogether.<sup>56</sup> The court “shall not determine that the defendant is unable to pay . . . solely because of such defendant’s incarceration” but shall consider all of defendant’s sources of income.<sup>57</sup> This is not identical to the approach in *Bearden*. Under CPL 420.10(3) and (5), the burden is on the defendant to ask for resentencing, not on the Court to conduct an ability to pay inquiry in the first instance. This burden shifting has the potential to expose defendants, especially unrepresented defendants, to a higher risk of incarceration.

If a court finds that the defendant is able to pay but has nevertheless failed to do so, the defendant may be imprisoned until the fine, restitution, or reparation is satisfied, within limits imposed by CPL 420.10(4). For a misdemeanor, the incarceration period may not exceed one-third of the maximum authorized term of imprisonment;<sup>58</sup> for a petty offense, the incarceration period may not exceed 15 days.<sup>59</sup>

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(continued....)

that in his experience, ‘Judges in Dutchess County have normally set bail in a defendant’s case without inquiring into whether the defendant has the ability to pay the bail amount.’”)

<sup>53</sup> Id. at 330–331 (further stating that \$5,000 bail is substantially more burdensome to an individual earning \$10,000 per year compared with an individual with more substantial earnings).

<sup>54</sup> See Interview 8 (June 26, 2018).

<sup>55</sup> See CPL 420.10(3); see also CPL 420.10(5).

<sup>56</sup> Id.

<sup>57</sup> CPL 420.10(5).

<sup>58</sup> See CPL 420.10(4).

<sup>59</sup> Id.

## B. Federal and New York State Guidance

Guidance from the DOJ, OCA and ABA has cautioned courts about “common [fines] practices that run afoul of the United States Constitution and/or other federal laws.”<sup>60</sup> In particular, they have instructed courts to refrain from incarcerating individuals for nonpayment of fines if they are indigent, and asked courts to consider and use *all* alternatives to incarceration.<sup>61</sup>

### 1. DOJ Guidance

The DOJ Letter sought to assist in ensuring that courts at every level of the justice system operate fairly and lawfully by addressing some of the most common practices that run afoul of the Constitution and other federal laws.<sup>62</sup> The DOJ Letter suggested several alternative practices for inability to pay cases, including the following:

(1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful; (2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees; (3) Courts must not condition access to a judicial hearing on the prepayment of fines or fees; (4) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees; (5) Courts must not use bench warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections; (6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release; and (7) Courts must safeguard against unconstitutional practices by court staff and private contractors.<sup>63</sup>

Between December 21, 2017 and July 3, 2018, former Attorney General Jeffrey Sessions rescinded 49 Guidance Documents, including the DOJ Letter.<sup>64</sup> Nevertheless, the DOJ Letter continues to be persuasive guidance that should be considered by the justice courts.

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<sup>60</sup> Department of Justice, Dear Colleague Letter (March 14, 2016) (the “DOJ Letter”). Accessed September 12, 2018 at <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf>; see also note 61 and *supra* note 17.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>; <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>.

## 2. OCA Guidance

OCA also has provided guidance outlining the mandates of *Bearden* and New York law. OCA's memorandum followed up on the DOJ Letter and was addressed to all justice court judges. Among other things, it cautioned courts not to incarcerate a person for nonpayment of fines without conducting an indigence hearing and determining that the failure to pay was willful.<sup>65</sup> OCA stated that "great care must be exercised in the issuance of CPL 420.10(3) warrants and the setting of bail or recognizance, to avoid incarceration before an inability to pay determination has been made pursuant to CPL 420.10(5) in order to avoid what *Bearden* characterizes as 'punishing someone for his poverty.'"<sup>66</sup>

OCA urged courts to consider adjourning cases to a specified regular court date and directing the defendant to pay the fine by that date if the obligation cannot be immediately satisfied.<sup>67</sup> OCA also stated that the court should inform the defendant that if the fine is not timely paid, the defendant must personally appear on the adjourned date, or otherwise risk the issuance of a bench warrant.<sup>68</sup> If a bench warrant is issued, then at arraignment on the warrant, the court should set a hearing if the defendant asserts inability to pay the fine due to indigence. If the defendant appears on the adjournment date, but is unable to pay due to indigence, the court should set a hearing date for resentencing.<sup>69</sup> Overall, OCA conveys the point that justice courts must differentiate between those defendants who are unable to pay and those who are unwilling to pay.

OCA has also prepared training materials to help courts understand when and how to conduct indigence hearings.<sup>70</sup> These materials detail the process that justice courts should utilize when a defendant asserts inability to pay.<sup>71</sup> Judges in our focus group were familiar with OCA training materials and referenced them when discussing best practices for fines and fees.

## 3. ABA Guidance

In August, 2018, the ABA adopted a set of ten guidelines on fines and fees aimed at national, state and local governmental bodies.<sup>72</sup> This guidance addresses, among other things,

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<sup>65</sup> Memorandum from the NY State Unified Court System, *Collection of fines and fees in local courts: A memorandum in response to the Department of Justice Letter of March 14, 2016* (Sept. 13, 2016).

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> See Office of Justice Court Support, "Fines Under Criminal Procedure Law Article 420." August 2017; see also National Task Force on Fines, Fees and Bail Practices, "Lawful Collection of Legal Financial Obligations." February, 2017.

<sup>71</sup> Id.

<sup>72</sup> See *supra* note 17.

limits on the amounts of fines and fees courts should impose, how and when courts should make ability-to-pay determinations and what sanctions are appropriate for failure to pay.

Guideline 4 states that ability-to-pay hearings are mandatory prior to the imposition of sanctions for nonpayment, and a court must find “willful failure to pay a fine or fee the individual can afford” and consider sanctions other than incarceration.<sup>73</sup> Guideline 6 provides “reasonable” alternatives to incarceration for courts to consider, including “extension of time to pay; reduction in the amount owed; and waiver of the amount owed.”<sup>74</sup> It also references non-monetary alternatives such as community service and social services.<sup>75</sup> The approach to sanctions described in Guideline 6 is individualized, emphasizing proportionality to the underlying offense and reasonableness of non-monetary sanctions in light of an individual’s life circumstances and limitations.

## **V. How NY Justice Court Judges Approach the Failure to Pay Fines**

Despite the constitutional and statutory requirements to conduct an ability to pay hearing, as well as OCA guidance on how to do so, the practices of justice courts around New York vary greatly. In order to better understand whether New York courts are jailing defendants for inability to pay, Modern Courts interviewed justice court judges, public defenders, legal advocates for indigents, and experts at organizations who focus on the imposition of fines. We held a focus group with a panel of seven town and village court judges, who discussed their practices and the challenges they face in imposing and enforcing fines and fees and provided suggestions for best practices. We also spent a day observing a Rockland County justice court to watch these issues play out in real time. Finally, we conducted surveys of public defenders and defense attorneys asking whether they have witnessed or represented individuals who were jailed for failing to pay fines without a hearing on their ability to pay. We received nearly a hundred responses to the public defender survey. On the basis of our interviews, discussions and the survey responses, it is clear that the issue is not limited to a few counties but stretches across New York.

### **A. Discussions and Observations from Town and Village Judges on Compliance with CPL 420(10)**

#### **1. Focus Group**

We convened a focus group of seven town and village court judges for a discussion of fines and fees. These judges serve in a diverse group of towns and villages with varied demographics and resources, representing a mix of rural and suburban areas with populations as small as 1,500 and as large as 37,000 residents.<sup>76</sup> Each judge’s constituents also varied widely,

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<sup>73</sup> Id. at 7.

<sup>74</sup> Id. at 10.

<sup>75</sup> Id.

<sup>76</sup> See *supra* note 21.

with one judge serving a population that is over 95% white, while other judges served more significant Latino, Native American and Black populations.<sup>77</sup> The socio-economic background of the judges' constituents also differed, with one judge from an economically disadvantaged county estimating that 90% of that court's criminal defendants receive assigned counsel.<sup>78</sup> The panel included male and female judges. Some judges were relatively new to the bench and others had served for decades.<sup>79</sup>

We asked the judges to explain how they approach setting fines. A majority of the judges said they tend to set fines on the lower end of the applicable range.<sup>80</sup> Several explained that they take this approach because the mandatory surcharges imposed on defendants under New York law are already so high.<sup>81</sup> While none of the judges indicated that they regularly perform an individualized ability to pay analysis before setting fines, they were sensitive to the financial burden on defendants and expressed concern that such surcharges are unduly punitive for low-income defendants.<sup>82</sup>

The judges also discussed what steps they take when a defendant has difficulty paying the imposed fines and fees. All of the judges shared that they are flexible to the extent possible, allowing extensions, partial payments or both, so long as the defendant demonstrates a willingness to communicate with and show up at the court.<sup>83</sup> However, not all of the judges in our focus group have clerks to help bear the administrative burden of tracking partial payments and changing deadlines. The failure to provide adequate financial and administrative resources for town and village courts makes it more difficult for judges to treat low-income defendants fairly by allowing them adequate time to pay.

It is not the practice of any of these judges to issue bench warrants for failure to pay. Several judges stated that bench warrants are a waste of time and resources, and that they do not increase the likelihood of payment. One judge referenced the OCA guidance against issuing bench warrants for failure to pay. The panel also agreed that they were not familiar with

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<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> See discussion in Section III *supra* for examples of typical surcharge amounts.

<sup>82</sup> See *supra* note 21. The judges also discussed diversion programs, which require a fee to the county District Attorney's office and result in the removal of the traffic violation. The focus group said that the recent proliferation of costly traffic diversion programs both allows for differential treatment of defendants based on their economic resources and bleeds funds away from the town and village courts. Some of the judges called this "justice for sale" and a "travesty."

<sup>83</sup> Id. The judges expressed that defendants' lack of responsiveness to court communication and non-appearance are major challenges for their courts.

examples of town and village judges who currently engage in this practice.<sup>84</sup> The consensus from the panel was that when a defendant ultimately cannot pay, the judges convert the amount owed to a civil judgment. Civil judgments can have long-lasting consequences and should be addressed; they do not have the same due process implications and do not impose the same immediate harm as imprisonment.<sup>85</sup>

## 2. Spring Valley

To see what incorporating ability to pay considerations into the daily conduct of court proceedings looks like in practice, we interviewed Judge David Fried and observed as he presided over cases in the Spring Valley Village Court.<sup>86</sup> Judge Fried has served on the court for seven years and, before that, was a member of the Rockland County legislature.<sup>87</sup> Judge Fried also maintains a private law practice.

There are three judges on the Spring Valley Village Court, who together have a docket of 12,000-15,000 cases each year.<sup>88</sup> Judge Fried hears as many as 125 cases in one day, and on the day we observed him he presided over 76.<sup>89</sup> In our interview, Judge Fried said that he leans toward imposing smaller fines when he has discretion because he serves a poor community and does not want to incarcerate those who cannot pay. We witnessed this in his courtroom. Although he did not make an ability to pay assessment before imposing fines, Judge Fried did use his discretion to set fines on the lower end of the applicable range.<sup>90</sup>

Judge Fried also made it clear in our interview, as well as to the defendants in court, that he will be flexible when defendants make a good faith effort to pay their fines.<sup>91</sup> He routinely allows for long-term payment plans and extends the period of time allowed to satisfy the fine. During our observation, he invited explanations by defendants of why they were unable to pay. This approach is in line with OCA and DOJ guidance, which differentiates between nonpayment due to poverty and willful nonpayment.<sup>92</sup> In the event that a defendant is ultimately unable to pay

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<sup>84</sup> One judge did indicate that city courts engage in this practice. Our findings in Section B suggest that this practice continues in some town and village courts.

<sup>85</sup> It should be noted that converting a fine to a civil judgment does not avoid the problem of license suspension, a point that several judges in our focus group raised.

<sup>86</sup> See Interview with Judge David Fried, Spring Valley Village Court (May 29, 2018); notes of court observation on file with author.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Id.; See Interview with Judge David Fried, Spring Valley Village Court (May 29, 2018).

<sup>92</sup> See *supra* Section IV.B.

the fines or fees owed, Judge Fried typically converts the amount owed into a civil judgment rather than jailing the defendant for failure to pay.<sup>93</sup>

Judge Fried is not alone in finding other alternatives when there is a failure to pay fines.<sup>94</sup> Approximately one-quarter<sup>95</sup> of the public defenders surveyed said that they are not aware of justice courts that have issued bench warrants as a result of unpaid fines. Additionally, when warrants are issued for failure to pay, approximately 17% of public defenders said that judges usually or always consider ability to pay before jailing a defendant for non payment. Nonetheless, this is a small percentage of the public defenders that we interviewed; in fact, the experience shared with us by many other public defenders suggests that many more justice court judges are not considering a defendant's ability to pay.

## **B. Many Justice Courts Are Violating Constitutional Requirements and CPL 420.10(5)**

Many of the public defenders and defense attorneys in New York State with whom we spoke shared experiences in which they believe judges were not abiding by governing law or guidance with respect to fines, thereby violating New Yorkers' constitutional rights to due process and equal protection.<sup>96</sup> The results of our interviews and surveys confirmed that these practices are widespread.

### **1. Public Defender and Defense Attorney Survey**

In order to obtain more information regarding justice court practices surrounding fines, Modern Courts, with the assistance of the Office of Indigent Legal Services ("ILS"), distributed a survey to public defenders and defense attorneys in New York State. The survey asked respondents whether they are aware of instances where defendants were jailed for failure to pay fines. We received 95 responses from lawyers practicing in 61 of the state's 62 counties.<sup>97</sup> The survey results echoed what Modern Courts had heard in interviews—that many justice courts are failing to follow the law and guidance governing fines.

Of the 95 respondents, 73% said they were aware of a town or village court that had issued a bench warrant for unpaid fines related to misdemeanors or violations.<sup>98</sup> Of this group,

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<sup>93</sup> See Interview with Judge David Fried, Spring Valley Village Court (May 29, 2018).

<sup>94</sup> Another judge whom we interviewed, a practicing attorney who served as a justice court judge for four years, said that she did not issue bench warrants for failure to pay in misdemeanor cases, citing both personal opposition as well as OCA guidance.

<sup>95</sup> See Schedule A, Summary of Survey Results.

<sup>96</sup> See William Glaberson, "In Tiny Courts of N.Y., Abuses of Law and Power." N.Y. Times, September 25, 2006. Accessed on September 12, 2018. <https://www.nytimes.com/2006/09/25/nyregion/25courts.html>; William Glaberson, "Money Trail Often Murky in Small-Town Courts." N.Y. Times, January 29, 2007. Accessed September 12, 2018. <https://www.nytimes.com/2007/01/29/nyregion/29courts.html>.

<sup>97</sup> See Schedule A Summary of Survey Results.

<sup>98</sup> Id.

63% (53 respondents in total) said that such courts “rarely” or “never” took a defendant’s ability to pay into account before issuing a bench warrant.<sup>99</sup> The responses of “rarely” or “never” came from defenders practicing in 43 counties, suggesting that three-quarters of counties are implicated in the justice courts’ failure to consider ability to pay before incarceration.<sup>100</sup>

The survey results also revealed that not only are bench warrants issued without the appropriate process, but such warrants also pose a real threat to defendants’ liberty. Of the respondents who said that they had observed or represented defendants arraigned on warrants for unpaid fines, 79% said that those defendants spent time in jail.<sup>101</sup> This includes defendants who were detained prior to arraignment as well as those sentenced to jail pursuant to CPL 420.10(5). The length of incarceration varied, but the most common response was that defendants spent more than one day, but less than one week, in jail.<sup>102</sup> There was substantial overlap between those respondents who observed bench warrants being issued without consideration of ability to pay and respondents who reported that defendants served jail time for failure to pay.

## 2. Recent Interviews with Public Defenders Confirm Violations

We interviewed several public defenders who represent clients who were jailed without the required ability to pay inquiry. For example, a public defender from northern New York said that the practice of jailing individuals for failure to pay fines was common in his experience, and that one long-serving judge does so routinely.<sup>103</sup> According to this attorney, judges rationalize issuing bench warrants by claiming that they are doing so not because of defendants’ failure to pay, but because of defendants’ violation of a condition of their discharge.<sup>104</sup> This condition, of course, is payment of a fine, and the fact that payment was a condition of a defendant’s discharge does not make it permissible under *Bearden* for a court to imprison an individual who does not have the means to pay.<sup>105</sup>

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<sup>99</sup> Id.

<sup>100</sup> Id. Many of the respondents practice in multiple counties. After the survey results came in, we interviewed several of the respondents to obtain more details. Those respondents said that they saw these practices in every county (although not every justice court) where they appeared. However, even if respondents’ answers relate to only one county in which they primarily practice, which is unlikely, a minimum of 18 counties are still implicated in the failure to consider ability to pay before issuing a bench warrant for failure to pay fines.

<sup>101</sup> Id.

<sup>102</sup> Id. This time period was reported by 48% of respondents; 30% said that incarceration was for one day or less, and 22% said that incarceration was for one week or more.

<sup>103</sup> See Interview 4 (June 7, 2018).

<sup>104</sup> Id.

<sup>105</sup> Other interviewees reported that judges in their counties have made a similar argument, which, in their view, is an attempt to evade the requirements of CPL 420.10(5). Specifically, the court will impose a fine as a condition of defendant’s discharge. Defendant fails to pay the fine. The court then contends that the failure to pay is a violation of the conditional discharge, so CPL 420.10(5) does not apply and an ability to pay hearing is not required. See Interview 15 (October 15, 2018). However, there is no authority under Penal Law Section 65.10 to include the fine in the terms of the conditional discharge. And even if there was authority to include the fine as an additional condition, that should not obviate the need for an ability to pay hearing. The Supreme Court ruled in (...continued)



A public defender in Wayne County reported similar problems.<sup>106</sup> Several of his clients have been jailed for failure to pay fines without an ability to pay hearing. In those instances in which a hearing was held, the public defender described the standards required by the court in order to obtain resentencing for inability to pay as nearly impossible to meet. For example, one defendant admitted that he had bought a pack of cigarettes in the time since the sentence was imposed and was found to be in willful violation of the fine requirement.<sup>107</sup> Others were jailed because they missed a single court hearing regarding payment of the fine, resulting in incarceration despite the total absence of any evidence of a willful failure to pay.<sup>108</sup> As a result of the courts' decisions, defendants have spent many nights in jail and several of his clients lost their jobs.

Another public defender in the capital region stated that there is a town court that is notorious for setting high fines and for issuing warrants for failure to pay them. This respondent further stated, "My clients are, by definition, indigent . . . . [T]his is rarely, if ever, considered [by the court] in the setting of fines or in the punishment imposed when those fines to unpaid."<sup>109</sup>

Review of the annual report issued by the Town of Colonie's justice court explains why some justice courts might be motivated to collect fines.<sup>110</sup> In the report, the justice court details its financial position, pointing out that the court has paid for itself almost every year.<sup>111</sup> At the same time, the report notes that the court is severely under-resourced and lacks sufficient funding.<sup>112</sup> Not surprisingly, counsel who practice in Colonie town court have reported that it

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(continued...)

*Bearden* that jailing a defendant for failure to pay a fine without an evidentiary hearing violates due process in all circumstances. See Section III.A.1.

<sup>106</sup> See Interview 13 (October 3, 2018).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See Interview 14 (October 3, 2018).

<sup>110</sup> See *supra* note 6, "The State of Colonie Town Justice Court".

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* The Vera Institute for Justice (the "Vera Institute") described a now retired city court judge in Montgomery County who was known for imposing and collecting a large volume of fines for his city and for imprisoning many people along the way. According to the article, "No One is Watching: Jail in Upstate New York," the judge used his discretion in setting fine amounts to impose the maximum fine for each defendant without inquiring into ability to pay—a practice he claimed worked to "keep everybody equal." That judge also collected fines aggressively, promoting his efforts during his campaign for district attorney. "A lot of people went to jail for not paying fines," the judge admitted. See Jack Norton, "No One is Watching: Jail in Upstate New York," at 5. Accessed June 4, 2018, accessible at <https://www.vera.org/in-our-backyards-stories/no-one-is-watching-jail-in-upstate-new-york>; see also *supra* note 8.

experiences a much higher incarceration rate for non payment of fines than other courts in the area.<sup>113</sup>

Problems are likewise severe in other northern and western counties. Our interviews disclosed that defendants were being jailed without ability to pay hearings.<sup>114</sup> Respondents were aware of jail terms of as little as three days to periods as long as three weeks.<sup>115</sup> One interviewee described a situation where defendant was picked up for non payment of a fine from nine years earlier and then jailed after a brief arraignment where she had no lawyer present.<sup>116</sup> Justice courts in Ontario County were often reluctant to agree to partial payments or payment plans as an alternative to incarceration because of the administrative burden of tracking payments.<sup>117</sup> Those courts which did agree to alternative payment arrangements have reported that they resulted in more collections over time.<sup>118</sup>

Many of the public defenders we interviewed noted that they wished that someone would take these cases up on appeal to obtain some definitive guidance. For most of the lawyers on the front lines of this issue, there is not enough time or resources to devote to litigation. Their focus lies on quickly getting their clients out of jail.

### **3. Sanctions Issued by the Judicial Conduct Commission**

The Judicial Conduct Commission has sanctioned a number of judges for failure to follow the law regarding imposition and enforcement of fines.<sup>119</sup> In one particularly problematic example,<sup>120</sup> a judge in Saratoga County, New York, found a defendant guilty of a traffic infraction and sentenced him to a \$100 fine or 15 days in jail. Although the defendant did not have enough money to pay the fine on the spot, he offered to pay the \$41 he had on his person and requested additional time to pay the remainder. Instead of allowing the defendant additional time, the judge immediately committed him to jail, without either considering his ability to pay or advising him of the right to seek resentencing.

The Commission stated in its opinion that “it was patently unfair and discriminatory for respondent to incarcerate a defendant convicted after trial because he could not pay the fine

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<sup>113</sup> See Interview 14 (October 3, 2018); see also Interview 17 (October 12, 2018).

<sup>114</sup> See Interview 15 (October 5, 2018).

<sup>115</sup> Id.

<sup>116</sup> See Interview 16 (October 12, 2018).

<sup>117</sup> Id.; see also Interview 17 (October 12, 2018).

<sup>118</sup> Id.

<sup>119</sup> The authors wish to thank Robert Tembeckjian of the NY Commission on Judicial Conduct who helped access and understand the Commission’s publically available records.

immediately.”<sup>121</sup> The judge in that case showed indifference to the defendant’s circumstances, incarcerating him over the timing of a \$60 payment.

Similarly, a judge in Jefferson County, New York, was admonished for failure to “be faithful to the law”<sup>122</sup> in sentencing defendants to jail in numerous instances without considering their ability to pay or advising them of their right to apply for resentencing.<sup>123</sup> This resulted in incarceration of multiple defendants for extended periods of time, even when they had affirmatively told the court that they were unable to pay the fines.<sup>124</sup> The defendants spent up to 89 days in jail for failure to pay balances as low as \$423.<sup>125</sup> The Commission decided, however, only to admonish, not remove, Judge Cox because he was not a lawyer, was unaware of CPL 420.10(5) and had not been instructed about it in annual training classes.<sup>126</sup> This outcome highlights the need for intensive training, particularly of non-lawyer judges, in constitutional and legal requirements for bail, fines and incarceration. It also highlights the need to closely monitor justice courts so that unlawful judicial behavior is quickly identified and corrected, rather than injuring numerous defendants.

## **VI. Recommendations to Improve Compliance with New York and Federal Law Regarding the Imposition and Enforcement of Fines**

As detailed above, many of New York’s justice courts struggle with state and federal requirements concerning how to proceed when a defendant does not pay fines due to indigence. As a result, many New Yorkers spend time in jail unfairly, when an appropriate application of the Constitution, law and OCA guidance would have avoided that result.

The Fund for Modern Courts believes that it is time to address these serious issues proactively and make significant changes in the law and its practices to address the resulting injustice to which they may lead.

- CPL 420.10(3) and (5) should be amended to require courts to conduct an ability to pay hearing prior to ordering incarceration for failure to pay fines and fees, regardless of whether defendant asks for a hearing or not. Placing the burden on the indigent defendant rather than the court is inconsistent with *Bearden* and risks unjust outcomes.
- Although enforcement of existing laws and constitutional rights will make a positive difference to indigent New Yorkers faced with fines that they cannot pay,

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<sup>121</sup> Id at 134.

<sup>122</sup> Id. at 95.

<sup>123</sup> See *Matter of Cox*, Judicial Commission Annual Report (2003) at 95.

<sup>124</sup> Id.

<sup>125</sup> Id. at 92.

<sup>126</sup> Id.

it will not address the fundamental question of why such high fines are imposed in the first place for misdemeanors and violations without consideration of the defendant's ability to pay. To address that underlying problem, Modern Courts recommends that CPL 420.10 be revised to require ability to pay to be expressly considered and addressed as part of the initial sentencing determination.

- Justice court judges need more frequent and more focused training on the proper procedure to decide to impose fines and what to do when a defendant cannot pay. Providing guidance or one-time training is not sufficient.
- The court system needs to collect more information to understand where and when justice court judges are falling short of compliance with New York law. Modern Courts' survey is no substitute for systematic data collection.
- OCA should establish a task force composed of judges, lawyers, town and village officials, experts and other stakeholders to review the question of fines and formulate new rules and best practices to ensure that all New Yorkers who appear in the justice courts enjoy equal treatment under the law.

Taken together, Modern Courts believes that these measures will go a long way toward enforcing the Constitution and New York law to address the burdens placed on indigent New Yorkers.

**A. Revise CPL 420.10(5) to Make Ability to Pay Hearings Mandatory and Require A Determination before Imposition of a Fine**

Many of the recommendations detailed in this report relate to ensuring that justice courts comply with the existing CPL 420.10(5) requirement that, upon request, a court make an ability to pay determination prior to jailing a defendant. However, those recommendations do not address the fundamental flaws in CPL 420.10(5). First, CPL 420.10(5) should be amended to require courts to conduct ability to pay hearings prior to incarceration in all circumstances, not limited to those cases in which defendants make the affirmative request. Second, a recurring theme among many people interviewed by Modern Courts, including public defenders, advocates, experts in the imposition of fines and other judges concerned about fair treatment for indigent defendants, is that there is no requirement under New York law to perform an ability to pay analysis *before* imposing a fine. It is a futile and potentially destructive exercise to impose a fine when it is clear that a defendant has no prospect of being able to pay due to indigence. In order to address this question, we recommend amending CPL 420.10(5) to require all courts to address ability to pay both at the time when a fine is imposed and again at a later date if the defendant proves unable to pay. This will also require giving judges discretion to modify all elements of the monetary penalty, including not only fines and fees but also mandatory surcharges.

## **B. Increased Training Relating to Enforcement and Collection of Fines**

Over 60% of all justice court judges are not lawyers.<sup>127</sup> All justice court judges, whether lawyers or not, hold court on a part-time basis and have limited access to resources and outside expertise. As a result, they may be vulnerable to making mistakes in interpreting the law or failing to be aware of the law at all. As discussed in Section IV, the Judicial Conduct Commission recommended lighter sanctions for a judge who had blatantly and repeatedly violated the law by jailing defendants (one for 89 days) who were guilty of no more than indigence, because the judge was unaware of the applicable law.<sup>128</sup> OCA has already taken steps to improve training in this area. Throughout 2017, the Office of Justice Court Support conducted a training sessions for justice court judges entitled “Fines Under Criminal Procedure Law Article 420” as part of its Continuing Judicial Education Program. Nevertheless, only one year later, Modern Courts’ public defender survey showed that in 43 of 57 relevant counties, justice court judges “rarely” or “never” consider a defendant’s ability to pay before issuing a bench warrant for a failure to pay fines.<sup>129</sup>

Modern Courts recommends that training on the imposition and enforcement of fines be incorporated into the Town and Village Continuing Judicial Education curriculum on an annual basis. In addition, we recommend that training also be given on a more local level in those counties, town and villages where violations occur. Our focus group of justice court judges expressed a clear preference for training from county associations or other local bench and bar organizations. Training in smaller groups, delivered in part by experts who are well known in the relevant geographic area, is more likely to be effective in changing judicial practices. The focus group also highlighted the important role of “peer-to-peer” counseling in changing judicial habits.<sup>130</sup> Sometimes the best and most convincing voice is one judge speaking to another.<sup>131</sup> To that end, investing resources to bring all, or as close to all, justice court judges into county associations and the statewide Magistrate’s Association is important. Judges who have regular contact with their peers and the local bar are inevitably better informed and make better decisions. Several of the public defenders that we interviewed agreed that training from OCA or another authority delivered at a local level would improve compliance with CPL 420.10(5).<sup>132</sup>

Identifying which counties, towns and villages need more training will require an extended process. Certainly, the data gathered by Modern Courts in connection with this white paper will suggest some potential candidates. Other organizations with state-wide expertise will also be good sources of information, including the Office of Indigent Legal Services, which has deep connections in the courts and the advocacy community, and the newly established

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<sup>127</sup> See *supra* note 24 at 4.

<sup>128</sup> See *supra* Section V.B.2.

<sup>129</sup> See *supra* at Section V.B.1.

<sup>130</sup> See Focus Group Interview (December 10, 2018).

<sup>131</sup> *Id.*

<sup>132</sup> See Interview 13 (October 3, 2018). See also Interview 15 (October 5, 2018).

nationwide advocacy organization, the Fines & Fees Justice Center. In addition, Modern Courts believes that the systematic collection of data from justice courts on the imposition and collection of fines as described in the next recommendation would permit those who supervise the courts to create an early-warning system that would quickly identify justice courts whose conduct falls outside normal parameters.

This type of supervision and training will increase compliance with CPL 420.10(5) and allow more prompt identification of courts that may be struggling to comply.

### **C. Increased Data Transparency & Required Reporting**

Based on our interviews and discussion with OCA's data experts, Modern Courts understands that the OCA recently purchased a case management system for use by the justice courts.<sup>133</sup> Modern Courts believes that the acquisition of this system presents OCA and others with a new opportunity to collect data from justice courts on their operations, including with respect to fines. This is especially important because until now, there have been very limited means available to collect data from justice courts on a uniform state-wide basis.<sup>134</sup>

In order to ensure that the justice courts are complying with CPL 420.10(5), Modern Courts recommends that the case management system be programmed to collect the following information from justice courts:

- 1) the amount of fines imposed;
- 2) whether the fines were paid by the original deadline;
- 3) if not, whether an extension of time to pay or some other accommodation was approved by the court;
- 4) whether the court issued a bench warrant for non payment of fines;
- 5) whether the court informed the defendant of the availability of resentencing if the defendant states that he or she is unable to pay the fine;
- 6) whether the court conducted an ability to pay inquiry prior to sentencing a defendant to imprisonment for failure to pay; and
- 7) whether the defendant ultimately served any time in jail as a result of non payment.<sup>135</sup>

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<sup>133</sup> See Interview 12 (August 3, 2018).

<sup>134</sup> See Interview 6 (June 8, 2018).

<sup>135</sup> Modern Courts consulted with the Fines & Fees Justice Center regarding the types of information that would be most helpful. See also Interview 7 (June 11, 2018). Additionally, there are many other data points that may be helpful to collect, both related to incarceration for inability to pay and to similar topics, such as license suspension and other consequences of failure to pay. A Judicial Task Force (see *supra* Section VI.D) could consider and recommend a specific set of data points for collection.

With the benefit of this data, it will be possible to identify courts or counties where large numbers of bench warrants are being issued for failures to pay fines, as well as identify instances where courts have imposed jail sentences without the protections provided under CPL 420.10(5). That data will allow for corrective measures to be taken more quickly, whether in the form of guidance to the relevant courts, targeted training, or in egregious circumstances, a referral to the Judicial Conduct Commission for review and remediation.

However, additional requests for data collecting should be paired with a recognition that more data collection also means a larger burden for justice courts. The burden is particularly severe for the 12% of justice courts that have no court clerks or other administrative support. OCA and others should consider how to increase monetary support to the justice courts who do not have clerks. This would help them comply with data requests, but would also make it easier to comply with CPL 420.10(5). For example, a judge with a clerk is better placed to agree to a payment schedule or partial payments because the court has the resources to track and monitor payments.

#### **D. Create a Task Force to Improve Enforcement of CPL 420.10(5) and Consider Reforms of the Imposition of Fines in Justice Courts**

The problems identified in this white paper are real and pervasive. New Yorkers in counties across the state are going to jail for the “crime” of indigence. Ensuring that justice courts comply with CPL 420.10(5) will take time and a significant commitment of resources by the courts, counsel, public policy experts, advocacy organizations and all concerned constituencies. Modern Courts believes that the chances of success would be much improved if OCA were to create a task force to look at all the issues surrounding imposition, payment and enforcement of fine judgments in the justice courts. The Task Force would be empowered to study this question, recommend potential remedies and improvements to the justice courts, and supervise and advocate for the changes needed. OCA has followed this model for other issues, including civil legal services and criminal justice questions, and it has a proven track record of success. Modern Courts believes that the justice courts will benefit from a similar concentration of resources and expert focus.

To combat any lack of understanding of the law, the Task Force may consider creating a bench card on fines and fees for New York judges.<sup>136</sup> A bench card is a brief and accessible document outlining what the law is and how to apply it, which judges can easily consult while they work. In addition to other recommendations for improvement, this practical approach could allow the Task Force to more immediately impact the administration of justice in town and village courts.

## **CONCLUSION**

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<sup>136</sup> A number of entities have prepared bench cards on fines and fees for other states. The National Center for State Courts’ National Task Force on Fines, Fees and Bail Practices has drafted a bench card that could be a helpful resource for drafting a New York-specific bench card. See Lawful Collection of Legal Financial Obligations: A Bench Card for Judges (February 2017). Accessed November 25, 2018. [https://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard\\_FINAL\\_Feb2\\_2017.ashx](https://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx).

This report demonstrates that many of New York's justice courts are struggling with the requirements of the U.S. Constitution and CPL 420.10(5) as they pertain to a defendant's ability to pay fines. As a result, New Yorkers are going to jail because they are too poor to pay fines. While there are limits on the justice courts' jurisdiction, for the cases that they can hear, the deprivation of rights for some New Yorkers is great. Modern Courts believes that implementation of our recommendations would go a long way toward protecting the Constitutional rights of New Yorkers and respect for New York law.