NOTE

Justice Favors the Rich: Expanding *Griffin*'s Promise and Combatting Criminal Debt

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INTRODUCTION

Velia Dueñas is a homeless mother of young children.[1] Because of her cerebral palsy, Dueñas dropped out of high school and has experienced difficulty obtaining stable employment.[2] She lives off of food stamps and has no bank account or credit card.[3] When she was a teenager, Dueñas received three juvenile citations.[4] Because she could not afford the $1,088 the court assessed for these citations, the court suspended her driver's license.[5] Over the next few years, Dueñas received three misdemeanor convictions for driving on a suspended license and one misdemeanor conviction for failing to appear.[6] Recognizing that she could not afford the fines and fees, the court offered her a choice: she could try to pay the debt, or she could serve additional jail time in lieu of payment.[7] Because she could not pay, for each of the cases, she chose to serve additional jail time, totaling an additional fifty-one days across the four cases.[8] In total, Dueñas served 141 days in jail for driving on a license that was suspended because she could not afford to pay court fines and fees accumulated in her teenage years.[9] When she was finally released from jail, Dueñas was still liable for court-assessed user fees, including attorney's fees,[10] for each misdemeanor conviction.[11]

In July 2015, Dueñas was once again convicted for driving with a suspended license.[12] Because she could not afford to get a driver's license on time, the court sentenced her to thirty-six months of probation and imposed a $300 fine.[13] The court offered her the chance to "save money and convert the $300 [fine] to 9 days of county jail," which she accepted because she could not afford the fine.[14] The court determined the $30 court facilities assessment and $40 court operations

1 People v. Dueñas, 242 Cal. Rptr. 3d 268, 270 (Ct. App. 2019).

2 *See id.*

3 *Id.*

4 *Id.* at 271.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 On July 1, 2021, the California Legislature enacted Assembly Bill 1869. Assemb. B. 1869, 2019 Leg., Reg. Sess. (Cal. 2019). The new law removed the obligation for indigent defendants to pay for some or all of the costs associated with having a public defender. *Id.*

11 *Dueñas*, 242 Cal. Rptr. 3d at 271.

12 *See id.*

13 *Id.*

14 *Id.*

assessment were both mandatory regardless of Dueñas's ability to pay, and ordered her to pay the fees.[15]

Velia Dueñas's experience is not unique. Along with potential jail sentences, criminal defendants face court-imposed fines and fees that can add up to hundreds or thousands of dollars.[16] These fines can be punitive, such as restitution, or administrative, such as fees covering the cost of maintaining court facilities.[17] The court user fees imposed against Dueñas were imposed "[t]o ensure and maintain adequate funding for court facilities" and "[t]o assist in funding court operations."[18]

Across the country, criminal defendants face court-assessed fees that cover administrative costs.[19] In at least forty-three states (including California) and the District of Columbia, defendants may be charged for costs associated with retaining a public defender.[20] In Washington state, defendants are charged for impaneling a jury for their trials, preparing trial transcripts, and receiving records on appeal.[21] Many states (including California) have "pay to stay" plans, where jails charge defendants for "room and board," including while they are in jail awaiting trial.[22]

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[15] *Id.* at 272.

[16] *See* Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM EST), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/2MNU-MG35].

[17] *See id.*

[18] *See Dueñas*, 242 Cal. Rptr. 3d at 274 (quoting CAL. GOV'T CODE § 70373 (2021); CAL. PENAL CODE § 1465.8 (2021)).

[19] *See* Shapiro, *supra* note 16.

[20] *See id.*; *State-By-State Court Fees*, NPR (May 19, 2014, 4:02 PM EST), https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees [https://perma.cc/EY69-JAT7]. The California Legislature recently enacted a law removing the obligation for defendants to pay for the costs associated with having a public defender. *See supra* note 10.

[21] *See* Board for Judicial Administration, *Funding Alternatives Work Group Fees Recommendations to the Court Funding Taskforce*, WASH. CTS., https://www.courts.wa.gov/programs_orgs/pos_bja/index.cfm?fa=pos_bja.display&fileid=cftf/AppendI (last visited Mar. 7, 2022) [https://perma.cc/8QVR-EHNY].

[22] *See* Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate [https://perma.cc/5354-C2KK]; *see also* Steven Hale, *Pretrial Detainees Are Being Billed for Their Stay in Jail*, APPEAL (July 20, 2018), https://theappeal.org/pretrial-detainees-are-being-billed-for-their-stay-in-jail [https://perma.cc/BCE8-WDJG]; Jennifer Medina, *In California, a Plan to Charge Inmates for Their Stay*, N.Y. TIMES (Dec. 11, 2011), https://www.nytimes.com/2011/12/12/us/in-riverside-california-a-plan-to-charge-inmates.html [https://perma.cc/R6U4-3DC8].

This Note focuses specifically on court-assessed user fees. User fees are "itemized payments for court activities, supervision, or incarceration charged to defendants determined guilty of infractions, misdemeanors[,]or felonies."[23] These fees are intended to fund the administration of justice in courtrooms.[24] Part I of this Note provides background on the state of the law regarding the assessment of court fees and the barriers to justice they impose. It provides an overview of United States Supreme Court jurisprudence on the subject and its recent application in a series of cases in California.[25] Part II argues that imposing administrative user fees on indigent criminal defendants without regard for their ability to pay violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[26] Finally, Part III argues that these constitutional provisions require courts to hold ability-to-pay hearings before assessing user fees against criminal defendants and discusses the need for better, more concrete guidance on considering a defendant's ability to pay.[27]

I. BACKGROUND

Since the United States Supreme Court's decision in *Griffin v. Illinois*,[28] the Court has developed a lengthy jurisprudence on an individual's fundamental right to access the courts. In *Griffin*, the Court held that the practice of charging indigent defendants for obtaining their trial record violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it "effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."[29] This Section describes *Griffin* and its progeny, which together define the fundamental right to access the criminal court.[30] It then discusses the current state of the law concerning the assessment of court user fees upon indigent criminal

[23] COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1 (2015).

[24] *See id.*

[25] *See infra* Part I.

[26] *See infra* Part II.

[27] *See infra* Part III.

[28] *See generally* Griffin v. Illinois, 351 U.S. 12 (1956) (holding that because Illinois guaranteed appellate review, the Due Process and Equal Protection Clauses prevent the state from imposing financial obligations that effectively prevent indigent defendants from pursuing appeals).

[29] *Id.* at 18.

[30] *See infra* Part I.A–B.

defendants, with a specific focus on recent decisions in the California Courts of Appeal.[31]

A. Griffin v. Illinois

After they were convicted of armed robbery, petitioners Griffin and Crenshaw filed a motion in the trial court requesting a certified copy of the entire trial record to be provided without cost.[32] Under Illinois law, only defendants sentenced to death were afforded their trial record at no cost; all other defendants had to purchase it.[33] The petitioners alleged they were indigent and thus unable to purchase their trial record.[34] The two men argued that failure to provide their trial record without cost would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment and appealed to the United States Supreme Court.[35]

The Supreme Court agreed with the petitioners and held that courts must supply criminal defendants with their trial record for free if they cannot afford it.[36] Justice Black, writing for a four-justice plurality,[37] reasoned that states that guarantee a right to appellate review cannot "do so in a way that discriminates against some convicted defendants on account of their poverty."[38] In his concurrence, Justice Frankfurter summarized the injustice in the petitioners' cases thus: "[i]f [the State] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope."[39]

The four-justice plurality reasoned that "at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations."[40] In *Griffin*, the "invidious discrimination" was wealth discrimination.[41] Finding

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[31] *See infra* Part I.C.

[32] *Griffin*, 351 U.S. at 13.

[33] *Id.* at 14.

[34] *Id.* at 13.

[35] *Id.* at 14-16.

[36] *See id.* at 19.

[37] *Griffin* was a plurality opinion. *See id.* at 13. Justice Frankfurter wrote a separate concurrence in which he argued the Illinois law failed rational basis review. *See id.* at 21-22.

[38] *Id.* at 18.

[39] *Id.* at 24 (Frankfurter, J., concurring).

[40] *Id.* at 18.

[41] *Id.*

"[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review," the plurality held that this kind of discrimination based on wealth status is prohibited.[42] According to the plurality, the rule requiring petitioners to purchase the tools for appealing — namely, their trial transcript — deprived them of their right to defend themselves.[43] Justice Black described the right thus: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[44]

The *Griffin* decision does not explicitly define a fundamental right of access to the criminal court.[45] However, in the years that followed, the Court more clearly — and explicitly — defined the right.[46]

B. Griffin*'s Progeny: Access to the Criminal Court as a Fundamental Right*

The Supreme Court solidified *Griffin*'s jurisprudential weight in the years following the decision. Through a series of decisions that have come to define the fundamental right to access the courts, the Supreme Court overturned numerous state laws that it found violated the Due Process and Equal Protection Clauses because they were wholly contingent on the defendant's ability to pay.[47]

Relying on *Griffin*'s central holding, that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,"[48] the Supreme Court invalidated state court decisions

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[42] *Id.*

[43] *See id.* at 18-19.

[44] *Id.* at 19.

[45] *See* Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 243 (2007).

[46] *See, e.g.*, Tennessee v. Lane, 541 U.S. 509 (2004) (holding that courts that do not allow reasonable accommodations under the Americans with Disabilities Act are interfering with the disabled person's fundamental right to access the courts).

[47] *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 127 (1996) (overturning a Mississippi law that conditioned individuals' ability to file an appeal in child custody cases on their ability to pay record preparation fees); *see also* John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1217 (1999) ("*Griffin v. Illinois* marks the beginning of a new phase of the Court's equal protection jurisprudence [and] was the first in a wave of cases where the Court invalidated laws previously held to be constitutional because they interfered with fundamental rights or interfered with the rights of 'discrete and insular minorities.'").

[48] *Griffin*, 351 U.S. at 19.

denying free trial transcripts to defendants when the trial court considered their appeals "frivolous."[49] It similarly invalidated decisions refusing free representation for indigent defendants on first appeal.[50] Regarding court fines and fees specifically, the Supreme Court expanded the *Griffin* holding by declaring that states may neither impose prison sentences nor revoke probation and order a defendant to prison for a non-willful failure to pay court-ordered fines and fees.[51]

In the first of these cases, *Williams v. Illinois*, the Supreme Court struck down an Illinois criminal statute allowing judges to impose lengthier jail terms for defendants unable to pay their fines.[52] Williams was convicted of petty theft and received the maximum sentence allowed by Illinois law: one year imprisonment and a $500 fine, along with $5 in court costs.[53] The judgment further ordered that if Williams failed to pay his court fines and costs by the end of his sentence, he would remain in jail to "work off" his financial obligations at a rate of $5 per day.[54] The Supreme Court, relying on *Griffin*, concluded "that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense."[55] In effect, Illinois law imposed a higher maximum punishment on the indigent defendant than the solvent defendant.[56] The Court concluded that this sentencing scheme violated the Equal Protection Clause, which "requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[57]

One year after *Williams*, the Supreme Court further expanded the fundamental right to access the courts in *Tate v. Short*, when it held a

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[49] *See* Draper v. Washington, 372 U.S. 487, 499-500 (1963).

[50] *See* Douglas v. California, 372 U.S. 353, 357-58 (1963).

[51] *See* Bearden v. Georgia, 461 U.S. 660, 661-62 (1983) (overturning a Georgia state court's decision to revoke petitioner's probation and ordering him to serve the remainder of his probation term in prison); Tate v. Short, 401 U.S. 395, 399 (1971) (striking down a Texas law providing for the conversion of unpaid court fines into prison sentences); Williams v. Illinois, 399 U.S. 235, 242 (1970) (holding that state statutes imposing different consequences on defendants depending on their ability to pay fines violate Equal Protection).

[52] *Williams*, 399 U.S. at 236.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 241. In *Williams*, this differential sentencing involved continuing the confinement of indigent defendants beyond the statutory maximum for their failure to satisfy the monetary provisions of their sentences. Solvent defendants, therefore, would not face these lengthier sentences. *See id.* at 236.

[56] *See id.* at 243-44.

[57] *Id.*

Houston ordinance authorizing jail sentences for individuals who fail to pay their traffic fines on time violated the Equal Protection Clause.[58] After accumulating $425 in fines following nine convictions for traffic violations, Tate was committed to a municipal prison farm on the condition that he stay there for a sufficient time to pay his debt at a rate of $5 per day.[59] The Supreme Court reversed, citing *Williams*.[60] The Court concluded that this Houston ordinance, like the law in *Williams*, violated the Equal Protection Clause because while solvent defendants' prospective punishments remained merely financial, indigent defendants saw their fines converted to prison terms simply because they lacked the means to pay.[61]

Finally, in *Bearden v. Georgia*, the Supreme Court considered whether the Fourteenth Amendment prohibits a state from revoking a defendant's probation for failure to pay their fines.[62] As a condition of Bearden's probation following his conviction for burglary and theft, the court ordered he pay a $500 fine and $250 in restitution pursuant to a fee schedule.[63] After he was laid off, Bearden failed to meet his payment schedule and the state filed a petition to revoke his probation.[64] The court granted the state's petition and ordered Bearden to serve the remainder of his probationary period in prison.[65] The Supreme Court reversed and held "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay."[66] The Court determined it is a violation of the Equal Protection Clause to revoke probation for failure to pay fines without first inquiring as to the probationer's ability to pay.[67]

Griffin set the doctrinal stage for applying the Due Process and Equal Protection Clauses to cases concerning the unequal justice indigent criminal defendants receive.[68] Upon this foundation, the Supreme Court — in *Williams*, *Tate*, and *Bearden* — more closely defined the fundamental right to access the criminal court by attacking the various

[58] *See* Tate v. Short, 401 U.S. 395, 397 (1971).

[59] *Id.* at 396.

[60] *Id.* at 397.

[61] *See id.* at 398-99.

[62] *See* Bearden v. Georgia, 461 U.S. 660, 661 (1983).

[63] *See id.* at 662.

[64] *See id.* at 663.

[65] *See id.*

[66] *Id.* at 672.

[67] *See id.*

[68] Betram F. Willcox & Edward J. Bloustein, *The* Griffin *Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 16 (1957).

ways the criminal justice system has denied that access to indigent defendants.[69] From this line of cases, we may infer a general rule that the Constitution imposes certain procedural minimums that courts must meet in order to protect and guarantee the rights of indigent litigants.[70] As argued in Part II, this includes accounting for a defendant's relative ability to pay prior to assessing court user fees, as some courts in California already do.

C. The Current State of the Issue in California

People v. Dueñas was a watershed case in California, as the Second Appellate District, Division Seven, held that the principles of *Griffin*, *Bearden*, and *Tate* apply to user fees assessed at the time of conviction.[71] The *Dueñas* court held that because these user fees pose "additional, potentially devastating consequences suffered only by indigent persons[,] in effect transform[ing] a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay," courts must determine whether the defendant has the present ability to pay before assessing the fees.[72]

The California Supreme Court denied review of *Dueñas* in 2019.[73] Later that year, the California Legislature passed Assembly Bill 927, which would prohibit courts from imposing fines and fees on a convicted defendant prior to a finding that the defendant has the ability to pay.[74] Despite Assembly Bill 927's overwhelming support in the Legislature, Governor Gavin Newsom vetoed the bill.[75] In his veto message, Governor Newsom stated that while he supported the bill's intent, he "[did] not believe that requiring a hearing on defendants'

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[69] *See, e.g.*, Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, HARV. L. REV. F. 112, 118 (2020) ("[T]he Constitution imposes certain procedural constraints on states' authority to charge criminal justice [legal financial obligations] that burden fundamental rights.").

[70] *See, e.g.*, *Bearden*, 461 U.S. 660 (finding it unconstitutional to convert a defendant's probation term to a prison term based on a non-willful failure to pay fines); Williams v. Illinois, 399 U.S. 235 (1970) (finding it unconstitutional to impose lengthier jail sentences on defendants because of their inability to pay court fines); Griffin v. Illinois, 351 U.S. 12 (1956) (invalidating a requirement that prospective appellants pay for the cost of their trial transcripts).

[71] *See* People v. Dueñas, 242 Cal. Rptr. 3d 268, 274-77 (Ct. App. 2019).

[72] *Id.* at 276.

[73] *See* People v. Dueñas, No. S254210, 2019 Cal. LEXIS 2076, at *1 (2019).

[74] *See* Assemb. B. 927, 2019 Leg., Reg. Sess. (Cal. 2019).

[75] Letter from Gavin Newsom, Governor of California, to Members of the California State Assembly (Oct. 9, 2019) (available at https://www.gov.ca.gov/wp-content/uploads/2019/10/AB-927-Veto-Message-2019.pdf).

ability to pay is the best approach in every case."[76] Subsequently, the appellate districts have developed an active split in their evaluations of the *Dueñas* holding.[77]

In 2019, the California Supreme Court granted review in *People v. Kopp* to consider first whether courts must consider a defendant's ability to pay prior to assessing fines and fees, and second, assuming courts must make such a finding, which party bears the burden of proof.[78] The intermediate appellate court in *Kopp* agreed with *Dueñas*'s central holding that "imposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive."[79] However, the Fourth District disagreed with *Dueñas* and held that it is the defendant's burden to demonstrate inability to pay.[80] In Appellant's Opening Brief on the Merits to the California Supreme Court, the appellant argues that, pursuant to *Griffin* and *Bearden*, "the Fourteenth Amendment requires that courts examine a criminal defendant's ability to pay [legal financial obligations] before imposing them as part of a sentence."[81]

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[76] *Id.*

[77] *Compare* People v. Cowan, 260 Cal. Rptr. 3d 505 (Ct. App. 2020) (holding that a sentencing court must allow a defendant to present arguments regarding their ability to pay court-ordered fees), People v. Son, 262 Cal. Rptr. 3d 824 (Ct. App. 2020) (agreeing with *Dueñas* and holding that the imposition of court facilities assessments without first holding a hearing on the defendant's ability to pay is unconstitutional), People v. Belloso, 255 Cal. Rptr. 3d 640 (Ct. App. 2019) (holding that imposition of criminal assessments without an ability-to-pay determination violated the defendant's due process rights), *and Dueñas*, 242 Cal. Rptr. 3d 268 (2019) (holding that defendants have a due process right to an ability-to-pay determination prior to a court imposing fees), *with* People v. Curry, 276 Cal. Rptr. 3d 406 (Ct. App. 2021) ("[T]he principles of due process do not require of a defendant's present ability to pay before imposing the fines and assessments at issue in *Dueñas*."), People v. Kopp, 250 Cal. Rptr. 3d 852 (Ct. App. 2019) (agreeing with *Dueñas* in part, but holding that the court should not be limited by a defendant's present ability to pay, but rather may look at their wages while incarcerated), *and* People v. Hicks, 253 Cal. Rptr. 3d 116 (Ct. App. 2019) (disagreeing with *Dueñas* and holding that the imposition of fines and fees did not deprive the defendant of access to the courts).

[78] *See* News Release, Sup. Ct. of California, Summary of Cases Accepted and Related Actions During Week of November 11, 2019 (Nov. 15, 2019), https://www.courts.ca.gov/documents/ws111119.pdf [https://perma.cc/AWW3-6KJ3].

[79] *Kopp*, 250 Cal. Rptr. 3d at 893 (quoting People v. Dueñas, 242 Cal. Rptr. 3d 268, 275 (Ct. App. 2019)).

[80] *Id.*

[81] Appellant's Opening Brief on the Merits at 19-23, People v. Kopp, No. S257844 (Cal. Sep 05, 2019).

The appellate court split in California is illustrative of the need for a more defined standard across both the state and country.[82] If the California Supreme Court agrees with *Dueñas*, and finds trial courts have an obligation to hold ability-to-pay hearings prior to imposing user fees,[83] the California Supreme Court should articulate a clear standard of how a defendant's "ability to pay" should be defined.[84] Part II of this Note explores arguments for using *Dueñas* as a model for extending *Griffin*'s central holding to these cases in order to further ensure the fundamental right to access the courts, regardless of one's wealth status.[85]

II. DUE PROCESS AND EQUAL PROTECTION REQUIRE COURTS TO DETERMINE A DEFENDANT'S ABILITY TO PAY BEFORE ASSESSING USER FEES

A. Imposing User Fines and Fees on Indigent Defendants Deprives Them of Their Fundamental Right to Access the Criminal Court

1. User Fees, Like Those Assessed in Dueñas, Implicate the Fundamental Right to Access the Courts

The Supreme Court's jurisprudence following *Griffin* illustrates the Court's belief, although at times not explicitly stated, that access to the courts is a fundamental right.[86] The Court repeatedly struck down state laws and court decisions denying access to the criminal court in myriad

[82] At present, defendant-appellants whose cases appear in different appellate court districts in California face dramatically different outcomes when appealing the imposition of user fees. *Compare Cowan*, 260 Cal. Rptr. 3d 505 (describing the First Appellate District's agreement with the holding in *Dueñas*), *with Hicks*, 253 Cal. Rptr. 3d 116 (describing the Second Appellate District's disagreement with the holding in *Dueñas*). Further, different divisions within appellate districts have come to different conclusions on the issue. *Compare Dueñas*, 242 Cal. Rptr. 3d 268 (describing Division 7 of the Second Appellate District's holding that ability-to-pay hearings must be held prior to the imposition of user fees), *with Hicks*, 253 Cal. Rptr. 3d 116 (describing Division 2 of the Second Appellate District's disagreement with the holding in *Dueñas*).

[83] *See Dueñas*, 242 Cal. Rptr. 3d at 273.

[84] Different appellate districts across the state have come to different conclusions on how to determine a defendant's ability to pay. Compare *Kopp*, 250 Cal. Rptr. 3d 852 (holding that courts may look at a defendant's wage-earning capacity while incarcerated when determining the defendant's ability to pay court fees), *with Dueñas*, 242 Cal. Rptr. 3d at 280 (holding that the ability-to-pay determination should be based on the defendant's "present ability to pay").

[85] *See infra* Part II.

[86] *See supra* Part I.B.

ways on the basis of wealth.[87] In later cases, the Court more explicitly defined access to the courts as a fundamental right. For example, in *Tennessee v. Lane*,[88] the Court recognized that access to courts is one of the "basic constitutional guarantees, infringements of which are subject to a more searching judicial review."[89]

The *Griffin* decision, written in 1956, does not contain any explicit fundamental rights analysis.[90] However, the decision's language, read with the Court's later-developed fundamental rights jurisprudence, suggests the *Griffin* plurality had its eyes set toward this ultimate analysis. Justice Black noted that while the United States Constitution does not mandate that states provide for criminal appeals as a matter of right, once a state chooses to do so, the Constitution prevents them from doing so in a manner that "discriminates against some convicted defendants on account of their poverty."[91] While the Court strayed from using explicit terms to define this right as fundamental, it recognized the importance of appellate review, noting many convictions are reversed on appeal.[92] With this in mind, it seems undeniable that the appellate process, when available, provides important access to a government process and is therefore a fundamental right.[93]

Griffin and its progeny rested on the principle that when courts withhold access on the basis of wealth classifications, it results in a substantial deprivation of defendants' rights under the Due Process and Equal Protection Clauses.[94] This right is founded upon the notion that

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[87] *See supra* Parts I.A.–B.

[88] 541 U.S. 509 (2004).

[89] *Id.* at 522-23.

[90] Farrell, *supra* note 45, at 243.

[91] Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[92] *Id.* at 18-19.

[93] Farrell, *supra* note 45, at 243; *see also* Willcox & Bloustein, *supra* note 68, at 16 (arguing it is "the essence of citizenship that a person have access to the state's legal institutions").

[94] *See* Willcox & Bloustein, *supra* note 68, at 26 ("To the extent that the principle of the *Griffin* case finds acceptance it will constitute a new charter of freedom for the poor."). Wealth classifications do not automatically trigger strict scrutiny. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Reading *Griffin* in conjunction with *Rodriguez*, however, makes clear that *Griffin* survives *Rodriguez* because *Griffin* involved a fundamental right — the right to access the courts — while *Rodriguez*'s focus on public schools did not involve a fundamental right. *See id.* at 30-31 (holding that education, while important, is not a fundamental right); Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); *see also* Tennessee v. Lane, 541 U.S. 509, 522 (2004) (noting that access to courts is one of the "basic constitutional guarantees, infringements of which are subject to a more searching judicial review").

fundamental rights include those which guarantee access to important functions of government.[95] As Willcox and Bloustein note, depriving access to courts is fundamentally different from denying access to other governmental services because equal access to the court system is foundational to our understanding of equal citizenship.[96]

In *Dueñas*, the State argued that *Griffin* and *Bearden* do not apply to the case of user fees because the defendants in *Griffin* and *Bearden* were subject to imprisonment because of their poverty, while Velia Dueñas was subject only to a civil judgment.[97] The *Dueñas* court rejected this argument, reasoning first that *Griffin* has not been limited to instances where a defendant is subject to imprisonment, and second that the civil judgment scheme exposes indigent defendants to a web of consequences that "result in a new form of debtor's prison."[98] The court reasoned that because enforcement of these fees through the collections process can lead to financial insecurity by disrupting employment and the individual's ability to meet other financial obligations, these user fees "in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay."[99] Following the principle that states cannot punish defendants merely for their inability to pay the financial portions of their sentences, the *Dueñas* court determined that imposing user fees without regard for

[95] *See* Farrell, *supra* note 4545, at 241-45.

[96] *See* Willcox & Bloustein, *supra* note 68, at 16. In his dissent in *Griffin*, Justice Harlan argued the 14th Amendment does not impose an obligation on states to even the playing field with respect to economic class. *See Griffin*, 351 U.S. at 34 (Harlan, J., dissenting). Willcox and Bloustein lodge an effective response to Harlan's dissent by drawing a comparison between access to courts and social service programs. *See* Willcox & Bloustein, *supra* note 68, at 16. As they note, the Constitution does not require the creation of welfare programs or appellate review, but because while we may be able to imagine a man being a full citizen without a right to certain welfare programs, "[w]e cannot conceive of a man as truly a citizen if he is too poor to have access to the courts." *Id.* Therefore, when the Court struck down the law at issue in *Griffin*, it was merely taking further steps to ensure that citizens receive "that which is the most basic function of government, the provision of legal process." *Id.*

[97] *See* People v. Dueñas, 242 Cal. Rptr. 3d 268, 275 (Ct. App. 2019).

[98] *See id.*; *see also* Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971) (holding a city may not summarily deny free trial transcripts to those seeking to appeal their non-felony convictions). In *Mayer*, the defendant was convicted of misdemeanor disorderly conduct and interference with a police officer and sentenced to a $250 fine for each offense. *See id.* The Court held that the city's refusal to provide free trial transcripts to indigent defendants convicted of non-felony offenses violated the precedent set forth in *Griffin*. *See id.* at 195-96.

[99] *See Dueñas*, 242 Cal. Rptr. 3d at 276 (citing People v. Neal, 240 Cal. Rptr. 3d 629 (Ct. App. 2018)).

ability to pay violates the Due Process Clause of both the United States and California Constitution.[100]

The due process violation emanates from the fact that access to the criminal court is a fundamental right.[101] This right is implicated when trial courts assess user fees against criminal defendants without first ascertaining whether they can afford to pay them, as these fees are functionally no different from the transcript fee at issue in *Griffin*.[102] As the Fifth District Court of Appeal noted in *People v. Son*, the case law surrounding the fundamental right to access the courts is "about establishing limits beyond which the influence of criminal defendants' financial condition must not extend."[103] These user fees exceed those limits, as they implicate something even more basic than the access at issue in *Griffin*. These fees implicate the "ability to afford the admission ticket" into the courtroom at all.[104] As such, the *Dueñas* court and the other concurring appellate courts correctly determined that user fees related to court access belong in a category requiring closer judicial scrutiny.[105] In so doing, the *Dueñas* court extended *Griffin*'s promise of justice independent of wealth to defendants like Velia Dueñas, thus furthering the fundamental right to access the criminal court.[106]

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[100] *See id.* The *Dueñas* court reached this conclusion by relying on "the *Griffin-Antazo-Bearden* analysis." *Id.* In *In re Antazo*, the California Supreme Court held that an indigent criminal defendant may not be required to serve a jail term because of his inability to pay fines assessed at conviction. *See In re* Antazo, 473 P.2d 999, 1000 (Cal. 1970). The United States Supreme Court cited *Antazo* with approval in *Bearden*. *See* Bearden v. Georgia, 461 U.S. 660, 669 n.10 (1983).

[101] *See* Tennessee v. Lane, 541 U.S. 509, 522 (2004) (recognizing that access to courts is one of the "basic constitutional guarantees, infringements of which are subject to more searching judicial review"); Farrell, *supra* note 45, at 243. *Dueñas* does not explicitly state this fact; however, its analysis tracks a fundamental rights interpretation of the issue. *See Dueñas*, 242 Cal. Rptr. 3d at 276 (employing a dual due process and equal protection approach to conclude that "[t]hese additional, potentially devastating consequences suffered only by indigent persons in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay").

[102] *See* People v. Son, 262 Cal. Rptr. 3d 824, 836 (Ct. App. 2020) ("As nonpunitive incidents to utilization of the courts, imposed to cover certain of the courts' operating costs, the court facilities and operations assessments are like the transcript fees in *Griffin*.")

[103] *Id.* at 839.

[104] *Id.*

[105] *Id.*; *see also Dueñas*, 242 Cal. Rptr. 3d 274-75 (citing Griffin v. Illinois, 351 U.S. 12, 17 (1956)).

[106] *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has"). *See generally* Neil L. Sobol, Griffin v. Illinois*: Justice Independent of Wealth?*, 49 STETSON

2. Barriers on Access to the Criminal Court Implicate Strict Scrutiny

The United States Supreme Court applies strict scrutiny to an equal protection or due process claim implicating a fundamental right.[107] Under strict scrutiny, challenged statutory classifications must further a compelling governmental interest and constitute the least restrictive means of doing so.[108] The Court has applied strict scrutiny in the fundamental rights context in cases involving the right to travel,[109] the right to marry,[110] the right to procreate,[111] and others.[112] In so doing, the Court "weigh[s] the legitimacy and worth of the ends chosen by the legislature against the burdens imposed on affected individuals' rights in order to achieve those ends."[113]

The Supreme Court has applied strict scrutiny in cases concerning access to courts.[114] It did so in *M.L.B. v. S.L.J.*, for example, where the

L. REV. 399, 400 (2020) (describing *Griffin* as laying the "foundation for case law and legislation designed to address equal protection and due process concerns for defendants who lack financial resources").

[107] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., dissenting) ("Unquestionably we have held that a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny.'"); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 244 (2002).

[108] *See Bakke*, 438 U.S. at 357 (Brennan, J., dissenting).

[109] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (holding there is an implicit fundamental right to travel and applying strict scrutiny to conclude state laws conditioning welfare assistance upon residency requirements violated this fundamental right to travel).

[110] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (holding a Wisconsin law prohibiting individuals from marrying if they had outstanding child support obligations violated the Equal Protection Clause because there is a fundamental right to marry).

[111] *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 535, 541 (1942) (holding the Oklahoma Habitual Criminal Sterilization Act was subject to strict scrutiny because it implicated the fundamental right to procreate).

[112] *See* Richard Fielding, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 822-30 (1973).

[113] *Id.* at 822.

[114] *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding, pursuant to the Equal Protection and Due Process Clauses, states may not condition appeals from orders terminating parental rights on the parent's ability to pay for record preparation); Boddie v. Connecticut, 401 U.S. 371 (1971) (holding a Connecticut law requiring payment of a filing fee prior to receiving a hearing on a divorce petition violates the Due Process Clause). Justice Douglas wrote a separate concurrence and argued the case should be decided upon the *Griffin* line and using the Equal Protection Clause. *Boddie*, 401 U.S. at 383-84 (Douglas, J., concurring). Justice Brennan also wrote a separate concurrence,

Court relied on *Griffin* as the "foundational case" for access to appeals.[115] M.L.B. sought to appeal a trial court order terminating her parental rights to her two minor children.[116] However, Mississippi law required she pay record preparation fees in advance of appealing the order.[117] M.L.B. appealed, arguing that she could not afford to pay the fees, and that her financial solvency should not be dispositive in a case concerning an interest far more compelling than a mere property right.[118] The Supreme Court cited *Griffin* as precedent and agreed with M.L.B., holding that orders terminating parental rights belong within the class of cases in which the states may not "bolt the door to equal justice."[119]

M.L.B. represented the Court expanding *Griffin*'s central holding — "that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons" — to some civil cases.[120] In her majority opinion, Justice Ginsburg explained that the case should not be understood to stand for the proposition that the wealth-based sanctions at issue were impermissible because they were disproportionate in impact.[121] Rather, she noted, they were impermissible because they were "wholly contingent on one's ability to pay," and the consequences of that inability to pay were severe (here, an inability to appeal the permanent loss of parental rights).[122]

Further, the *Dueñas* court relied heavily on the California Supreme Court's decision in *In re Antazo*.[123] *Antazo*, which the United States

also arguing the case presented a "classic problem of equal protection of the laws" and citing *Griffin*. *Id.* at 388 (Brennan, J., concurring).

115 *M.L.B.*, 519 U.S. at 110.

116 *Id.* at 106.

117 *See id.*

118 *See id.* (quoting Santosky v. Kramer, 455 U.S. 745, 758-59 (1982)).

119 *See id.* at 124 (quoting Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)). The Majority in *M.L.B.* went through the history of the Court's jurisprudence on issues related to access to justice for indigent litigants, beginning with *Griffin*. *See id.* at 120-25; *see also* Henry Rose, *The Constitutionality of Government Fees as Applied to the Poor*, 33 N. ILL. U. L. REV. 293, 300 (2013).

120 *M.L.B.*, 519 U.S. at 111; *see also* Lloyd C. Anderson, *The Constitutional Right of Poor People to Appeal Without Payment of Fees: Convergence of Due Process and Equal Protection in* M.L.B. v. S.L.J., 32 U. MICH. J.L. REFORM 441, 441 (1999).

121 *See M.L.B.*, 519 U.S. at 127; *see also* Anderson, *supra* note 120, at 441.

122 *M.L.B.*, 519 U.S. at 127; *see also* Anderson, *supra* note 120, at 474. The Majority in *M.L.B.* took lengths to note the ruling did not mean *Griffin* was made applicable to all civil cases; rather, the Majority emphasized the severity of the interest at stake in this case, noting it was more than a mere property interest. *See M.L.B.*, 519 U.S. at 127-28.

123 *See* People v. Dueñas, 242 Cal. Rptr. 3d 268, 276-77 (Ct. App. 2019).

Supreme Court cited with approval in *Bearden*,[124] held that, absent the state demonstrating a compelling interest, requiring indigent defendants to serve jail sentences because they cannot afford to pay their fines "constitutes an invidious discrimination on the basis of wealth in violation of the equal protection clause of the Fourteenth Amendment."[125] As the *Antazo* court noted, cases involving fundamental rights are subject to strict scrutiny.[126] Although the *Dueñas* court relied primarily on due process grounds in reaching its conclusion, the court was mindful that "'[d]ue process and equal protection principles converge' when analyzing the constitutionality of imposing financial burdens upon indigent criminal defendants."[127]

3. Imposing User Fees on Indigent Defendants Violates Strict Scrutiny

Justice Ginsburg's majority opinion from *M.L.B.*, although centered on the issue of denying access to civil justice based on ability to pay, is instructive on the issue of whether these user fees pass muster under strict scrutiny. Justice Ginsburg harkened back to *Williams*, where the Court struck down a law allowing extended prison sentences for those unable to pay the monetary portion of their sentences.[128] In *Williams*, the Court characterized the law not as facially discriminatory, but rather operatively discriminatory.[129] Justice Ginsburg reasoned that the laws at issue in *M.L.B.* and *Williams* were not "merely disproportionate in impact," but rather were "wholly contingent on one's ability to pay, and thereby 'visit[ed] different consequences on two categories of persons.'"[130] The scheme at issue in *M.L.B.* resulted not in mere disparate impact on the poor, but rather imposed sanctions that were "visited on the poor and on nobody else."[131]

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[124] *See* Bearden v. Georgia, 461 U.S. 660, 669 n.10 (1983).

[125] *In re* Antazo, 473 P.2d 999, 1000 (Cal. 1970).

[126] *Id.* at 1005 (citing Shapiro v. Thompson, 394 U.S. 618 (1969)); *see* Sherbert v. Verner, 374 U.S. 398, 406 (1963); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[127] *Dueñas*, 242 Cal. Rptr. 3d at 276 n.4 (quoting *Bearden*, 461 U.S. at 665).

[128] *See* M.L.B. v. S.L.J., 519 U.S. 102, 127 (1996). *See generally* Williams v. Illinois, 399 U.S. 235 (1970) (holding a law allowing for extending incarceration periods based on ability to pay financial portions of sentences unconstitutional because it was "discriminatory in operation").

[129] *Williams*, 399 U.S. at 242 (citing Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956)).

[130] *M.L.B.*, 519 U.S. at 127 (quoting *Williams*, 399 U.S. at 242).

[131] Anderson, *supra* note 120, at 474.

The same analysis applies in the case of assessing court user fees against defendants once they are convicted. The user fees assessed against Velia Dueñas are routinely applied in criminal cases, as they are mandated by California law.[132] Both statutes at issue in *Dueñas* mandate that enumerated fees "shall be imposed on every conviction for a criminal offense."[133] On their face, neither law providing for the user fees assessed in *Dueñas* and other California cases is discriminatory, as the fees are mandatory and automatically assessed upon every criminal conviction.[134] However, similar to the schemes in *Griffin*, *Williams*, and *M.L.B.*, these statutes impose sanctions that "visit[] different consequences on two categories of persons."[135] While solvent defendants are able to pay these fees relatively painlessly, indigent defendants become embroiled in criminal debt collection schemes that can impact the most intimate and important aspects of their life.[136]

Further, under strict scrutiny, a discriminatory classification system that burdens a fundamental right may only be upheld if the classification is narrowly tailored to further a compelling governmental interest.[137] Generally, challenged classifications are narrowly tailored if there are no other less intrusive means of accomplishing the state's purpose.[138] In the case of user fees, while the state's interest in funding its courts is compelling, the funding mechanisms are not narrowly tailored to meet this interest.[139] The statutes at issue in *Dueñas* mandate imposition of the enumerated fees upon all criminal convictions, and

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[132] *See* CAL. GOV'T CODE § 70373 (2022); CAL. PENAL CODE § 1465.8 (2022); *Dueñas*, 242 Cal. Rptr 3d at 272.

[133] GOV'T § 70373; PENAL § 1465.8.

[134] GOV'T § 70373; PENAL § 1465.8.

[135] Williams v. Illinois, 399 U.S. 235, 242 (1970); *M.L.B.*, 519 U.S. at 127; Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[136] *See* People v. Son, 262 Cal. Rptr. 3d 824, 830 (Ct. App. 2020) (describing the snowballing effects of criminal debt, including possible loss of access to credit, harm to employment and housing prospects, early termination of probation, etc.).

[137] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (holding that when states draw racial distinctions which are considered to further a compelling governmental interest, "the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose"); *see also* Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQUALITY 239, 247-48 (1999); John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1230 (1999).

[138] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283-84 (1986) (holding the school board's decision to adopt a layoff plan as a means of achieving diversity hiring goals was not sufficiently narrowly tailored because there were other, less intrusive, means available).

[139] *Son*, 262 Cal. Rptr. 3d at 841.

they do not contain provisions outlining consideration of an individual's ability to pay the fees.[140] There are, plainly, narrower means available, including assessing the individual defendant's ability to pay.[141] The California Legislature has seemingly acknowledged that these less intrusive means are possible and even desirable, as the Legislature allowed for ability-to-pay considerations in similar statutes related to civil proceedings.[142]

The vast difference in consequences invited by user fees is apparent in Velia Dueñas's life. As the Second District explained, "the only reason Dueñas cannot pay the fines and fees is her poverty."[143] The court explained Dueñas's criminal history, showing it was defined entirely by her inability to pay fines and fees assessed following convictions she received as a juvenile.[144] As a result of these fines and fees, Dueñas's license was suspended, and she was unable to have her license reinstated because of her inability to pay those debts.[145] Over the next several years, Dueñas received multiple convictions for driving with a suspended license and had to spend countless days in jail for her continued inability to pay the fees.[146] As the *Dueñas* court noted, "[t]hese additional, potentially devastating consequences suffered only by indigent persons in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay."[147]

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[140] *See* CAL. GOV'T CODE § 70373 (2022); CAL. PENAL CODE § 1465.8 (2022).

[141] *See Son*, 262 Cal. Rptr. 3d at 841; People v. Dueñas, 242 Cal. Rptr. 3d 268, 276 (2019).

[142] *See* CAL. GOV'T CODE § 68086(b) (2022) (stating that a litigant who has their initial court filing fees waived because of lack of financial resources pursuant to Government Code section 68631 is also entitled to waivers of the fees associated with the attendance of a court reporter at trial); Jameson v. Desta, 420 P.3d 746, 764 (Cal. 2018) (holding that "under California law when a litigant in a judicial proceeding has qualified for in forma pauperis status, a court may not consign the indigent litigant to a costly private alternative procedure that the litigant cannot afford").

[143] *Dueñas*, 242 Cal. Rptr. 3d at 270.

[144] *Id.* at 271.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 277.

B. Although These Fees Are Assessed After the Defendant Is Convicted, Assessing These Fines Without Regard for the Defendant's Ability to Pay Violates Griffin

Griffin concerned schemes whereby courts assess fines on defendants seeking to move forward with their appeals.[148] The Court determined that these fees violate the Due Process and Equal Protection Clauses because they functionally deprive indigent defendants of their fundamental right to access the courts.[149] *Griffin*'s general analysis also applies to the issue at hand: assessing user fees *after* a criminal defendant has used the court. The analysis set forth by California's Fifth District Court of Appeal in *People v. Son* demonstrates this application.[150]

Joseph Son, already serving a life sentence, was convicted of voluntary manslaughter.[151] Following his conviction, the court imposed a $30 court facilities assessment and a $40 court operations assessment.[152] Son cited *Dueñas* in his appeal and argued that imposition of these user fees and restitution without first holding a hearing on his ability to pay violated due process and equal protection.[153] The Fifth District Court of Appeal agreed with Son and declared that "the nonpunitive court facilities and court operations assessments may not be imposed on a defendant who is unable to pay" because "the scheme fails strict scrutiny."[154]

The *Son* court reasoned that the transcript fees charged in *Griffin* were effectively user fees and therefore functionally no different from the administrative fees charged to defendants like Son to cover the costs of court administration.[155] Like the fees charged against Son and Dueñas,

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148 Griffin v. Illinois, 351 U.S. 12, 19 (1956).

149 *See id.*

150 People v. Son, 262 Cal. Rptr. 3d 824, 834 (Ct. App. 2020) (holding the imposition of court-assessed user fees after conviction but without first ascertaining the defendant's ability to pay violates the fundamental right to access the courts established in *Griffin*).

151 *Id.* at 829.

152 *Id.* at 830. Son was also ordered to pay $280 in restitution. *Id.*

153 *Id.*

154 *Id.* at 845. While the *Son* court agreed with *Dueñas*'s analysis of the user fees, the Fifth District disagreed with the *Dueñas* court's analysis of restitution fines. Finding that these fines are punitive in nature, the *Son* court reasoned that any distinction made between those who can and cannot afford to pay the restitution fines are not subject to strict scrutiny. Because imposing these fines without regard for ability to pay is rationally related to the State's interest in punishment, failure to hold an ability-to-pay hearing prior to the imposition of restitution does not violate the Constitution. *Id.* at 845.

155 *See id.* at 836.

the transcript fee in *Griffin* was not punitive in nature or purpose.[156] However, the fundamental difference between the transcript fees in *Griffin* and the user fees in *Son* and *Dueñas* is that the transcript fee in *Griffin* imposed an impediment to moving forward with litigation, while court user fees are charged after the conclusion of the litigation.[157] Instead of blocking appeals through imposing unpayable fines, the California user fee scheme saddles defendants with what the *Son* court referred to as an "unpayable debt burden."[158]

There is, however, disagreement among the California appellate courts on this issue. Dissenting courts and judges reason that because these fees are assessed after the defendant has had an opportunity to defend the merits of their case and do not impede them from pursuing appeals, they do not deny access to the courts.[159] Those espousing this view argue that the cases involving financial barriers to court access focus on barriers that prevent litigants from litigating the merits of their case.[160] In the case of the user fees challenged in cases like *Dueñas*, however, the fees are imposed after conviction and during sentencing and do not impact the defendant's ability to file an appeal.[161] Therefore, according to the argument, these fees do not deprive anyone of their fundamental rights on the basis of their indigence, because the fees are imposed after the individual has had the opportunity to defend their rights and do not bar future action.[162]

The *Son* court was unpersuaded by this kind of argument and reasoned, "[t]he fact that the differential burden on access is of a different kind here — a higher price in the form of a web of counterproductive hardships, rather than a lock on the door — does not make it constitutional."[163] To further illustrate this point, the court

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156 *See* CAL. GOV'T CODE § 70373 (2022); CAL. PENAL CODE § 1465.8 (2022); *Son*, 262 Cal. Rptr. 3d at 836; People v. Dueñas, 242 Cal. Rptr. 3d 268, 272 (Ct. App. 2019).

157 *Son*, 262 Cal. Rptr.3d at 836.

158 *See id.*

159 *See, e.g.*, People v. Hicks, 253 Cal. Rptr. 3d 116, 120 (Ct. App. 2019) (disagreeing with *Dueñas* and holding court-imposed user fees do not deny a due process right to access the courts); People v. Gutierrez, 247 Cal. Rptr. 3d 850, 866 (Ct. App. 2019) (Benke, J., concurring) (holding the impositions of assessments and fines on defendants is not "an issue of access to our courts or justice system"); People v. Santos, 251 Cal. Rptr. 3d 483, 493 (Ct. App. 2019) (Elia, J., dissenting) (holding "*Dueñas* did not involve fines or fees required to be paid in order to access judicial processes.").

160 *See Hicks*, 253 Cal. Rptr. 3d at 120 (citing Jameson v. Desta, 420 P.3d 746, 755 (Cal. 2018)).

161 *See id.*

162 *See id.*

163 *Son*, 262 Cal. Rptr. 3d at 837.

remarked it was "very improbable that in *Griffin*, the state could have cured its violation by charging for trial transcripts after the appeal was over rather than before it began, and converting the charge to a debt for those unable to pay."[164]

Further, as the *Son* court reasoned, *Griffin* and its progeny represent the Court's deliberate decision to "somewhat remove the issue of access to the criminal courts from the influence of individuals' relative success or failure as participants in a market economy."[165] While the Court has never completely removed that influence from the justice system, the case law has been focused on "establishing limits beyond which the influence of criminal defendants' financial condition must not extend."[166] For example, while solvent defendants may choose to hire expensive private defense attorneys with smaller caseloads than public defenders, indigent defendants may not be denied effective assistance of counsel on the basis of their indigence.[167]

While the *Son* court argued *Griffin*'s holding would be unaffected if the state imposed the fees after Griffin and Crenshaw had the chance to bring their appeals, this temporal shift would appear to pass muster under the *Hicks* court's holding.[168] However, Griffin and Crenshaw's access to the appeals process certainly would have been impacted if the fees were to be assessed after the conclusion of their appeals, as they would not be able to freely choose to exercise their state-granted right to appeal without having to consider their ability to pay inevitable fees.

Further, in the case of user fees, we are talking about something more basic than what was at issue in *Griffin*: the price of admission into the court system at all.[169]

Although the *Hicks* court also acknowledged that these court-assessed fees could lay traps for the poor, it rejected the argument that these are constitutional concerns, instead laying the responsibility on the legislature.[170] However, the *Hicks* court's concerns over potential lost revenue due to courts considering a defendant's ability to pay is

164 *Id.*

165 *Id.* at 839.

166 *Id.*

167 *Id.*; *see also* Strickland v. Washington, 466 U.S. 668, 686 (1984); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding the right to defense counsel is fundamental in the criminal context, and therefore that indigent defendants must be afforded free representation).

168 *See* People v. Hicks, 253 Cal. Rptr. 3d 116, 120 (Ct. App. 2019) (holding user fees do not generate a constitutional problem because they are assessed after the defendant has had their time in court).

169 *See Son*, 262 Cal. Rptr. 3d at 840.

170 *See Hicks*, 253 Cal. Rptr. 3d at 123.

misplaced, as defendants who cannot afford to pay the fees will not be able to contribute to the fund in the first place.[171] The effect of ability-to-pay hearings would be simply to remove the obligations from those who could not meet them.[172] It therefore is clear that these user fees do not advance the states' interests in funding the operation of the courts, as these fees often go unpaid by those who cannot afford to meet the obligations.

C. User Fees, When Assessed Upon Indigent Defendants, Do Not Further the State's Interests in Recouping the Costs Associated with Court Administration

The *Dueñas* case is but one of thousands of examples of indigent defendants who get trapped in a cycle of incarceration brought on by their inability to pay court fees.[173] Following the killing of Michael Brown by a Ferguson police officer, the United States Department of Justice opened an investigation into the Ferguson Police Department.[174] The Justice Department found the Ferguson municipal court, which handles the majority of cases from the Ferguson Police Department, "does so not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue."[175] The report outlined several specific examples of individuals whose lives were upended as a result of their convictions for relatively minor violations resulting in hundreds of dollars in court debt.[176]

Those most likely to be arrested and go through the criminal process are poor and are disproportionately persons of color and more likely to suffer from addiction or mental illness.[177] Additionally, court fees are regressive payments that impact the poor in significantly harsher

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171 *See* People v. Belloso, 255 Cal. Rptr. 3d 640, 650 (Ct. App. 2019).

172 *See infra* Part II.C.

173 *See* People v. Dueñas, 242 Cal. Rptr. 3d 268, 270-73 (Ct. App. 2019) (detailing Dueñas's criminal history snowballing from a misdemeanor conviction for driving on a suspended license, for which she could not afford to pay the fees and costs of renewing her license).

174 Mark Berman & Wesley Lowery, *The 12 Key Highlights from the DOJ's Scathing Ferguson Report*, WASH. POST (Mar. 4, 2015, 12:11 PM), https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-dojs-scathing-ferguson-report/ [https://perma.cc/H6RZ-2XC8].

175 C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42 (2015) [hereinafter INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT].

176 *See id.*

177 Shapiro, *supra* note 16.

ways.[178] These fees force indigent defendants to make the difficult choice between paying off their debt burdens and making other necessary purchases.[179] And as *Dueñas* illustrates, these fees can snowball into a cycle of further incarceration and court debt.[180] All of these considerations informed the *Dueñas* court, which led it to hold that trial courts are obligated to conduct ability-to-pay hearings prior to assessing fees.[181]

The *Hicks* court expressed concern that refusing to impose these fees could jeopardize the continued operation of the courts.[182] However, these fees often go uncollected, and the costs of running these collection programs can exceed the revenue raised through collection.[183] Therefore, requiring ability-to-pay hearings would likely have a minimal impact on court revenues, as the population that would be released from obligations would be those unable to meet them in the first place. As such, the *Hicks* court's concerns are misplaced. Assessing an individual's ability to pay user fees would not jeopardize the administration of the court system in any significant way. Doing so may in fact assist the courts in their goal to act as the arbiters of justice and maintain public trust, as it would help to alleviate some of the distrust of the courts and criminal justice system in poor and marginalized communities.[184]

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178 *See* COUNCIL OF ECON. ADVISERS, *supra* note 23, at 3-4.

179 *Id.* at 4.

180 People v. Dueñas, 242 Cal. Rptr. 3d 268, 273 (Ct. App. 2019).

181 *Id.*

182 People v. Hicks, 253 Cal. Rptr. 3d 116, 122 (Ct. App. 2019).

183 *See* COUNCIL OF ECON. ADVISERS, *supra* note 23, at 4-5.

184 *See, e.g.*, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 175, at 42 (describing the Ferguson municipal court system as having the goal of maximizing revenues, rather than administering equal justice to all); *see also* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST. 1, 2 (Oct. 4, 2010), https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [https://perma.cc/53MX-CAHZ] ("Overdependence on fee revenue compromises the traditional functions of courts and correctional agencies."). The Department of Justice's investigative report on the Ferguson Police Department describes some of the distrust poor citizens feel towards the court system. The report explains that many individuals fear that if they show up to court, despite being unable to immediately pay their court debts, they will be remanded into custody and held in jail. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 175, at 48. Because of this distrust in the court, many people fail to appear at their court hearings. *Id.*

III. TRIAL COURTS SHOULD BE REQUIRED TO HOLD ABILITY TO PAY HEARINGS PRIOR TO ASSESSING USER FEES AGAINST CRIMINAL DEFENDANTS

The *Dueñas* court rightly determined that requiring ability-to-pay hearings before assessing user fees on indigent defendants would satisfy the due process concerns raised in the case.[185] Requiring ability-to-pay hearings would help to more appropriately tailor these user fee schemes and bring them in line with the demands of strict scrutiny.[186] Additionally, these hearings would lessen the differential impact of user fees upon indigent defendants.[187] Holding hearings on a defendant's ability to pay user fees would lessen the likelihood that indigent defendants suffer from the "web of consequences of being a delinquent debtor."[188] There remain, however, open questions about how to define an "ability to pay."[189]

Although *Dueñas* represents a step in the right direction, it fails to set out guidelines for determining ability to pay and therefore is an imperfect solution.[190] Following the Supreme Court's ruling in *Bearden*, many state legislatures moved to codify ability-to-pay determinations in

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[185] *See Dueñas*, 242 Cal. Rptr. 3d at 276 ("Under the *Griffin-Antazo-Bearden* analysis, the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are thus fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution."); *see also* People v. Son, 262 Cal. Rptr. 3d 824, 841 (Ct. App. 2020) (agreeing with *Dueñas*, and holding that "the laws requiring the imposition of the court facilities and court operations assessments without regard to a defendant's ability to pay fail strict scrutiny and violate the equal protection clause").

[186] *See Son*, 262 Cal. Rptr. 3d at 841 ("Given our conclusion that the Constitution prohibits imposition of the court operations and court facilities assessments on those who are unable to pay and would therefore suffer the consequences of delinquent debt from imposition of these assessments, it follows that, prior to imposing such assessments, courts must give defendants an opportunity to request an ability to pay hearing for purposes of showing they are in fact unable to pay these assessments.").

[187] *Cf.* M.L.B. v. S.L.J., 519 U.S. 102, 127 (1996) (citing Williams v. Illinois, 399 U.S. 235, 242 (1970)) (considering access to civil courts for indigent individuals); Anderson, *supra* note 120, at 443 (discussing fees and due process in the context of family law).

[188] *See Son*, 262 Cal. Rptr. 3d at 830.

[189] *See, e.g.*, Sup. Ct. of California, *supra* note 78 (noting that in *People v. Kopp*, 250 Cal. Rptr. 3d 852 (Ct. App. 2019), *appeal docketed*, S257844 (Cal. Sept. 5, 2019), the Supreme Court would be deciding whether ability to pay hearings are constitutionally required and, if so, who bears the burden of proving whether the defendant has the ability to pay).

[190] *See Dueñas*, 242 Cal. Rptr. 3d at 273.

their statutes.[191] These states have adopted widely varying standards for determining a defendant's ability to pay, including assessing whether the defendant collects public assistance, has recently been incarcerated, or owns property.[192] While many states have particularly searching standards, others rely on under-inclusive definitions.[193] Additionally, affording such a high degree of judicial discretion leads to vastly varying standards across jurisdictions.[194] Without further guidance and clearer definitions, these ability-to-pay hearings will continue to be held and determined on arbitrary grounds.

A. Comparing Approaches Across States

While many states have adopted statutes that allow for a consideration of a defendant's ability to pay, state responses and definitions of "ability to pay" vary widely.[195] To alleviate these concerns and further guarantee the fundamental right of access to the courts to all defendants, regardless of their financial status, states should adopt laws and courts should adopt practices that more specifically define what it means to be able to pay user fees. It is therefore useful to survey these varying approaches in search of a more universal solution. In the subsequent Sections, this Note analyzes the ability-to-pay standards in three states with some of the most searching review processes in the country: Washington, Colorado, and Pennsylvania. The standards set forth in these states provide a useful model for how to set effective statutory guidelines across jurisdictions.

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[191] Theresa Zhen, *(Color)blind Reform: How Ability-to-pay Determinations are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 201-02 (2019).

[192] *See id.* at 201. Some states conduct particularly invasive inquiries. For example, Alabama's statute allows courts to consider the defendant's ownership of "anything of value — land, house, boat, TV, stereo, jewelry." *Id.* at 202.

[193] *See id.* at 203. For example, the majority of states have statutes that include a presumption of indigence when the defendant receives public assistance. However, this definition only covers the most extreme cases of poverty, and would not apply to the working poor and those defendants who live on the margins. *See id.*

[194] These varied interpretations are clear in California, as various appellate courts have disagreed on the standards for determining whether a defendant has the ability to pay. *Compare Dueñas*, 242 Cal. Rptr. 3d at 273 (holding that courts should be required to consider the defendant's present ability to pay prior to assessing user fees), *with* People v. Kopp, 250 Cal. Rptr. 3d 852, 893 (Ct. App. 2019) (agreeing with *Dueñas* in part, but disagreeing with *Dueñas* by holding that the court should not be limited by a defendant's present ability to pay, but rather may look at their wages while incarcerated).

[195] *See* Bannon et al., *supra* note 184, at 14.

1. Washington

Washington law provides for user fees that may be assessed according to the judge's discretion.[196] The law further prohibits the court from assessing any fees against a defendant deemed indigent.[197] In 2015, the Washington Supreme Court held that trial courts must conduct ability-to-pay hearings prior to assessing such fees against defendants.[198] Noting both that the state's fee scheme poses "problematic consequences" and that the state cannot collect costs from those unable to pay, the Washington Supreme Court concluded that judges must make an individualized finding of ability to pay prior to imposing such fees.[199] The court also noted that these fees are often assessed in a disparate manner — for example, Latino defendants and men face disproportionate assessment.[200]

In *State v. Ramirez*,[201] the Washington Supreme Court elaborated on the requirements for an "adequate individualized inquiry before imposing [fees]."[202] At the ability-to-pay hearing conducted in Ramirez's case, the judge asked only two questions, both of the state.[203] After asking no questions of the defense, the court found Ramirez had the ability to make payments and imposed the fees.[204] In concluding that the trial court's inquiry was inadequate, the Supreme Court noted that the trial court did not inquire as to Ramirez's debts, nor other important factors, including his income, assets and other finances, monthly living expenses, and employment history.[205] The Supreme

196 *See* WASH. REV. CODE § 10.01.160 (2018) (providing that courts "*may* require a defendant to pay costs," including those associated with pretrial supervision, deferred prosecution, jury fees, and serving warrants for failure to appear (emphasis added)).

197 *Id.* Washington law provides that a person is indigent if, at the time of proceedings, they are on public assistance, are involuntarily committed to a state mental health facility, receive an income of 125 percent or less of the federal poverty level, or are unable to pay "any amount" of the costs of retaining counsel. WASH. REV. CODE § 10.101.010 (2011).

198 *See* State v. Blazina, 344 P.3d 680, 685 (Wash. 2015).

199 *Id.* at 684-85.

200 *Id.* at 685.

201 State v. Ramirez, 426 P.3d 714 (Wash. 2018).

202 *Id.* at 716.

203 *Id.* at 716. The court first asked whether Ramirez could afford to pay the fees when not in jail, to which the state responded that he could. *Id.* The state further asserted that he could afford to pay the fees while in jail because he would be able to earn wages. *Id.* Second and finally, the court asked whether the state believed the fees should be imposed, which it did. *Id.*

204 *Id.*

205 *Id.* at 720. Regarding employment history, the court recommended trial courts look both at present employment as well as past work experience. *Id.* Further, the court

Court further considered Ramirez's motion for indigence as a "reliable framework."[206] The court concluded that, in order to satisfy the requirement of an individualized inquiry, the trial record must reflect that the court inquired as to all five of the aforementioned categories.[207]

2. Colorado

Colorado law provides that defendants who are ordered to pay fees as a component of their conviction but lack the present ability to pay without undue hardship may not be jailed for failure to pay.[208] The statute then goes on to define undue hardship, declaring "a defendant or a defendant's dependents are considered to suffer undue hardship if he, she, or they would be deprived of money needed for basic living necessities, such as food, shelter, clothing, necessary medical expenses, or child support."[209]

When determining whether a defendant or his dependents will suffer undue hardship, the statute mandates that the court *shall* consider the following: (1) whether the defendant is experiencing homelessness; (2) the defendant's present income, employment, and expenses; (3) the defendant's present debts and liabilities; (4) whether the defendant qualifies for and is receiving public assistance; (5) the "availability and convertibility, without undue hardship" of any of the defendant's real or personal property; (6) whether the defendant lives in public housing; (7) whether the defendant's family income is less than 200 hundred percent of the federal poverty line; and (8) "[a]ny other circumstances that would impair the defendant's ability to pay."[210] Once a defendant presents evidence of his inability to pay, the burden shifts to the prosecution to show the defendant is in fact able to pay.[211]

3. Pennsylvania

The Pennsylvania Sentencing Code provides that a court shall not assess a fine unless the record show that the defendant is, or will become, able to pay the fine and such payment would not preclude the

stated that, when concerned with the defendant's debts, trial courts should look at a defendant's other legal financial obligations, health care costs, and education loans. *Id.*

206 *Id.*

207 *See id.* The five categories are: (1) debts, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) employment history. *Id.*

208 COLO. REV. STAT. § 18-1.3-702(2)(b) (2022).

209 *Id.* § 18-1.3-702(4).

210 *Id.*

211 Williams v. People, 454 P.3d 219, 226-28 (Colo. 2019).

defendant from making restitution to the victim.[212] The Pennsylvania Supreme Court interpreted this statute to require an ability-to-pay finding even when a defendant accepts a fine as a part of a negotiated plea agreement.[213] Noting that it is "fair to say that the primary concern of most defendants is the length of their incarceration rather than the sum of their fines," the Supreme Court rejected the Commonwealth's argument that the mere acceptance of a plea arrangement that includes fines indicates an ability to pay those fines.[214] When determining a defendant's ability to pay, Pennsylvania law requires the court to look at the defendant's entire financial picture, including consideration of the defendant's employment, present income and expenses, and the "ordinary expenses attendant on everyday life."[215] These "ordinary expenses" include rent, utilities, cost of insurance, transportation, and dependent care.[216] Pennsylvania trial courts may also look at debts and whether a defendant will be or has recently been incarcerated.[217]

B. Toward a More Universal Definition and Standard

These three statutory schemes provide a model for developing an effective statutory scheme that may be applied across jurisdictions.[218] Because of these inconsistent standards that exist across the country,[219] even when states provide waivers for defendants who are unable to pay, those waivers are often ignored or are inconsistently applied.[220] More

[212] 42 PA. CONS. STAT. § 9726(c) (2022). While this portion of the Pennsylvania Sentencing Code applies to punitive fines and this Note is concerned with court user fees, Pennsylvania's approach to determining a defendant's ability to pay fines or fees is nonetheless useful. *See id.*

[213] Commonwealth v. Ford, 217 A.3d 824, 825 (Pa. 2019).

[214] *Id.* at 829-30.

[215] Crosby Square Apartments v. Henson, 666 A.2d 737, 738-39 (Pa. Super. Ct. 1995); *see also* ACLU-PA., AN ACLU GUIDE TO DETERMINING WHETHER A DEFENDANT IS "ABLE TO PAY" FINES, COSTS, OR RESTITUTION 1 (2018), https://www.aclupa.org/sites/default/files/2018-07-24_ACLU-PA_Ability_to_Pay_Guide.pdf [https://perma.cc/2LLM-RPRG] [hereinafter AN ACLU GUIDE].

[216] *See* ACLU-PA., AN ACLU GUIDE, *supra* note 215, at 2.

[217] *Id.*

[218] *See supra* Part III.A.

[219] *Compare* 42 PA. CONS. STAT. § 9726(c)-(d) (2022) (requiring that a court establish a defendant's ability to pay prior to assessing fines), *with* State v. Taylor, 163 N.E.3d 486, 488 (Ohio 2020) (holding that Ohio law does not require trial courts to consider a defendant's ability to pay court fees when assessing a motion to waive, suspend, or modify costs).

[220] BANNON ET AL., *supra* note 184, at 14; *see, e.g.*, *Taylor*, 163 N.E.3d at 488 ("The statutory language provides no explicit criteria that a court should use in deciding whether to waive, suspend, or modify costs."). These waivers often go ignored because

uniform and strictly defined standards will improve consistency and ensure that defendants who cannot afford to pay are given waivers or alternative sentencing. Doing so will help to break the cycle of criminal justice debt.[221]

First and foremost, defendants must be made aware of the possibility of a fee waiver.[222] This information could be provided by the defendant's probation or parole supervisor.[223] For example, the Maryland Legislature enacted a statute requiring the Division of Probation and Parole to provide their supervisees with information regarding fee waivers and exemptions.[224] In states that allow informal or "summary" probation, because a defendant sentenced to informal probation would likely not have regular contact with their jurisdiction's probation department,[225] the task of informing defendants of this possibility could be taken on by the judge or the defense attorney. Along with making clear the possibility of a fee waiver, states should prioritize creating uniform standards with clear terms and definitions so they may reduce the arbitrariness across jurisdictions.[226]

When analyzing a defendant's ability to pay, courts need to examine the defendant's entire financial picture, including their other financial obligations.[227] Generally, defendants who receive public benefits, reside in state correctional or psychiatric facilities, or who live below some

defendants are unaware that the exemptions are available and may lack the legal resources to apply for them. ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 14-15 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf [https://perma.cc/4B4B-LBYE].

221 *See* PATEL & PHILIP, *supra* note 220, at 3.

222 *Id.* at 14.

223 *Id.* at 15.

224 *Id.*; *see* MD. CODE ANN., CORR. SERVS. § 7-702(j) (2021). The statute provides that supervisees will be assessed a monthly fee of $50 as a condition of their supervision under the Division of Parole and Probation. However, the Department is required to give the supervisee oral and written notice of the conditions the Commission may use in determining whether to exempt a supervisee from the fees and an explanation of the process for applying for a fee exemption. MD. CODE ANN., CORR. SERVS. § 7-702(d), (j).

225 When an individual is sentenced to informal (or "summary") probation, they are not required to meet with the Probation Department regularly and are often not assigned a probation officer. *See, e.g.*, CAL. PENAL CODE § 1203(a) (2022) ("'[C]onditional sentence' means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the court without the supervision of a probation officer.").

226 *See* ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS 11 (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf [https://perma.cc/G98Z-RPEY] [hereinafter IN FOR A PENNY].

227 *See* BANNON ET AL., *supra* note 184, at 14.

fixed multiple of the federal poverty level should be presumed unable to pay.[228] Examining the defendant's entire financial picture must include looking at their income as well as their obligations, including the costs associated with ordinary life as well as those particular to the defendant.[229] The court should inquire as to any outstanding financial obligations that could expose the defendant to further legal liability and financial upheaval, such as child support obligations and debts.[230] Courts should not, however, rely on a defendant's non-liquid assets or the financial ability of a defendant's family and friends in determining the defendant's ability to pay.[231]

As ability-to-pay procedures have gained popularity across the country, some scholars have expressed concern that these procedures do not do enough to combat the injustice of criminal justice debt.[232] One common concern is that the inquiry into a defendant's ability to pay would be necessarily invasive.[233] These critics correctly point out that defining poverty to a discrete set of answers to a few simple questions would be an over-simplification of the issue.[234] These procedures also involve an inquiry into some of the most intimate facets of a defendant's life.[235] Additionally, some states do not limit their inquiry into only the defendant's finances, and will search into the finances of friends and family members as well.[236]

While critiques that the process could be unduly invasive are salient and should be heeded,[237] the inquiry may be resolved by simple client

[228] *Id.* For example, in Colorado, if a defendant's income is less than 200 percent of the federal poverty level, this factor weighs toward finding they are unable to pay. COLO. REV. STAT. § 18-1.3-702(4)(g) (2022).

[229] *See* BANNON ET AL., *supra* note 184, at 14.

[230] *See id.* at 14, 29; *see, e.g.*, § 18-1.3-702(4)(c) (requiring the court to examine the defendant's debts and liabilities when determining whether a defendant can pay a monetary fine without undue hardship).

[231] BANNON ET AL., *supra* note 184, at 14. *But see, e.g.*, § 18-1.3-702(4)(e) (allowing courts to consider the value and convertibility of a defendant's real and personal property so long as the conversion would not result in "undue hardship").

[232] *See* Zhen, *supra* note 191, at 176-78, 182-87.

[233] *See, e.g.*, *id.* at 201-03 ("A thorough review of statutory standards for ability-to-pay determinations finds that many states authorize invasive techniques to investigate a defendant's financial resources. Many states then apply underinclusive criteria to determine indigency.").

[234] *See id.* at 201; Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555, 564 (2011).

[235] *See* Zhen, *supra* note 191, at 202.

[236] *See id.* at 202.

[237] *See, e.g.*, *id.* at 201-02 (arguing that ability-to-pay determinations involve overly intrusive inquiries into the defendant's personal life).

intake forms provided by defense counsel.[238] A thorough intake form would inquire as to the defendant's estimated present income, debts, and obligations, as well as whether the defendant receives public benefits.[239] Alternatively, because information contained in these intake forms would be protected by attorney-client privilege,[240] courts may take a submission from the defendant under oath.[241] Additionally, if probation and parole departments are required to disclose the waiver possibility and requirements to their supervisees, those individuals may self-report that information to the departments.[242]

Finally, and most fundamentally, states should focus their efforts on adequately funding criminal courts from general revenue so that they may perform their essential function without relying on funds from those who cannot afford to pay.[243] In 1986, the Conference of State Court Administrators released a national survey with policy recommendations for how to effectively run state courts.[244] Noting that court fees are often nominal in comparison to the total costs associated with court administration, the Conference recommended against using these charges to fund court operation.[245] Considering both the nominal nature of these charges in relation to the total cost of court administration as well as the potentially devastating impacts they invite

[238] *See, e.g.*, DIST. OF KAN. FED. PUB. DEF., FPD INTAKE FORM (2022), https://ks.fd.org/sites/ks.fd.org/files/forms/intake_form-current.pdf [https://perma.cc/6A8S-TBVY] (inquiring as to the defendant's housing, receipt of public benefits, child support obligations (and possible arrears), employment, medical history (including insurance), and education).

[239] *See, e.g.*, *id.* (requesting information regarding the client's employment status, receipt of public benefits including food stamps and social security, and debt obligations).

[240] MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. (AM. BAR ASS'N 1983) ("[I]n the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be… required to produce evidence concerning a client."). The client may, however, choose to disclose privileged information and elect to submit the intake form as evidence of their inability to pay. *See id.*

[241] Zhen, *supra* note 191, at 203; *see* VA. CODE ANN. § 19.2-355 (2018); REV. STAT. § 135.050(1) (2018).

[242] *See* PATEL & PHILIP, *supra* note 220, at 14.

[243] *See* ACLU, IN FOR A PENNY, *supra* note 226, at 28.

[244] COMM. TO EXAMINE FILING FEES, COSTS, & SURCHARGES, CONF. OF STATE CT. ADM'RS, STANDARDS RELATING TO COURT COSTS: FEES, MISCELLANEOUS CHARGES AND SURCHARGES AND A NATIONAL SURVEY OF PRACTICE 4-5 (1986), https://cdm16501.contentdm.oclc.org/digital/collection/financial/id/81 [https://perma.cc/VWK3-6AAW].

[245] *Id.* at 9.

on indigent litigants, states should move away from using fees as a funding mechanism for state courts.[246]

By adopting a more universal definition of ability to pay and requiring hearings prior to assessing user fees against indigent defendants, courts will be able to remove the arbitrariness that currently exists across jurisdictions.[247] Allowing for a sliding-scale approach, or complete abrogation of fees depending on the defendant's ability to afford them, would substantially limit this variability, as much of the variability comes from enforcement mechanisms against delinquent debtors.[248] By individualizing the fee structures and allowing for waivers for those who are truly unable to pay, states may balance their compelling interest in funding court administration while employing far less intrusive and inequitable means.

Establishing ability-to-pay procedures that balance the interests of understanding a defendant's financial picture with protecting the defendant's privacy is integral to securing the promise made by the *Griffin* court over half a century ago.[249] Given the steep costs of imposing fees on defendants who cannot afford to pay,[250] it is important that jurisdictions establish procedures that account for the complexities of a defendant's financial picture. Further, despite United States Supreme Court precedent rejecting the creation of debtor's prisons,[251]

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[246] *See id.* at 4, 9; MATTHEW MENENDEZ MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES 5-6 (2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [https://perma.cc/7T3A-AJWD].

[247] *See* Zhen, *supra* note 191, at 204-05 (noting that variations across jurisdiction leads to a "punishment continuum" that can be so stark that some people who have penal debt in two different jurisdictions will face the possibility of "concurrently navigating between different punishment continuums and different bureaucratic court hierarchies"); *see also* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 99 (2016).

[248] *See* HARRIS, *supra* note 247, at 99; Zhen, *supra* note 191, at 215.

[249] *See* Griffin v. Illinois, 351 U.S. 12, 19-20 (1956) (holding that the Illinois law violated the petitioners' constitutional rights and that they may be entitled to free transcripts because of their inability to afford to pay for them); *see also supra* Part I.B (describing the series of cases following *Griffin*'s lead in holding that various state court procedures violated litigants' rights because of their lack of consideration of the litigants' ability to pay).

[250] *See, e.g.*, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 175, at 42 (describing several examples of individuals whose lives were upended by court debt arising from their convictions for relatively minor offenses).

[251] *See* Bearden v. Georgia, 461 U.S. 660, 668-69 (1983) ("[I]f the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without

many states have since established work-arounds that result in further incarceration for those who fail to pay court-ordered fees.[252] Requiring ability-to-pay procedures and establishing clear and effective guidelines would reduce these harmful consequences by ensuring that these fees are only levied against those who can truly afford to pay them.

CONCLUSION

Griffin and its progeny established the fundamental right to access the courts and stand for the proposition that punishments and fees that treat defendants differently on the basis of their wealth violate that fundamental right.[253] Because user fees invite different consequences on different defendants based only on their wealth status, assessing these fees without first considering the defendant's ability to pay violates the principles established by the Court in these cases.[254] While the prospect of paying what amounts to seventy dollars in court fees may seem fairly insignificant in the abstract, one need look no further than Velia Dueñas's case to understand the devastating and snowballing effects these fees have on indigent defendants.[255]

In order to further the guarantees of *Griffin*, courts should be required to consider defendants' ability to pay prior to assessing fees against them.[256] Implementing such a structured approach would help cure the violation presented in cases like Velia Dueñas's.[257] In so doing, courts

considering whether adequate alternative methods of punishing the defendant are available.").

[252] *See* BANNON ET AL., *supra* note 184, at 19-20 (describing four paths to debtors' prison in use across fifteen states even after *Bearden*). For example, Velia Dueñas was offered extended jail terms in exchange for lessening her court debt burden. People v. Dueñas, 242 Cal. Rptr. 3d 268, 271 (Ct. App. 2019). Because these kinds of options are considered "voluntary," the practice has been allowed to exist in several states even after *Bearden*. *See* BANNON ET AL., *supra* note 184, at 20.

[253] *See generally Bearden*, 461 U.S. 660 (holding that states may not imprison probationers for their non-willful failure to pay probation fines); Tate v. Short, 401 U.S. 395 (1971) (concluding that it is a violation of the Equal Protection Clause to convert a defendant's fines into a jail term based on the defendant's inability to pay); Williams v. Illinois, 399 U.S. 235 (1970) (same); *Griffin*, 351 U.S. 12 (holding that the state's practice of requiring defendants to pay for their own trial transcripts for appeal was unconstitutional).

[254] *See Dueñas*, 242 Cal. Rptr. 3d at 270 ("[T]he only reason Dueñas cannot pay the fines and fees is her poverty."); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 127 (1996); *Williams*, 399 U.S. at 242; *Griffin*, 351 U.S. at 18.

[255] *Dueñas*, 242 Cal. Rptr. 3d at 273.

[256] *See supra* Part III.

[257] *See supra* Part III.

may further *Griffin*'s foundational promise of ensuring equal access to justice for all, independent of wealth.