

Too Rich to be Poor: The Hypocrisy of Indigency Determinations

Brandon L. Greene*

How we decide who is indigent has severe consequences for historically marginalized and underserved populations. Yet many of the rubrics for determining indigency and eligibility for services have been put into place without enough deep inquiry into how to best serve the populace in light of the diverse factors impacting their lives. In this way, access to justice programs fail to accomplish either access or justice in a comprehensive and holistic manner. As a result, current standards harm rather than help. Under the guise of access to justice, municipalities and other legal entities foreclose rather than expand opportunities for justice and threaten fair and equitable outcomes for the communities they claim to serve. Using the State of California, Alameda County and two of its largest cities, Oakland and Berkeley, this article contends that poorly designed access to justice programs increase financial hardship on impacted communities. The lack of continuity between the requirements of access to justice programs often produces unequal outcomes based entirely on the jurisdiction in which the violation occurs and exacerbates levels of community distrust in government. Ultimately, this article advocates for an approach to defining justice that is both data-driven and intersectional. This approach creates the necessary pathways for impacted communities to fully access justice.

Introduction.....	3
I. Martha Fineman's Vulnerability Theory	6

DOI: <https://doi.org/10.15779/Z38CZ3255K>

*Manager of the Oakland Civic Design Lab. Former Lecturer and Clinical Instructor at the East Bay Community Law Center, a clinic of University of California, Berkeley, School of Law. I would like to thank Kate Weisburd, Seema Patel, Theresa Zhen, Tirien Steinbach, Renee Hatcher and Erika Wilson. I am also grateful to Randy Hertz and the participants of the Clinical Law Review Writers' Workshop at NYU Law School. Most importantly, I would like to thank all of our community partners for your trust. The author has retained the copyright for this article.

II. Frank Rudy Cooper’s revised vulnerability theory	8
A. Access to Justice.....	9
III. State and Federal Programs that Utilize Income as a Metric for Qualification	11
A. Federal Programs.....	11
B. California Programs.....	12
IV. The California Traffic Amnesty Program (“CTAP”) as One California State Access to Justice Program that Utilized Receipt of Public Benefits and/or 125% of the FPL to Determine Who Qualified	13
A. Qualifying Income Metrics Under the CTAP as a Limitation on, Rather than an Expansion of, Access to Justice	14
B. Excluding Individuals Who Owe Victim Restitution Under California Penal Code Section 1202.4(F) (“PC 1202.4 (F)”) as a Limitation on, Not an Expansion of Access of Justice.....	15
C. Limiting Eligible Tickets to Those Due Prior to January 1, 2013 and to Those Where a Payment Was Made After September 30, 2015 as Limitation on, Not An Expansion of Access to Justice.....	17
V. Implementation of the Superior Court’s Ability to Pay Program	18
A. Program Overview.....	18
B. Requirements of the Program	19
C. Implementation of the Program.....	21
VI. City of Oakland and Other Programs That Utilize Income as a Metric For Qualification.....	23
A. Program Overview.....	23
B. Requirements	24
C. Implementation.....	25
VII. City of Berkeley	31
A. Program Overview.....	31
B. Requirements	32
C. Implementation.....	33
VIII. How Inconsistent Use of Financial Metrics Harm Indigent Individuals	34
A. The Inconsistency Between Berkeley’s Community Service Program and Berkeley’s Parking Payment Plan Program Likely Harms the Individuals They Are Supposed to Serve.....	34

2019	<i>TOO RICH TO BE POOR</i>	3
	B. Berkeley’s Failure to Consider Economic Realities in its Establishment of Qualifying Income Metrics Harms Indigent Individuals	36
	C. Oakland’s Failure to Consider Underlying Economic Realities Harms the Individuals its Payment Parking Plan Aims to Serve	36
	D. Alameda County Superior Court Should Set the Tone for the County.....	37
	IX. How Use of Disparate Financial Metrics Can Have a Racialized Impact	38
	X. Envisioning Wide Use of a Consistent Standard	41
	XI. Envisioning Standards that Use an Intersectional Analysis.....	42
	Conclusion	45

INTRODUCTION

Supercharged by the death of Mike Brown in Ferguson, Missouri and the televised protests of activists,¹ a national movement has gained traction. This movement has been driven by the impacted by policies and practices siphoning financial resources from the most marginalized communities. It seeks to bring to light what communities have suffered through in the dark.

A year of sustained direct action by advocates in Ferguson² sparked renewed interest in the inextricable connection between police violence and municipal debt. Among other startling revelations, the Department of Justice (“DOJ”) found that the City of Ferguson used traffic and other municipal debt to generate revenue; that the police used aggressive tactics to drive compliance and enforce the municipal codes without a focus on public safety; and that the court system operated not as a neutral arbiter, but primarily as a debt collector.³ Most alarming was the DOJ’s findings on racial bias:

Data collected by the Ferguson Police Department from 2012 to 2014 shows that African Americans account for 85% of vehicle

¹ See *Ferguson Unrest: From Shooting to Nationwide Protests*, BBC (Aug. 10, 2015), <https://www.bbc.com/news/world-us-canada-30193354>.

² See Steven Hsieh, *One Year After the Ferguson Protests, Just a Few Reforms Have Succeeded*, THE NATION (Aug. 10, 2015), <https://www.thenation.com/article/one-year-after-the-ferguson-protests-just-a-few-reforms-have-succeeded/>.

³ CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

stops, 90% of citations, and 93% of arrests made by FPD officers, despite comprising only 67% of Ferguson's population. African Americans are more than twice as likely as White drivers to be searched during vehicle stops even after controlling for non-race based variables such as the reason the vehicle stop was initiated, but are found in possession of contraband 26% less often than White drivers, suggesting officers are impermissibly considering race as a factor when determining whether to search. African Americans are more likely to be cited and arrested following a stop regardless of why the stop was initiated and are more likely to receive multiple citations during a single incident. From 2012 to 2014, FPD issued four or more citations to African Americans on 73 occasions but issued four or more citations to non-African Americans only twice.⁴

Other studies suggest Ferguson is not an outlier. Since the early 1990's, the phenomenon of "driving while black" has been detailed by communities and advocates.⁵ Most recently, data emerged from Chicago detailing how municipal debt drives Black motorists into bankruptcy;⁶ from Florida about the impact of racial bias on the severity of a speeding ticket;⁷ and from Kansas highlighting how biased use of police discretion creates a perfect storm to over-penalize Black drivers.⁸ Ferguson sparked many of these studies' broad geographic findings.

The Back on the Road Coalition ("BOTR"), a coalition of legal and policy organizations in California, including the East Bay Community Law Center ("EBCLC"), lead the fight to challenge existing laws and the narratives that drove them.⁹ This data-driven work included the release of a series of reports detailing racial bias in traffic stops in California. These reports, *Not Just a Ferguson Problem: How Traffic Courts Drive*

⁴ *Id.* at 4.

⁵ See DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999).

⁶ See Melissa Sanchez and Sandhya Kambhampati, *Driven Into Debt: How Chicago Ticket Debt Sends Black Motorists Into Bankruptcy*, PROPUBLICA (Feb. 27, 2018), <https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/>.

⁷ See German Lopez, *How Harsh Is Your Speeding Ticket? A New Study Suggests It May Come Down to Your Race*, VOX (Aug. 4, 2017, 1:30 PM), <https://www.vox.com/identities/2017/8/4/16070664/police-racial-bias-speeding-ticket>.

⁸ See Aaron Randle and Kelsey Ryan, *Black KC Drivers Get More Tickets Than Whites. Race Is Only Part of the Problem*, KAN. CITY STAR (May 20, 2018, 5:30 AM), <https://www.kansascity.com/news/local/article210495169.html>.

⁹ See COALITION INFORMATION – BACK ON THE ROAD, CALIFORNIA, <https://ebclc.org/backontheroad/about/coalition-information/> (last visited Nov. 12, 2019).

*Inequality in California*¹⁰ and *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*¹¹ have driven multiple reforms in California, including a mandate that each county-level superior court consider an individual's ability to pay traffic fines and fees.¹² Additional reforms have included a requirement that municipalities have a payment plan process in place prior to utilizing the Department of Motor Vehicles ("DMV") for the purposes of withholding individuals' vehicle registration as an incentive to repay debt.¹³ Simultaneously, other policy advocates, government entities,¹⁴ philanthropic organizations, and even design schools at academic institutions¹⁵ have begun to focus on the barriers preventing marginalized communities from accessing justice.

Too often legislators undertake efforts without answering the most basic underlying questions: What do we mean by "justice?" Does reform merely reinforce systems of efficiency, that fast track members of our most vulnerable communities into a web of municipal machinery that manufactures inequity? We must reckon with the myriad ways in which the procedural "justice" can harm the very communities our rhetoric proclaims concern for.

This paper analyzes the financial rubrics used to determine who qualifies as "indigent" and thereby eligible to receive social benefits and participate in access to justice programs. Using County of Alameda in California and the cities of Oakland and Berkeley, this paper argues that the categorization of the poor works to their detriment. By creating arbitrary and inconsistent financial rubrics that fail to adequately consider additional contributing factors, these access to justice programs cause, long-lasting harm to the communities they are purported to help.

This paper begins with a discussion of Martha Fineman's vulnerability theory and Frank Rudy Cooper's re-envisioning of

¹⁰ ALEX BENDER ET AL., *BACK ON THE ROAD, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA* (2015).

¹¹ STEPHEN BINGHAM ET AL., *BACK ON THE ROAD, STOPPED, FINED AND ARRESTED* (2016).

¹² See HON. GAIL DEKREON & HON. TRICIA ANN BIGELOW, *JUD. COUNCIL OF CAL., TRAFFIC AND CRIMINAL PROCEDURE: INFRACTION PROCEDURES REGARDING BAIL, FINES, FEES, AND ASSESSMENTS; MANDATORY COURTESY NOTICES; AND ABILITY-TO-PAY DETERMINATIONS* (2016).

¹³ See Assemb. B. 503, 2017 Leg., Reg. Sess. (Cal. 2017).

¹⁴ See ABOUT THE OFFICE, <https://www.justice.gov/atj/about-office> (last visited Nov. 29, 2019).

¹⁵ See JUSTICE INNOVATION | A PROJECT OF THE LEGAL DESIGN LAB, <http://legaltechdesign.com/access-innovation/> (last visited Nov. 29, 2019).

vulnerability theory as a lens through which access to justice programs may be viewed. The next section discusses the theoretical framework of access to justice programs, followed by a description of the various California State Public Benefits programs often used as an automatic qualifier for access to justice programs. Next, the piece describes the access to justice program in Alameda County Superior Court and its guidelines for qualification. Using client stories and anecdotes from EBCLC advocacy, the paper demonstrates how this program fails in its mission to help those most impacted by traffic-related fines and fees: the poor. I then detail the ability to pay and access to justice programs that exist in Oakland and Berkeley and their eligibility rubrics. After describing various local, county, and state programs, I evaluate the inconsistent use of financial metrics and how this disconnect harms communities by rendering many ineligible for services. This is followed by a discussion of how this inconsistency exacerbates disproportionate racial impact, examining how these programs fail to account for the intersectional issues faced by these communities. Next, I evaluate how disproportionate racial impact could be lessened by a consistent standard. This discussion concludes with examples and recommendations for an alternative standard based on an intersectional framework that accounts for historical and current harms shouldered by communities of color. These suggestions make the case that more justly designed programs will benefit impacted communities by increasing their economic standing and increasing constituent trust of the government entities that implement these programs.

I. MARTHA FINEMAN'S VULNERABILITY THEORY

Martha Fineman's Vulnerability Theory first begins by conceptualizing vulnerability as the "primal human condition."¹⁶ Fineman defines "vulnerable" as "the continuous susceptibility to change in both our bodily and social well-being that all human beings experience."¹⁷ She explains:

Human vulnerability has social, as well as physical and material consequences. On the most obvious level, our embodiment means that we are innately dependent on the provision of care by others when we are infants and often when we are ill, aged, or disabled. It is human vulnerability that compels the creation of social

¹⁶ Martha A. Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 142 (2017).

¹⁷ *Id.*

relationships found in designated social institutions, such as the family, the market, the educational system and so on. The very formation of communities, associations, and even political entities and nation-states are responses to human vulnerability. Social problems emerge when these social institutions and relationships are not functioning well.¹⁸

Fineman's theory evaluates the limitations of equality as a foundational goal of social justice.¹⁹ In her discussion, equality is measured as the comparison of "the circumstances of those individuals considered equals."²⁰ She states that "assessments of equality focus on specific individuals and operate to consider and compare social positions or injuries at a particular point in time."²¹ Fineman explains that in scenarios of inescapable inequality, law and policy solutions are often constructed by either "imposing a fabricated equivalence between the individuals or by declaring that an equality mandate does not apply because the individuals to be compared are positioned differently."²² Vulnerability theory distinguishes itself from either of these approaches by "incorporat[ing] a life-course perspective while also reflecting the role of the social institutions and relationships in which our social identities are formed and enforced. It also defines a robust sense of state responsibility for social institutions and relationships."²³

This life-course analysis positions the state, rather than the individual, as the focus of success or failure. It evaluates whether or not the state has fulfilled its responsibility in providing adequate resources sufficient for individuals' reliance.²⁴ Fineman's focus on the state and institutions leads to the conclusion that how people experience varying identities and the process by which they accumulate assets result from certain state actions.²⁵ In *The Vulnerable Suspect*, Fineman states:

[W]ith respect to the assets any one person possesses, it is not multiple identities that intersect to produce compounded inequalities, as has been posited by some theorists, but rather systems of power and privilege that interact to produce webs of advantages and disadvantages. Thus, where other theorists expand

¹⁸ *Id.*

¹⁹ *Id.* at 134.

²⁰ *Id.*

²¹ *Id.* at 135.

²² *Id.*

²³ *Id.* at 143.

²⁴ *Id.*

²⁵ *Id.*

the traditional equal protection analysis to account for multiple intersecting identities, a vulnerability analysis provides a means of interrogating the institutional practices that produce the identities and inequalities in the first place.²⁶

This seeming reduction or erasure of the import of identity, lived experiences, and the resulting trauma and inequity that follows has fueled critique of Vulnerability Theory. One such critique comes from Frank Rudy Cooper, who proposes an alternative in his piece *Always Already Suspect*. However, elements of Vulnerability Theory aid a discussion of access to justice: namely, that the state should carry the burden of ensuring adequate resources and should take the blame when it cannot do so. In particular, Fineman's discussion of the fabrication of equivalence also proves salient in discourse about access to justice because it challenges us to ask: What is meant by justice and who should access it? Fineman's framing of state responsibility for the success or failure of individual resilience implies a restorative justice element. The state must seek to repair the harm it is responsible for. Cooper's critique and revision of vulnerability theory alludes to this theme.

II. FRANK RUDY COOPER'S REVISED VULNERABILITY THEORY

In his piece *Always Already Suspect*, Cooper critiques Fineman's portrayal of universality, fearing that the "approach masks real differences amongst people."²⁷ For the state and broader society treat individuals differently based on certain characteristics reflects these real differences.²⁸ Cooper's re-envisioning of Fineman's vulnerability replaces notions of universality with a "multifaceted" profile "made up of gender, race, sexual orientation, class, and religious affiliations, among others."²⁹ Cooper's rationalizing this shift, arguing that more equitable results come from a "vulnerability theory that insists on a responsive state but makes that state aware of the ways that identities privilege some and disadvantage others."³⁰ Grounded in the inherent historical suspiciousness of Black men as it relates to racial profiling, Cooper's critique and proposed solution provides an example of how the state bears the burden of seeking solutions that take individuals' historical role into

²⁶ Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 16 (2008).

²⁷ Frank R. Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1365 (2015).

²⁸ See *id.* at 1364-65, 1369.

²⁹ *Id.* at 1376.

consideration, as opposed to framing solutions based on a fiction of universality.³⁰ The framing of a culpable state responsible for addressing vulnerability paired with Cooper's framing of the "already always suspect" help analyze the efficacy and application of access to justice programs generally and those analyzed here specifically.³¹

The next section details the access to justice framework, the systemic distrust of Courts on behalf of marginalized peoples, and the use of the Federal Poverty Line in determining indigency for access to programs.

A. Access to Justice

Poor and low-income individuals have a fraught relationship with government and other legal institutions.³² In her law review article titled *Race, Class and Access to Civil Justice*, Sara Sternberg Greene cites an American Bar Association study finding that,

"among low-income individuals, . . . 47% were experiencing one or more civil legal needs at the time of the survey. Of those 47%, only about one-quarter sought legal advice. Nearly three-quarters shunned the justice system entirely, not even taking the first step of picking up the phone to find out what kind of legal help might be available."³³

Greene's study found that individuals with negative experiences with the criminal justice system often extended their perceptions to the civil legal system, seeing both as systems where "justice is bought."³⁴ Levels of trust in both civil and criminal institutions varied by race, with 75% of white respondents conveying trust in the court system.³⁵ Only 22% of Black respondents felt similarly.³⁶ The racial disparities in perception persisted across question categories too. Half of black respondents believed the court to be a corrupt institution whereas only a few white respondents felt that way.³⁷ Survey respondents related the use of money to influence judges and a feeling that the system was designed

³⁰ *Id.* at 1379.

³¹ *See id.*

³² *See* Sara Stenberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1265-67 (2016).

³³ *Id.* at 1265.

³⁴ *Id.* at 1266-67.

³⁵ *Id.* at 1301.

³⁶ *Id.* at 1302.

³⁷ *Id.* at 1307.

to deliver injustice to poor people and people of color.³⁸ The stark revelations in Greene's build upon preexisting literature on the impact of poverty and other stressors on the lives of individuals living at the margins.

Poverty captures and monopolizes an individual's attention, resulting in reduced productivity and diminished ability to process new information. People living in poverty often direct a tunnel-like focus on the experience of scarcity and its immediate consequences, altering the way they perceive the world. This "tunneling" on the scarcity occurs then one's attention become involuntarily diverted to what is lacking. Preoccupation with the scarcity can consume and overwhelm, leaving less mental bandwidth to attend to other matters. The poor do not have less mental bandwidth to begin with, rather that the "experience of poverty" reduces the available bandwidth, thereby imposing additional barriers to effective self-help.³⁹

The sentiment expressed in the above quote is true from the vantage point of many public interest lawyers. Throughout my time as an attorney at the East Bay Community Law Center, the organization advocated for policy makers to fully grapple with the reality of our client's lives and to craft policies that consider those realities. Instead, policy makers often use the possibility of an equitable outcome for a few to justify taking minimal steps toward effectuating access to justice for all.

As detailed in the forthcoming sections, eligibility for many programs relies on receipt of public benefits or having an income that falls at or below 125% of the Federal Poverty Line ("FPL"). This article draws parallels to other scholarship examining how an individual can be too poor to afford a lawyer while still falling outside the current definition of indigency.⁴⁰ In his article, John P. Gross discusses how courts' use of a multiple of the FPL to determine eligibility results in the "denial of counsel to criminal defendants who are too poor to hire a lawyer."⁴¹ He details the origin of the use of the FPL, pointing mainly to Johnson's 1964 declaration of the war on poverty and the creation of the Legal Services

³⁸ *Id.*

³⁹ See Lois R. Lupica et al., *The Apps for Justice Project: Employing Design Thinking to Narrow the Access to Justice Gap*, 44 *FORDHAM URB. L.J.* 1363, 1367 (2017).

⁴⁰ See, e.g., John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Rights to Counsel*, 70 *WASH. & LEE L. REV.* 1173, 1175 (2013).

⁴¹ *Id.* at 1175.

Corporation (“LSC”) that same year.⁴²

At the time of its creation, the LSC decided to use 125% of the FPL as its eligibility criteria for those seeking civil legal services.⁴³ The use of a percentage of the FPL for determining eligibility for services did not remain the sole province of the LSC. Several federal agencies followed suit, adopting the FPL as their standard.⁴⁴ In the next section, I detail some of the California State programs that use a variation of the FPL for determining eligibility.

III. STATE AND FEDERAL PROGRAMS THAT UTILIZE INCOME AS A METRIC FOR QUALIFICATION

Generally, individuals automatically qualify for one of several access to justice programs if they receive one of the Federal or State benefits discussed below:

A. Federal Programs

The two Federal programs, Social Security Income (“SSI”) and Social Security Disability Insurance (“SSDI”), automatically qualify someone for access to justice programs such as the Alameda County Superior Court traffic court payment plan and the parking payment plans for Oakland and Berkeley.⁴⁵

To qualify for SSI, an individual must meet the following four requirements: 1) be at least age 65; 2) be blind or disabled; 3) have limited income and resources; and 4) be a Citizen or national of the U.S. or an alien who meets certain applicable requirements or reside in one of the 50 States, District of Columbia, or the Northern Mariana Islands, except for a child of military parent(s) assigned to permanent duty anywhere outside the United States or certain students temporarily abroad.⁴⁶

⁴² *Id.* at 1194.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ As discussed later, the Alameda County Superior Court plan, Berkeley parking payment plan, and Oakland income-driven parking payment plan accept receipt of SSI and SSDI benefits as automatic qualification. *See* WHAT IF I CAN’T AFFORD TO PAY?, <http://www.alameda.courts.ca.gov/Pages.aspx/What-if-I-can-t-afford-to-pay-> (last visited Nov. 29, 2019); PARKING TICKET PAYMENT PLANS, <https://www.oaklandca.gov/services/parking=ticket-payment-plan> (last visited Nov. 30, 2019); CITY OF BERKELEY, *Indigent Payment Plans for Parking Citations* (Nov. 2018), https://www.cityofberkeley.info/uploadedFiles/Customr_Service/Level_3_-_General/Indigent%20Payment%20Plan%20FAQ's.pdf.

⁴⁶ SUPPLEMENTAL SECURITY INCOME (SSI), <https://www.benefits.gov/benefits/benefit->

To qualify for SSDI, you must have 1) worked a job that is eligible for social security benefits and 2) have a qualifying disability.⁴⁷

B. California Programs

Several California programs use various metrics, including income, to determine eligibility. Some of the main programs used to determine automatic qualification for access to justice programs include: 1) CalFresh (formerly known as food stamps), “an entitlement program that provides monthly benefits to assist low-income households in purchasing the food they need to maintain adequate nutritional levels”;⁴⁸ 2) CalWORKs, “a welfare program that gives cash aid and services to eligible needy California families”;⁴⁹ and 3) Medi-Cal, California’s Medicaid healthcare program.⁵⁰

To qualify for CalFresh, an individual must be a U.S. citizen and register for employment.⁵¹ In addition, a single individual’s household income must not exceed \$15,444.⁵² To qualify for CalWORKs, an individual must be

a resident of the state of California, either pregnant or responsible for a child under 19 years of age, a U.S. national, citizen, legal alien, or permanent resident, have low or very low-income, and be either under-employed (working for very low wages), unemployed or about to become unemployed.⁵³

The income threshold for CalFresh is \$2,010 per month (\$24,120 per year) for a single person.⁵⁴ To qualify for Medi-Cal, an individual

details/4412 (last visited Nov. 10, 2019).

⁴⁷ BENEFITS PLANNER: DISABILITY | HOW YOU QUALIFY, U.S. SOC. SEC. ADMIN., <https://www.ssa.gov/planners/disability/qualify.html> (last visited Nov. 10, 2019).

⁴⁸ CALFRESH, <https://www.benefits.gov/benefits/benefit-details/1228> (last visited Nov. 10, 2019).

⁴⁹ CALWORKS, <https://www.benefits.gov/benefits/benefit-details/1229> (last visited Nov. 10, 2019).

⁵⁰ CALIFORNIA MEDICAID, <https://www.benefits.gov/benefits/benefit-details/1620> (last visited Nov. 10, 2019).

⁵¹ CALFRESH, *supra* note 49.

⁵² *The CalFresh page* lists income limitations as follows: \$21,983 for a family of two; \$27,729 for a family of three; \$33,475 for a family of four; \$39,221 for a family of five; \$44,967 for a family of six; \$50,713 for a family of seven; and \$56,459 for a family of eight).

⁵³ CALWORKS, *supra* note 50.

⁵⁴ *Eligibility Basics*, CALFRESH, <http://mycalfresh.org/the-basics/> (last visited Nov. 10, 2019) (listing additional income guidelines: \$2,820 per month for a family of two; \$3,556 for a family of three; \$4,292 for a family of four; \$5,030 for a family of five; \$5,766 for

must “be a resident of the state of California, a U.S. national, citizen, permanent resident, or legal alien, in need of health care/insurance assistance, whose financial situation would be characterized as low-income or very low-income.”⁵⁵ For a single person, this equates to \$15,800 per year.⁵⁶ Additionally, an individual “must also be either pregnant, blind, have a disability or [have] a family member in [their] household with a disability, be responsible for children under 19 years of age, or be 65 years of age or older.”⁵⁷

IV. THE CALIFORNIA TRAFFIC AMNESTY PROGRAM (“CTAP”) AS ONE CALIFORNIA STATE ACCESS TO JUSTICE PROGRAM THAT UTILIZED RECEIPT OF PUBLIC BENEFITS AND/OR 125% OF THE FPL TO DETERMINE WHO QUALIFIED

One of the more recent California State Access to Justice Programs is the Traffic Amnesty Program, enacted by statute on June 27, 2015.⁵⁸ There are four purposes of this program: 1) provide relief to individuals who are in violation of a court-ordered obligation because of unpaid debt; 2) provide relief to individuals who have had their driving privileges suspended; 3) provide increased revenue by encouraging payment of old fines that have remained unpaid; and 4) allow courts and counties to resolve older delinquent debt.⁵⁹ Under this program, an individual can qualify for a 50% or 80% reduction in traffic fines and fees owed prior to January 1st, 2013 if they meet certain criteria.⁶⁰ First, an individual must not have outstanding misdemeanor or felony warrants in the County in which they applied.⁶¹ Second, an individual must not owe victim restitution.⁶² Third, an individual must not have made any

a family of six; \$6,504 for a family of seven; and \$7,240 for a family of eight).

⁵⁵ CALIFORNIA MEDICAID, *supra* note 51.

⁵⁶ *Id.* (listing additional income guidelines: \$21,307 for a family of two; \$26,813 for a family of three; \$32,319 for a family of four; \$37,825 for a family of five; \$43,331 for a family of six; \$48,851 for a family of seven; and \$54,384 for a family of eight).

⁵⁷ *Id.*

⁵⁸ JUDICIAL COUNCIL OF CAL., 18-MONTH STATEWIDE INFRACTION AMNESTY PROGRAM REPORT 1 (2017).

⁵⁹ *Traffic Tickets Amnesty Program*, CAL. DEP’T OF MOTOR VEHICLES, <https://www.dmv.ca.gov/portal/dmv/detail/home/trafficamnestyprogram+> (last visited Nov. 12, 2019).

⁶⁰ *Traffic Amnesty is Here*, ALAMEDA SUPERIOR COURT, <http://www.alameda.courts.ca.gov/Resources/Documents/TrafficAmnesty%20Form%20Submission%20Poster%283%29.pdf>.

⁶¹ *Id.*

⁶² *Id.*

payments on their outstanding tickets after June 14, 2015.⁶³ Qualification for an 80% reduction requires that an individual receive public benefits or have an income below 125% of the FPL.⁶⁴ If an individual otherwise qualifies but exceeds the income guideline, then they are eligible for a 50% reduction.⁶⁵

Under this program, an individual who does not have a qualifying ticket was still eligible to have a failure-to-appear hold on their license removed as long as they were in good standing on a payment plan.⁶⁶ The Traffic Amnesty Program has resolved 255,306 individuals' cases.⁶⁷ This resulted in the collection of over \$45 million in gross revenue.⁶⁸ In addition, 246,300 people sent requests to the DMV to rectify their driver's license suspensions.⁶⁹ Administration of the program, however, was not without challenges. The amnesty eligible debt of 2.62 billion dollars was only reduced by 45 million.⁷⁰ Relatedly, only 5.5% of eligible amnesty cases (representing 4,967,917 cases) resulted in a debt reduction.⁷¹

A. Qualifying Income Metrics Under the CTAP as a Limitation on, Rather than an Expansion of, Access to Justice

The administration of the traffic amnesty program demonstrates how a fear of too much justice can result in policy decisions that deny, rather than expand, access to justice. One example is the 30% difference in debt reduction for individuals with incomes exceeding 125% of the FPL, which accounted for any annual income over \$14,712.50 for a single person in 2015.⁷² For context, according to the California Budget and Policy Center, approximately six million Californians lived in poverty during this time.⁷³ However, when analyzed through the Supplemental

⁶³ *Id.*

⁶⁴ *Traffic Amnesty Sample Participation Form*, SUPER. CT. OF CAL., CTY. OF ALAMEDA, <http://www.alameda.courts.ca.gov/Resources/Documents/Amnesty%20Participation%20Form.pdf>

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ JUDICIAL COUNCIL OF CAL., *supra* note 59, at 1.

⁶⁸ *Id.*

⁶⁹ *Id.* at 18.

⁷⁰ *Id.* at 2.

⁷¹ *Id.*

⁷² *See 2015 Poverty Guidelines*, DEP'T OF HEALTH & HUMAN SERV. (Sept. 6, 2015) <https://aspe.hhs.gov/2015-poverty-guidelines>.

⁷³ Alissa Anderson, *California's Poverty Rate Declined but Millions Are Still Not Sharing Economic Gains*, CAL. BUDGET AND & POLICY CTR. (Sept. 2016),

Poverty Measure (“SPM”), that number grew to approximately 8 million Californians, over 20% of the state’s population.⁷⁴ Even without utilizing the SPM, which unlike the official poverty measure considers additional factors, California ranked as the 17th most impoverished state in the country.⁷⁵ Given the stark poverty rates in California, qualification for the greatest discount should not be determined using 125% of the FPL as the metric. Similarly, given the stated goals of the CTAP to “[p]rovide increased revenue by encouraging payment of old fines that have remained unpaid” and “[a]llow courts and counties to resolve older delinquent debt,”⁷⁶ a more inclusive and broader eligibility metric would more effectively achieve this goal.

B. Excluding Individuals Who Owe Victim Restitution Under California Penal Code Section 1202.4(F) (“PC 1202.4 (F)”) as a Limitation on, Not an Expansion of Access of Justice

Under the CTAP, an individual who owed victim restitution under PC 1202.4 (f) cannot participate.⁷⁷ The practical impact is that those owing victim restitution under this provision could neither pursue driver’s license restoration, nor receive a discount on owed traffic fines and fees.⁷⁸ PC 1202.4(a)(1) states that “it is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.”⁷⁹ PC 1202.4(f) also states:

Except as provided in subdivisions (q) and (r), in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss

<https://calbudgetcenter.org/resources/californias-official-poverty-rate-declined-2015-millions-people-still-not-sharing-recent-economic-gains/>.

⁷⁴ *Id.*

⁷⁵ Chris Nichols, *True: California Has the Nation’s Highest Poverty Rate, When Factoring in Cost-of-Living*, POLITIFACT (Jan. 20, 2017, 3:11 PM), <https://www.politifact.com/california/statements/2017/jan/20/chad-mayes/true-california-has-nations-highest-poverty-rate-w/>.

⁷⁶ JUDICIAL COUNCIL OF CAL., *supra* note 59, at 2.

⁷⁷ ALAMEDA SUPER. CT., *supra* note 61.

⁷⁸ *Frequently Asked Questions*, CAL. COURTS 3, <http://www.courts.ca.gov/partners/documents/rc-amnesty2015-FAQs.pdf>.

⁷⁹ CAL. PENAL CODE § 1202.4 (2019).

cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution. The court may specify that funds confiscated at the time of the defendant's arrest, except for funds confiscated pursuant to Chapter 8 (commencing with Section 11469) of Division 10 of the Health and Safety Code, be applied to the restitution order if the funds are not exempt for spousal or child support or subject to any other legal exemption.

Proposition 9 (Marsy's Law), the Victims' Bill of Rights Act of 2008, was enacted on November 4, 2018.⁸⁰ Among the many provisions of the Victim's Bill of Rights was a section that explicitly addressed victim restitution.⁸¹ That section states:

It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.⁸²

To be sure, victims of crime should be made whole. However, if making victims of crime whole is something to be prioritized, excluding those who owe victim restitution from participation in a debt reduction or a driver's license restoration program seems ineffective. First, "it is widely estimated that 60-80% of criminal cases involve indigent defendants."⁸³ Second, an access to a driver's license impacts employability⁸⁴ and disproportionately impacts low-income communities of color in California. Lack of a driver's license has a distinct impact on

⁸⁰ *California Crime Victims' Rights*, CAL. VICTIMS COMP. BD., <https://victims.ca.gov/victims/rights.aspx> (last visited Nov. 12, 2019).

⁸¹ *California Voter Guide* 128, <https://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9>.

⁸² CAL. VICTIMS COMP. BD., *supra* note 81.

⁸³ See Bureau of Justice Assistance, Contracting for Indigent Defense Services: A Special Report (U.S. Department of Justice, 2000), available at <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

⁸⁴ Alana Semuels, *No Driver's License, No Job*, THE ATLANTIC (June 15, 2016), <https://www.theatlantic.com/business/archive/2016/06/no-drivers-license-no-job/486653/>.

reentry.⁸⁵ Consequently, excluding the those who owe victim restitution from participation in the CTAP contributes to inability to pay fines.

C. Limiting Eligible Tickets to Those Due Prior to January 1, 2013 and to Those Where a Payment Was Made After September 30, 2015 as Limitation on, Not An Expansion of Access to Justice

The CTAP limited eligible traffic tickets to those due on or before January 1, 2013.⁸⁶ Similarly, the CTAP excluded tickets if a payment was made after September 30, 2015,⁸⁷ even though the legislation was enacted on June 24, 2015,⁸⁸ and the program became effective on October 1, 2015.⁸⁹ As a result, people with a mix of tickets due on or before January 1, 2013, and tickets due after January 1, 2013, or people who only had tickets due after January 1, 2013, may have some tickets eligible for a reduction while others were not. This prevented many from fully benefitting from the debt reduction. Similarly, those unfamiliar with the program who made a payment after September 30, 2015, were excluded from any debt reduction, though they were still eligible for license restoration.⁹⁰ These individuals who may have otherwise qualified for a substantial discount on the debt owed stayed on the hook for fees for as much as thousands of dollars.

CTAP excluded individuals from participation in other ways that fall beyond the scope of this article. As a final example, Alameda County Superior Court (“the Superior Court”), profiled below, refused to waive the \$50 participation fee for indigent individuals who qualified, despite having the discretion to do so.⁹¹ Additionally, the Superior Court interpreted the “good standing” requirement for payment plans to mean that individuals had to “pay off every single monthly payment they’ve

⁸⁵ Todd A. Berger & Joseph A. DaGrossa, *Overcoming Legal Barriers to Reentry: A Law School-Based Approach to Providing Legal Services to the Reentry Community*, 77 FED. PROBATION 3, 5 (2013) (“In a recent multi-state survey of offenders about to be released back into the community, 45 percent cited a need for assistance with outstanding child support matters, 83 percent reported the need for a driver’s license, and 80 percent reported a need for employment.”).

⁸⁶ CAL. COURTS, *supra* note 79, at 3.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1.

⁸⁹ *Id.*

⁹⁰ *Id.* at 4.

⁹¹ Sam Levin, *California Traffic Tickets Amnesty Program Leaves Many Behind*, EAST BAY EXPRESS (Nov. 11, 2015), <https://www.eastbayexpress.com/oakland/california-traffic-tickets-amnesty-program-leaves-many-behind/Content?oid=4572407>.

missed.⁹² This resulted in a denial for participation in the program unless people paid off their debts in full.⁹³ This discretionary interpretation worked against the stated anti-poverty goals of the program.⁹⁴ Importantly, as a statewide program, the CTAP set the tone for related access to justice programs whose administration raised similar questions about how much justice they seek to effectuate.

The Superior Court, despite being at the forefront of implementing of an access to justice program, serves as a glaring example of how a fear of too much justice harms the most vulnerable communities. In the next section I discuss how the current iteration of the Superior Court's ability to pay program continues to harm vulnerable communities.

V. IMPLEMENTATION OF THE SUPERIOR COURT'S ABILITY TO PAY PROGRAM

A. Program Overview

The Superior Court's ability to pay program is based on Judicial Council Rule of Court 4.335.⁹⁵ This rule mandates that all county courts provide defendants an opportunity to be "heard" on their ability to pay.⁹⁶ Based on the ability-to-pay determination, the court may exercise discretion to: 1) provide for payment on an installment plan (if available); 2) allow [an individual] to complete community service in lieu of paying the total fine (if available); 3) suspend the fine in whole or in part; or 4) offer an alternative disposition.⁹⁷ Additional guidance to county courts stated that the court should consider a number of factors for determining an individual's ability to pay, including the receipt of public benefits and a monthly income of 125% or less of the current poverty guidelines.⁹⁸ Finally, courts were instructed that the amount and manner of paying the total fine must be reasonable and compatible with the defendant's

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ CAL. RULES OF CT. 4.335 (effective Jan. 1, 2017), http://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_335.

⁹⁶ Blaine Corren, *Council Approves New Rules to Better Inform Defendants of Their Rights in Infraction Cases*, CAL. COURTS NEWSROOM (Dec. 16, 2016), <https://newsroom.courts.ca.gov/news/council-approves-new-rules-to-better-inform-defendants-of-their-rights-in-infraction-cases>.

⁹⁷ CAL. RULES OF CT., *supra* note 95.

⁹⁸ *Id.*

financial ability.⁹⁹

B. Requirements of the Program

Under the ability to pay program, if a person meets the qualifications they can have their traffic court debt reduced and be placed on a payment plan for up to three years.¹⁰⁰ Previously under this program, an individual could qualify in the following ways by: 1) receiving public benefits; 2) making \$1,256.25 per month (\$15,075 annually); or 3) having \$250 or less in disposable income.¹⁰¹ The past income guideline for this program was based on 125% of the FPL.¹⁰²

However, after over a year of advocacy by EBCLC, the Alameda County Court agreed to augment the requirements. Now an individual qualifies for the program if they receive any of the following public benefits: SSI, SSP, CalWORKs, Tribal TANF, GR, GA, CAPI, IHSS, or Medi-Cal.¹⁰³ In order to prove receipt of public benefits, an individual must provide a statement of benefits dated within the past six months.¹⁰⁴ Previously, this statement of benefits had to be dated within the past 60 days, along with other documentation of income.¹⁰⁵ If an individual sought to qualify under the past income guidelines, they were required to submit either a copy of a current pay stub with year-to-date totals or their last three months of pay stubs.¹⁰⁶ If an individual is married, they were also required to turn in proof of income of additional household members; if they had children, they were also required to turn in the previous year's

⁹⁹ *Id.*

¹⁰⁰ WHAT IF I CAN'T AFFORD TO PAY?, *supra* note 46.

¹⁰¹ ALAMEDA CTY. SUPER. CT., *Form TR-018-Request for Ability to Pay Determination* (effective May 1, 2017), [http://www.alameda.courts.ca.gov/Resources/Documents/Ability%20To%20Pay%20Application%20Form%2005012017\(2\).pdf](http://www.alameda.courts.ca.gov/Resources/Documents/Ability%20To%20Pay%20Application%20Form%2005012017(2).pdf).

¹⁰² *See* ALAMEDA CTY. SUPER. CT., PRESS RELEASE (July 18, 2018), [http://www.alameda.courts.ca.gov/Resources/Documents/ATP%20Revised%20Income%20Standards%20Press%20Release\(1\).pdf](http://www.alameda.courts.ca.gov/Resources/Documents/ATP%20Revised%20Income%20Standards%20Press%20Release(1).pdf).

¹⁰³ WHAT IF I CAN'T AFFORD TO PAY?, *supra* note 46.

¹⁰⁴ ALAMEDA CTY. SUPER. CT., *Ability to Pay Document Checklist for Applicants* (effective May 1, 2017; revised June 26, 2018), [http://www.alameda.courts.ca.gov/Resources/Documents/Ability%20to%20Pay%20Document%20Checklist%20amended%2006262018%20\(3\).pdf](http://www.alameda.courts.ca.gov/Resources/Documents/Ability%20to%20Pay%20Document%20Checklist%20amended%2006262018%20(3).pdf).

¹⁰⁵ ALAMEDA CTY. SUPER. CT., *Ability to Pay Document Checklist for Applicants* (effective May 1, 2017; revised Mar. 19, 2018), [http://www.alameda.courts.ca.gov/Resources/Documents/Ability%20to%20Pay%20Document%20Checklist%2003192018%20\(7\).pdf](http://www.alameda.courts.ca.gov/Resources/Documents/Ability%20to%20Pay%20Document%20Checklist%2003192018%20(7).pdf).

¹⁰⁶ *Id.*

tax return.¹⁰⁷ Now, however, the income qualifications are based not on

FY 2018 Income Limit Area	Median Family Income Explanation	FY 2018 Income Limit Category	Persons in Family							
			1	2	3	4	5	6	7	8
Oakland-Fremont, CA HUD Metro FMR Area	\$104,400	Very Low (50%) Income Limits (\$) Explanation	40,700	46,500	52,300	58,100	62,750	67,400	72,050	76,700
		Extremely Low Income Limits (\$)* Explanation	24,400	27,900	31,400	34,850	37,650	40,450	43,250	46,050
		Low (80%) Income Limits (\$) Explanation	62,750	71,700	80,650	89,600	96,800	103,950	111,150	118,300

125% of the FPL but rather on the Housing and Urban Development (“HUD”) extremely low-income standard.¹⁰⁸

¹⁰⁹

This new standard is approximately \$9,000 higher for a single person than the previous standard,¹¹⁰ which should result in more qualifying individuals.

The new standard requires individuals to show either a current pay stub with year to date totals or the most current pay stub.¹¹¹ A married individual with children is still required to turn in documentation of their additional household member’s income and their most recent tax return.¹¹² Finally, under the new Superior Court guidelines, someone not on public benefits and whose income exceeds the guidelines still qualifies if he or she has less than \$400 in disposable income.¹¹³ This is up from

¹⁰⁷ *Id.*

¹⁰⁸ ALAMEDA CTY. SUPER. CT., *Press Release* (effective July 2, 2018) *supra* note 103.

¹⁰⁹ FY 2018 Income Limits Documentation System, HUD, <https://www.huduser.gov/portal/datasets/il/il2018/2018summary.odn> (Select “Oakland-Fremont, CA HUD Metro FMR Area” from the drop-down menu and click “Select HFMA Income Limits Area” to generate a graph).

¹¹⁰ The previous standard was \$15,175 dollars. ALAMEDA CTY. SUPER. CT., *Form TR-018-Request for Ability to Pay Determination*, *supra* note 102.

¹¹¹ ALAMEDA CTY. SUPER. CT., *Ability to Pay Document Checklist for Applicants*, *supra* note 105.

¹¹² *Id.*

¹¹³ ALAMEDA CTY. SUPER. CT., *Ability to Pay Document Checklist for Applicants*, *supra*

\$250 in disposable income under the previous standard.¹¹⁴ Under the previous standard, in order to qualify under the disposable income rubric, an individual needed to submit either; 1) a current pay stub with year to date totals or 2) the most current pay stub; 3) proof of other household member's income; 4) copies of the last tax return, if they have children; 4) copy of bank statements, if applicable; 5) copy of rental agreement or mortgage; and 6) a copy of other documents if applicable, to demonstrate and inability to pay.¹¹⁵ Under the new guidelines, the requirements for demonstrating less than \$400 in disposable income remain largely unchanged.¹¹⁶

C. Implementation of the Program

The Superior Court was one of the first county courts to implement an ability to pay process and has continued to work collaboratively with the East Bay Community Law Center to refine the program. However, that collaboration was not without challenges. Though the Court eventually adopted the HUD standard,¹¹⁷ it initially refused to adopt the very low standard which would have more closely aligned with the true costs of living in Alameda County. Prior to adopting the HUD standard, the Court Executive Officer expressed to EBCLC that he would need to confirm the new standard with other court executives. The officer wanted to ensure no other court executive would object to the new standard or view it as an opening salvo in a movement that could impact the other courts. The following email excerpt details why EBCLC believed that the Very Low-Income Standard would expand access to justice:

We are thrilled that you plan to adopt the HUD standard for “extremely low-income” residents of Alameda County.

While we applaud your courage to take this important step, Brandon and I urge you to adopt the “Very Low” HUD standard, which is a much better (though still imperfect) metric when considering the rising cost of living in Alameda County.

note 106.

¹¹⁴ Alameda Cty. Super. Ct., *Form TR-018-Request for Ability to Pay Determination*, *supra* note 102.

¹¹⁵ Superior Court of California, *County of Alameda, Ability to Pay Document Checklist for Applicants*, *supra* note 105.

¹¹⁶ *See id.*

¹¹⁷ Alameda Cty. Super. Ct., Press Release (effective July 2, 2018) *supra* note 103

The “Very Low” HUD standard is more appropriate for families. Neither the FPL nor the HUD standard differentiates between family sizes, which, if you have children in Alameda County, you know drastically informs your expenses on varying stages of childcare needs. In Alameda County, the 2014 self-sufficiency standard* was \$63,979 for a family of four with two adults with one preschooler and one school-age child. This is where the “Extremely Low” standard falls short. A family of four living in Alameda County would need to make less than \$34,850 in order to qualify under “Extremely Low,” which is much less than the self-sufficiency standard. This does not contemplate family type, size, or other costs like specialized care. In comparison, under “Very Low” standard, a family would need to make less than \$58,100 in order to qualify under “Very Low” which, while imperfect, gets much closer to capturing the real costs of raising children in Alameda County.

The “Very Low” HUD standard is more appropriate for families. As you mentioned on the phone, it’s near impossible to live in Alameda County with an income of \$15,000 per year, which is what it was under 125% FPL. After some calculations, it’s also near impossible to live on an income of \$24,400 (standard for 1-person under “Extremely Low”). For a person earning a living wage in Alameda County (\$16.48/hr**), that comes out to \$34,278.4/year. This is significantly higher than the Extremely Low standard of \$24,400. In short, the “Extremely Low” standard will not take into account the necessity of making a living wage in Alameda County.

The “Very Low” HUD standard is more appropriate for renters. The rents in Alameda County recently experienced the steepest climbs in all of the Bay Area. In 2015, the rent costs in Alameda County was \$2,170. As of May 2018, the average rent was \$2,458/month, which comes up to \$29,496/year just in housing costs. 85% of rentals in Alameda County are more than \$2,000/month for rent.

In short, we urge you to adopt the “Very Low” standard. It is much more in line with the realities for residents in Alameda County.

Ultimately, the court accepted the extremely low-income standard because, although it raises the income cap substantially for a single individual, the gap between the two standards increasingly narrow with increasing family members, to only a \$3000 gap in standards for a family of four. Additionally, after adopting the new standard, the Superior Court refused to apply the HUD standard retroactively to applicants with prior denials. It also refused to create an outreach plan for previously denied

applicants that now qualified under the new standards.

As the chart below shows, approximately 50% of all applications were denied. Of the applications that were granted for receipt of public benefits, very few were being granted for incomes at 125% of the FPL, and even fewer were granted for net incomes of \$250 or less. There are various reasons for this but at a minimum, it seems likely that the program vastly underserved the poor, but not poor enough to be receiving public benefits.

Ability To Pay Statistics

Column1	Column2	Column3	Column4	Column5	Column6	Column7	Column8	Column9
Month	Total Processed	Average Processing time in Days	Total Denied	Total Granted	Granted - Public Assistance	Granted - 125% Federal Poverty Level	Granted - Net Income	Outstanding Cases
May 2017	72	1	11	61	55	3	3	
June 2017	190	5	88	102	88	9	5	
July 2017	249	3	72	177	155	19	3	
August 2017	277	4.5	142	135	126	6	3	
September 2017	290	3.9	85	205	200	4	1	
October 2017	275	2.9	110	165	147	3	15	
November 2017	66	1.9	24	42	37	0	5	78
December 2017	223	4.4	65	158	142	10	6	
January 2018	239	1.7	114	125	117	5	3	
February 2018	155	1.5	56	98	90	1	8	

At present, the current income standard for the Superior Court's plan falls in-line with the very-low income standard under HUD, the standard initially recommended by EBCLC. This allows a single individual making \$40,700 or less to qualify for a 50% debt reduction and a payment plan, and moves the Court closer to having a plan that equitably serves those at the margins.¹¹⁸ In the next section, I detail the requirements and implementation of Oakland's Parking Ticket Payment Plan Program.

VI. CITY OF OAKLAND AND OTHER PROGRAMS THAT UTILIZE INCOME AS A METRIC FOR QUALIFICATION

A. Program Overview

Currently, Oakland has two different parking ticket payment plan programs, a non-income-driven payment plan and an income-driven payment plan.¹¹⁹

¹¹⁸ See WHAT IF I CAN'T AFFORD TO PAY?, *supra* note 46.

¹¹⁹ City of Oakland, *Parking Ticket Payment Plans*, <https://www.oaklandca.gov/services/parking-ticket-payment-plan>.

B. Requirements

The non-income-driven payment plan specifically says that it “offers a low-payment, penalty-free payment plan for those who are most vulnerable in our community and are considered indigent.”¹²⁰ In order to qualify under the non-income-driven payment plan, an individual must meet the following requirements: 1) owe more than \$250 in outstanding parking tickets; 2) pay a participation fee; and 3) pay 50% of the new amount.¹²¹ In addition, an individual must have a valid driver’s license, social security card, and prove their income by showing their most recent pay stub, dated within the last 30 days or, if they are self-employed, a copy of the “most recent completed 1040 tax return, last 3 months’ bank statements and, if the business is in Oakland, a current business tax certificate.”¹²² Should an individual default under this plan, “a collection fee of \$300 or 10%, whichever is greater, will be assessed on the unpaid balance and collections action will be taken immediately.”¹²³

In order to qualify for the income-driven payment plan, modeled after the Superior Court’s ability to pay program, an individual must be able to verify that they are very low-income or on public benefits.¹²⁴ In addition, an individual must apply “within 60 calendar days from citation issuance or 10 days of hearing of determination, whichever is later.”¹²⁵ Under this program, an individual may qualify in the following ways: 1) by receiving of public benefits; 2) by making \$1256.25 per month or lower (\$15,075 annually); or 3) by having \$250 or less in disposable income.¹²⁶ The City of Oakland’s website says that if an individual defaults under the income-driven payment plan “all penalties and interest will be applied to each citation and a collection fee of \$300 or 10%, whichever is greater, will be assessed on the unpaid balance and collections action will be taken immediately.”¹²⁷

¹²⁰ City of Oakland, *Request for Ability to Pay Determination* (May 7, 2018), <https://www.oaklandca.gov/documents/ability-to-pay-application-parking-ticket>.

¹²¹ City of Oakland, *Parking Ticket Payment Plan Promissory Note*, <https://cao-94612.s3.amazonaws.com/documents/oak070673.pdf>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ City of Oakland, *Request for Ability to Pay Determination*, *supra* note 46.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ City of Oakland, *Parking Ticket Payment Plans*, *supra* note 121.

C. Implementation

The non-income-driven payment plan pre-dated the income-driven plan. In fact, Oakland's payment plan was part of the impetus behind EBCLC helping to draft Assembly Bill 503 ("AB 503"), which mandated that all municipalities working with the Department first implement an ability-to-pay plan before withholding vehicle registration from individuals who owe parking tickets.¹²⁸ The relevant section of AB 503 reads:¹²⁹

SEC. 6. Section 40220 of the Vehicle Code is amended to read:
40220.

(a) Except as otherwise provided in Sections 40221 and 40222, the processing agency may proceed under one of the following options in order to collect an unpaid parking penalty:

(1) (A) File an itemization of unpaid parking penalties and service fees with the department for collection with the registration of the vehicle pursuant to Section 4760. Beginning July 1, 2018, the processing agency shall not file an itemization pursuant to this subdivision unless all of the following conditions have been satisfied:

(i) The issuing agency provides a payment plan option for indigent persons that, at a minimum, does all of the following:

(I) Allows payment of unpaid parking fines and fees to be paid off in monthly installments of no more than twenty-five dollars (\$25) for total amounts due that are three hundred dollars (\$300) or less. However, unpaid parking fines and fees shall be paid off within 18 months. There shall be no prepayment penalty for paying off the balance prior to the payment period expiring.

(II) Waives all late fees and penalty assessments, exclusive of any state surcharges described in Sections 70372, 76000, and 76000.3 of the Government Code, if an indigent person enrolls in the payment plan. Waived late fees and penalty assessments may be reinstated if the person falls out of compliance with the payment plan.

(III) Limits the processing fee to participate in a payment plan to five dollars (\$5) or less for indigent individuals and twenty-five dollars (\$25) or less for all other individuals. The processing fee

¹²⁸ See CAL. VEH. CODE § 12808.1 (2019).

¹²⁹ *Id.*

for an indigent individual may be added to the payment plan amount, at the discretion of the indigent owner.

(IV) Allows for application for indigency determination for a period of 60 calendar days from the issuance of a notice of parking violation, or 10 days after the administrative hearing determination, whichever is later.

EBCLC's involvement in AB 503 directly related to the client issues seen in the clinic, where numerous clients could not afford to pay their tickets. In preparing to address the impact of parking tickets on low-income individuals, EBCLC filed Public Records Act requests. The acquired data demonstrated that millions of dollars went uncollected, mostly from the penalty phase of tickets, as indicated in the chart below:

	2011-12	2012-13	2013-14	2014-15	2015-3/2016	Total
# of tickets	368,706	326,075	331,739	324,939	214,950	1,566,409
\$ amt of tickets	\$25,013,463	\$22,470,347	\$22,996,978	\$22,858,283	\$15,056,718	\$108,395,789
\$ amt of penalties assessed	\$14,108,725	\$13,092,485	\$13,415,183	\$13,655,534	\$6,712,495	\$60,984,422
\$ collected	\$26,472,818	\$23,790,529	\$23,961,595	\$21,946,930	\$10,143,185	\$106,315,058
\$ outstanding	\$11,478,705	\$10,491,578	\$11,143,059	\$13,326,216	\$11,116,983	\$57,556,543

Due to involvement with both direct services related to AB 503 and its drafting, EBCLC monitored implementation. After the passage of the Bill, EBCLC sent the City of Oakland an implementation letter¹³⁰ to advocate for expanding the bill's provisions. Primarily, EBCLC hoped to push Oakland to make the bill apply retroactively to tickets issued before July 1, 2018, to increase the income eligibility requirements, and to expand various timelines, such as deadlines for filing for an ability-to-pay plan and for an individual to come into compliance post default. This letter is excerpted below:

[EBCLC is] recommending the following [to the City of Oakland]:

- Review existing data as it relates to outstanding debt vs. amount collected to determine whether the amounts collected justify the cost of collections efforts. For example, data from the City of Oakland has demonstrated that the penalty phase of parking tickets, remains largely

¹³⁰ See Letter from East Bay Community Law Center to City of Oakland (Sept. 29, 2017) (on file with author).

uncollected. For the time period between 2011 and 2016, the City of Oakland issued \$60,984,422.00 in parking ticket penalties. The outstanding debt for that same period is \$57,556,543.47

- Review existing data as it relates to whether or not the revenue generated from parking tickets and the costs of collecting it, is sufficient to justify the fee structure. For example, parking ticket revenue for the City of Oakland only represents approximately 5% of the City's General Fund and 2% of the overall city budget.
- Institute a debt forgiveness program for indigent individuals who are currently in collections, under wage garnishment and/or who have had their registration withheld (see the Statewide Traffic Ticket Amnesty program (Vehicle Code § 42008.8)).
- Allow individuals with existing parking tickets on [date of signing of AB503] to petition within a specified time for an indigency determination and qualify for the waiver of parking ticket late fees as well as the payment plan option
- Extend the application for indigency determination from 60 calendar days from the issuance of a notice of parking violation to 90 days and from 10 days after the administrative hearing determination to 30 days, whichever is later. In our experience representing indigent clients who often struggle with stable housing, reliable mailing addresses and other forms of communication, such a short timeline may be hard to meet, as relevant documents are sometimes lost due to lives lived in constant transition.
- Allow payment plans for indigent individuals for unpaid parking fines and fees totaling \$500 or less, instead of a \$300 threshold as contemplated by AB503.
- Extend the maximum duration of a payment plan from 18 months to 24 months.
- In addition to participation in a government benefits plan, annual income and other metrics, consider proof of current or recent homelessness (e.g., letter documenting receipt of services from a caseworker or temporary residence in a shelter), and additional financial barriers such as current or recent incarceration and/or current or recent incarceration of a family member.
- Expand the one-time extension for individuals who have fallen out of compliance with a payment plan from 45 calendar days to 60 calendar days.

- Require the minimal amount of documents necessary to determine an individual's indigency status (e.g., pay stub and rent statement, public benefits card).

Despite initially indicating that they would adopt the very low-income standard under HUD, the city declined to take action on these recommendations. When the ability to pay form revealed that the City would continue to rely on 125% of the FPL for individuals to qualify, EBCLC pointed out the impact on indigent individuals. The agency's response prioritized efficient implementation over equity and access. Their response stated, in part:¹³¹

The AB 503 does not give specific guidelines as to the income levels to be used or on the procedures to begin implementation. The bill calls for implementation to begin July 1st, however in February the city has already offered this payment option to two of our citation holders who qualify. Our Collection staff has been briefed and as I mentioned, we are developing flyers and signage to ensure as much coverage as possible for outreach.

It is also worth noting that The City of Oakland Collection Section has offered a payment plan for parking citations for over numerous years, unlike no other cities. We have always tried to work with the most vulnerable of our community. We understand that they are usually the ones who suffer the most from the boot, tow and storage fees that happen when one is unable to pay their balance in full. Our desire to continue to be that agency is what has fueled us to create a form and a payment plan, far in advance of the dictated implementation date.

In our effort to implement as much as we can administratively, we have reviewed various government agency's payment plans, that also seek to provide low payment, penalty free plans for those who are considered indigent. In keeping with the examples of San Francisco Municipal Transportation Agency and Alameda County Superior Court's "Request for Ability to Pay Determination", we are, at least for now, using the Federal Poverty Level amounts, times 125%.

Later, the City issued a report detailing its motivations for complying with AB 503. The city loses minimal revenue on the implementation of AB 503-compliant plans relative to the money lost on

¹³¹ E-mail from City of Oakland to East Bay Community Law Center (Feb. 15, 2018, 12:30 PM PST) (on file with author).

being barred from participation in the DMV collections program.¹³² The report analysis stated:

Under the current payment plans structure, 372 parking citation payment plans would generate \$64,356 of administrative and management fee and penalty revenue. Furthermore, there is a loss of revenue in penalties assessed on citations that will be realized with the implementation of AB503. The first penalty on a citation is assessed on day 42[,] which is equivalent to the original City fine. With the adoption of AB 503, if 20% of the 372 payment plans qualified for an AB 503 payment plan, the City could experience a loss of \$12,499; at 30% the revenue loss would be \$18,749; at 40% the loss would be \$24,998 . . . Offering payment plans in accordance with AB503 also allows the City to continue to qualify for the DMV Recovery Program . . . If the City does not offer payment plans, the City will not be allowed to participate in the DMV Recovery Program, at no cost to the City, and would therefore forfeit access to much needed revenue that supports the City's General Purpose Fund.¹³³

In preparation for the City Council finance committee meeting scheduled to discuss AB 503 implementation, EBCLC again issued a letter specifically quantifying collected data to bolster reform arguments.¹³⁴ The letter explained:¹³⁵

To truly deliver racial and economic equity to a municipal system that has been particularly harmful to low-income communities of color, the implementation of AB 503 must account for Oakland's unique economic and demographic landscape. The current minimum wage in Oakland is \$13.23; an individual working 40 hours per week makes approximately \$27,518.40 annually. The median rent in Oakland is \$2,950 per month, and has risen about

¹³² See Agenda Report from Katano Kasaine, Finance Director, City of Oakland, to Sabrina B. Landreth, City Administrator, City of Oakland (May 7, 2018), <https://oakland.legistar.com/calendar.aspx> (choose 2018 in "This Month" dropdown and choose Finance & Management Committee in "All Departments" dropdown; then download Agenda PDF for the 9/11/2018 meeting; then open "View Report" attachment under the agenda item five).

¹³³ *Id.*

¹³⁴ See Letter from East Bay Community Law Center to Oakland City Council Finance Committee (June 7, 2018) (on file with author).

¹³⁵ *Id.*

51% over the last five years. A single person in Oakland therefore pays an annual median rent of \$35,400 before utilities.

Defining indigence as at or below 125% of the Federal Poverty Line (\$15,175 for a single person) overlooks the escalating costs of living in Oakland and disqualifies many needy residents who would benefit from the payment plan program offered by AB 503. San Francisco, for example, makes eligible those individuals who are at or below 200% of the Federal Poverty Line (\$24,280 for a single person). The Alameda County Superior Court is set to amend its guidelines to follow the Housing and Urban Development (“HUD”) Extremely Low-income Standard (\$24,400 for single person), and the proposed Oakland parking plan is based on those forthcoming amendments. We propose that the City adopt either the HUD Very Low-income Standard (\$40,700 for a single person) or at least 300% of the Federal Poverty Line (\$36,420 for single person) to fully take into consideration the costs of living and the financial pressure experienced by those who make minimum wage or under.

When implementing a standard and a process, the City should take into consideration not only economic impacts, but racial impacts as well. We suspect but can’t know for certain that families of color generally and Black families specifically are disproportionately impacted by parking debt. However, we do know that these residents are disproportionately impacted by other issues. About 28% of Oakland residents identify as Black or African-American, and about 25% identify as Hispanic or Latino. Heightened police presence and involvement with the criminal justice system in these communities exacerbate the financial burdens they face. While the median household income in Alameda County is approximately \$91,564, the median income for Black families is roughly half of that (\$50,061) — the lowest of any demographic group in Alameda County. Hispanic/Latino households trail closely with a median household income of \$68,850. Moreover, 40% of Alameda County’s probation population lives in Oakland, and 47% of the county’s probation population is Black. Therefore, factors that may affect the implementation of AB 503 elsewhere in Alameda County do not accurately reflect the realities facing many low-income Oakland residents.

The City still declined to take action on EBCLC’s recommendations. However, a supplemental bill AB 2544, drafted by EBCLC and its coalition partners, made retroactive implementation of AB

503, the law of the land.¹³⁶ The relevant section of the law states:

40220.5. (a) (1) A processing agency may only use the process set forth in Section 4760 to collect unpaid parking penalties that were issued before July 1, 2018, and related service fees, if the processing agency provides indigent persons with the payment plan program described in this section.

(2) A processing agency shall not be required to comply with this section to collect unpaid parking penalties that were issued before July 1, 2018, and related service fees, pursuant to the process set forth in Section 4760 for any person who does not file an application for an indigency determination, any person who falls out of compliance with a payment plan, except as set forth in subdivision (d), or any person who the processing agency has determined is not an indigent person.¹³⁷

The City of Oakland serves as a stark example of a municipality wielding the power to extend justice to the margins, but failing to do so. Despite the City of Oakland citing the Superior Court and San Francisco as examples of municipalities, it declined to expand its financial metrics for qualification even when the Superior Court changed its own financial metrics for qualification to the HUD Standard and the qualifying metric for San Francisco was 200% of the FPL.¹³⁸ Nor was it persuasive that San Francisco was experiencing a revenue and collections increase due to the implementation of their parking payment plan.¹³⁹

VII. CITY OF BERKELEY

A. Program Overview

Like Oakland, the City of Berkeley has also implemented a payment plan for parking tickets that would comply with AB 503. This program is also modeled after the Superior Court program and has similar

¹³⁶ See CAL. VEH. CODE § 40220.5 (2019).

¹³⁷ *Id.*

¹³⁸ San Francisco Municipal Transportation Agency, *SFMTAB Resolution and San Francisco Transportation Code Divisions II Ordinance* (2018), https://www.sfmta.com/sites/default/files/reports-and-documents/2018/01/1-16-18_item_16_community_service_and_payment_plan_tc_amendment.pdf

¹³⁹ Joe Fitzgerald Rodriguez, *City Says Reduced Fee for Parking Citation Payment Program Boosting Revenues* (Feb. 26, 2009, 9:40 AM), <https://www.sfexaminer.com/news/city-says-reduced-fee-for-parking-citation-payment-program-boosting-revenues/>

requirements. However, unlike the Oakland and Superior Court plans, those who exceed the income guidelines or do not receive public benefits have not alternative avenues for qualifying. The Berkeley plan also differs from the Oakland plan in other substantial ways. First, it has a retroactive provision that allows an individual whose DMV registration has already been withheld to apply under the following guidelines:

Requests must be received within sixty (60) calendar days from citation issuance, or within ten (10) calendar days of an Administrative Hearing, whichever is later. A one-time exception may be made for parking citations appearing on a California Department of Motor Vehicles (DMV) Registration Renewal form and will be subject to a five dollar (\$5) Late Fee in addition to the five dollar (\$5) Administrative Fee. To apply for the one-time exception, include a copy of the DMV Renewal Form.¹⁴⁰

Both the Berkeley and Oakland plans state that an individual cannot add additional tickets to an existing payment plan. The Berkeley Plan allows for an individual to be on up to three simultaneous plans. Berkeley has a long-standing community service option for individuals who cannot afford to pay their parking tickets.

B. Requirements

To qualify for a parking payment plan a person must: 1) make at or under 125% of the FPL or 2) be on one of the identified public benefits.¹⁴¹ Additionally, an individual must provide documentation of income either through a recent pay stub or W-2.¹⁴² Similarly, an individual must provide proof of receipt of public benefits by providing copies of a benefits card.¹⁴³

To qualify for community service, an individual needs to meet the following requirements: 1) Their vehicle must be registered in the city of Berkeley; 2) the registered owner must certify as a low-income household (less than \$35,700 annually) by providing tax return or IRS certification; 3) the registered owner must sign up within the original bail period, as if the citation has moved to delinquent or lien status, and community service is not an option. A maximum of five citations can be satisfied via

¹⁴⁰ CITY OF BERKELEY, *supra* note 46.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

community service in a fiscal year.¹⁴⁴ Additionally, an individual must not have contested the parking citation.¹⁴⁵ Recently, Berkeley City Council discontinued the residency requirement¹⁴⁶ as a result of EBCLC's advocacy. According to the current documentation, each hour of community service applies an \$8 credit toward the citation.¹⁴⁷ The administrative cost borne by a participant depends on the number of community service hours performed.¹⁴⁸ Those costs are as follows: 1-25 hours = \$20.00; 26-50 hours = \$40.00; 51-75 hours = \$80.00; 76-100 hours = \$100.00.

C. Implementation

Though its advocacy efforts, EBCLC secured data from the City of Berkeley through Public Record Act requests and submitted an implementation letter and sample ordinance. Data collected by EBCLC demonstrates the need for an effective and equitable solution to people's inability to pay parking tickets. However, at present, there has been no movement on the implementation of the ordinance or EBCLC's ordinance. As a result, the payment plan likely underserves those in need.

Year	Outstanding Debt
2014	\$1,547,767.61
2015	\$1,534,573.66
2016	\$2,243,541.93
Cumulative total	\$5,325,883.20

¹⁴⁴ City of Berkeley, *Community Service in Lieu of Parking Penalties* (updated Jan. 2019), https://www.cityofberkeley.info/uploadedFiles/City_Manager/Level_3_-_General/COMMUNITY%20SERVICE.pdf.

¹⁴⁵ *Id.*

¹⁴⁶ See Annotated Agenda Special Meeting of the Berkeley City Council, Item Number 10 (July 31, 2018), https://www.cityofberkeley.info/Clerk/City_Council/2018/07_Jul/Documents/07-31_Special_Annotated_Agenda_pdf.aspx.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

VIII. HOW INCONSISTENT USE OF FINANCIAL METRICS HARM INDIGENT INDIVIDUALS

A. The Inconsistency Between Berkeley's Community Service Program and Berkeley's Parking Payment Plan Program Likely Harms the Individuals They Are Supposed to Serve

Inconsistent use of financial metrics harms the individuals these programs proclaim to help. An individual can be approved for or denied services with no clear rationale as to why their income may be categorized as sufficient in one sense, but deficient in others.

This paper offers an analysis of the various requirements for current Berkeley programs. As discussed above, to qualify for community service in lieu of paying for a parking ticket, an individual must not have a household income that exceeds \$35,700.¹⁴⁹ If the household has more than one person, then the household income must not exceed the standard set forth under HUD's Very Low-income category.¹⁵⁰ The chart below shows the current requirements.

FY 2018 Income Limits Summary

Alameda County, California										
FY2018 Income Limit Area	Median Family Income	FY 2017 Income Limit Category	1 Person	2 Person	3 Person	4 Person	5 Person	6 Person	7 Person	8 Person
Oakland-Fremont, CA Hud Metro FMR Area	\$104,400	Very Low (50%) Income Limits	\$40,700	\$46,500	\$52,300	\$58,100	\$62,750	\$67,400	\$72,050	\$76,700
		Extremely Low Income Limits (\$)*	\$24,400	\$27,900	\$31,400	\$34,850	\$37,650	\$40,450	\$43,250	\$46,050
		Low (80%) Income Limits	\$62,750	\$71,700	\$80,650	\$89,600	\$96,800	\$103,950	\$111,150	\$118,300

The 2018 income limit for a single person under HUD's very low-

¹⁴⁹ City of Berkeley, *supra* note 146.

¹⁵⁰ Letter from Ben Bartlett, Cheryl Davila, Kate Harrison, and Sophie Hahn (July 31, 2018), https://www.cityofberkeley.info/Clerk/City_Council/2018/07_Jul/City_Council__07-31-2018_-_Special_Meeting_Agenda.aspx (click on item 10: "Direction to the City Manager Regarding the Community Service in Lieu of Parking Penalties Program") (hereinafter Councilmember Letter).

income category was \$40,700.¹⁵¹ This is \$5,000 too high to qualify for the community service plan. Thus, someone can be poor enough to be categorized as “very low-income” under HUD, but earn too much to qualify for the community service plan.¹⁵² If the person had a dependent, he or she would qualify for community service only if the household income fell below \$46,500.¹⁵³

Once an individual qualifies, they only get credited \$8 per hour toward the amount owed.¹⁵⁴ By way of comparison, the minimum wage in Berkeley is \$13.75 per hour and rose to \$15.00 per hour on October 1, 2018.¹⁵⁵ Thus, an indigent participant in the community service program receives less than minimum wage.

Relatedly, individuals who could qualify for the community service plan based on their income would be barred Berkeley’s parking payment plan.¹⁵⁶ Similarly, an individual making the current minimum wage (\$28,600) or the planned increased minimum wage (\$31,200) cannot participate in the parking payment plan because their wages exceed the \$15,075 ceiling.¹⁵⁷ This disjointed financial policy impacts individuals whose indigency qualifies them for low-income housing subsidies under HUD, but who cannot afford to pay their parking tickets. This group pays both monetarily, through the administrative fee for community service, as well as with labor to pay down their parking tickets. If someone owes past parking tickets, has had their vehicle registration withheld, or both, they are also placed at greater risk for additional penalties such as booting, towing, and impounding fines and fees.¹⁵⁸ According to the Berkeley Parking Enforcement manual

¹⁵¹ Housing Authority of the City of Alameda, *FY 2018 Income Limits Summary* http://www.alamedahsg.org/UserFiles/Servers/Server_3723321/Image/FY%202018%20INCOME%20LIMITS.pdf.

¹⁵² *Id.*

¹⁵³ See Councilmember Letter, *supra* note 151.

¹⁵⁴ City of Berkeley, *supra* note 146.

¹⁵⁵ CITY OF BERKELEY, CAL., MINIMUM WAGE ORDINANCE, <https://www.cityofberkeley.info/MWO/>

¹⁵⁶ Qualification for the parking plan is based on 125% of the FPL, currently \$15,075 for a single individual. This is \$20,000 less than the qualifying income for applicants under the community service plan. See Housing Authority of the City of Alameda, *supra* note 152.

¹⁵⁷ See *id.*; CITY OF BERKELEY, CAL., MINIMUM WAGE ORDINANCE, *supra* note 156.

¹⁵⁸ Parking Enforcement Unit, Berkeley Police Dep’t, *Parking Enforcement Manual* (Nov. 18, 2016) [https://www.cityofberkeley.info/uploadedFiles/Police/Level_3_-_General/Parking%20Enforcement%20Operations%20Manual\(1\).pdf](https://www.cityofberkeley.info/uploadedFiles/Police/Level_3_-_General/Parking%20Enforcement%20Operations%20Manual(1).pdf).

impounded vehicles are “vehicles that are illegal to drive (i.e., expired registration, five or more outstanding parking citations, etc.).”¹⁵⁹

B. Berkeley’s Failure to Consider Economic Realities in its Establishment of Qualifying Income Metrics Harms Indigent Individuals

The inconsistencies between Berkeley’s parking payment plan and its community service plan harm the individuals they aim to serve. But the financial qualification metrics utilized are particularly troubling because they fail to consider the significant costs of housing. According to one data set, the average rental cost of a standard apartment in Berkeley is \$2,580 per month for a two bedroom apartment (\$30,960 annually).¹⁶⁰ A minimum wage worker in Berkeley made \$15.00 per hour in 2018.¹⁶¹ If that worker worked full time, they would make approximately \$28,800 per year, a salary that is less than the average yearly rental cost.¹⁶² Even if a minimum-wage worker split rent with another tenant, their share still exceeds the recommended 30% of their salary.¹⁶³ At \$30,960 annually, a person pays \$15,480 per year in rent.¹⁶⁴ At \$37,200 annually, a person pays \$18,600 per year in rent.¹⁶⁵ Given the extreme housing burden in the Bay Area, the failure to consider housing costs in ability to pay or access to justice program is inconceivable.

C. Oakland’s Failure to Consider Underlying Economic Realities Harms the Individuals its Payment Parking Plan Aims to Serve

Similar to Berkeley, Oakland’s choice of inconsistent financial metrics harms the people its programs seek to help. As already discussed,

¹⁵⁹ *Id.*

¹⁶⁰ Adam Brinklow, *Berkeley Has Bay Area’s Lowest Rents, Says Reports* (May 3, 2018, 1:36 PM) <https://sf.curbed.com/2018/5/3/17316196/berkeley-rent-median-numbers-san-francisco-2018-cost>.

¹⁶¹ CITY OF BERKELEY, CAL., MINIMUM WAGE ORDINANCE, *supra* note 156.

¹⁶² Tania Bradkin, *Try Living on \$15/Hour: Why Each of Us Has a Role Regarding the Minimum Wage* (May 12, 2015 3:36 PM, updated May 12, 2016), https://www.huffpost.com/entry/try-living-on-15hour-why-each-of-us-has-a-role-regarding-the-minimum-wage_b_7249316.

¹⁶³ Kathleen Elkins, *Here’s How Much of Your Income You Should Be Spending on Housing* (June 6, 2018 12:23 PM), <https://www.cnn.com/2018/06/06/how-much-of-your-income-you-should-be-spending-on-housing.html>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Oakland's income-driven parking payment plan,¹⁶⁶ based on the Superior Court's plan, uses 125% of the FPL as the metric for qualification.¹⁶⁷ However, this metric fails to account for a variety of relevant socio-economic factors specific to Oakland.

As of January 1, 2018, the minimum wage in Oakland is \$13.23 per hour (\$27,518 annually).¹⁶⁸ The average rental cost in Oakland is \$2,100 per month (\$25,200 annually) for a one bedroom and \$2,470 per month (\$29,640 annually) for two bedrooms.¹⁶⁹ A single person making the minimum wage and renting an average one-bedroom apartment would be utilizing over 90% of their income towards housing costs.¹⁷⁰ Even if that person were splitting the rent of a two-bedroom apartment with another individual, they would be utilizing over 46% of their income towards housing costs.¹⁷¹ Despite the cost of housing, a single individual making the minimum wage in Oakland could not participate in an AB 503-compliant parking plan based on income alone, unless they also received public benefits. Without proof of public benefits, the only other route for qualification requires the applicant to meet onerous requirements demonstrating that they have less than \$250 in discretionary income at month's end.¹⁷² Those ineligible for the income-driven payment plan could apply to the non-income-driven payment plan, which includes a \$125 charge and the requirement to pay 50% of the new amount up front in order to participate.¹⁷³

D. Alameda County Superior Court Should Set the Tone for the County

As discussed previously, Oakland's parking plan uses the Superior Court's plan as a model.¹⁷⁴ Previously, individuals at risk of

¹⁶⁶ City of Oakland, *supra* note 127.

¹⁶⁷ *Id.*

¹⁶⁸ *January 1, 2018 Minimum Wage Increase*, CITY OF OAKLAND, <http://www2.oaklandnet.com/government/o/CityAdministration/d/MinimumWage/index.html>.

¹⁶⁹ Louis Hansen, *Bay Area Rents Likely to Stay Sky High*, THE MERCURY NEWS (Feb. 6, 2018), <https://www.mercurynews.com/2018/02/06/bay-area-rents-likely-to-stay-sky-high/>.

¹⁷⁰ $\$25,200/\$29,640 = 91.5\%$

¹⁷¹ $\$27,518/2 = \$13,759$, $\$13,759/\$29,640 = 46.4\%$

¹⁷² *Parking Ticket Payment Plans*, CITY OF OAKLAND, <https://www.oaklandca.gov/services/finance/parking/parking-ticket-payment-plan>.

¹⁷³ City of Oakland, *supra* note **Error! Bookmark not defined.**

¹⁷⁴ City of Oakland, *supra* note 127.

being barred from participation in Oakland's parking plan would also be barred from the Superior Court's plan under the financial rubric of 125% of the FPL. Under HUD's very low-income standard, the reverse holds. Now, an individual can qualify for a reduction of a traffic court fine in the Superior Court but be denied participation in both Oakland's income-driven payment plan and Berkeley's payment plan because income exceeds 125% of the FPL.¹⁷⁵

Not only are the differing financial rubrics confusing for participants, but acceptance by one program and denial from another contributes to distrust in the system. Standards should at least be consistent county-wide. An individual should expect similar treatment and results regardless of the zip code where the violation occurs. Inconsistent results not only likely cause actual economic harm to individuals but also reputational harm to municipalities and institutions. Because low-income people of color are most likely to be impacted by these institutions, distrust is likely to increase among these communities.

IX. HOW USE OF DISPARATE FINANCIAL METRICS CAN HAVE A RACIALIZED IMPACT¹⁷⁶

People of Color, generally, and Black folks, specifically, face an incredible number of racialized barriers in Alameda County. These barriers manifest themselves through increased police stops,¹⁷⁷ housing burdens,¹⁷⁸ criminal justice involvement,¹⁷⁹ and economic burdens.¹⁸⁰ Black residents only represent 12% percent of Alameda County's population, but 47% of the probation population.¹⁸¹ Roughly 40% of the people on probation in the county live in Oakland, as shown below.¹⁸² The

¹⁷⁵ Housing Authority of the City of Alameda, *FY 2018 Income Limits Summary*, *supra* note 153. *See Also*, *supra* note 157.

¹⁷⁶ *See* THERESA ZHEN & BRANDON GREENE, *PAY OR PREY* (2019).

¹⁷⁷ BINGHAM ET AL., *supra* note 11, at 5. Data showed that Black drivers in Oakland accounted for 70% of police stops at the time of the study, despite making up only 26.5% of the population. In Berkeley, another Alameda County city, Black drivers account for 30.5% of police stops at the time, despite making up only 8.4% of the population.

¹⁷⁸ *Id.*

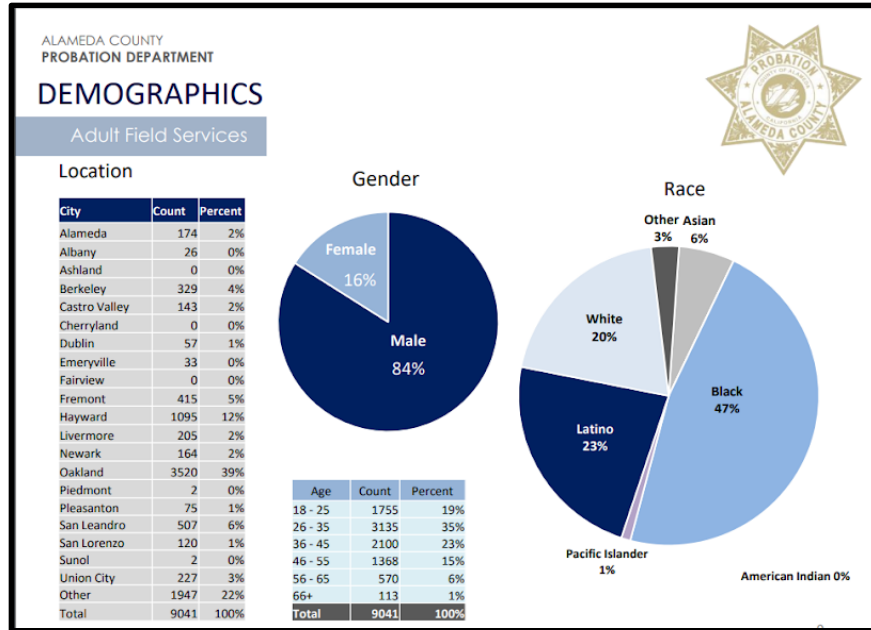
¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Wendy Still, *Final Budget Work Session*, ALAMEDA CTY. PROB. DEP'T (June 27, 2017), https://acgov.org/MS/OpenBudget/pdf/FY1718/Probation%20Final%20Presentation%20Budget%20FY%2017-18_06_27_17.pdf.

¹⁸² *Id.*

same populations impacted by incarceration in Oakland face the burden



of high housing cost; Black families in Alameda County “face the highest housing cost burden, with sixty-three percent devoting more than thirty percent of their income to housing.”¹⁸³ Latino families are not far behind with 58% being “housing cost-burdened.”¹⁸⁴

While the median annual income in Alameda is approximately \$100,000, the median annual income from Black families is roughly half of that, as shown in the chart below.¹⁸⁵

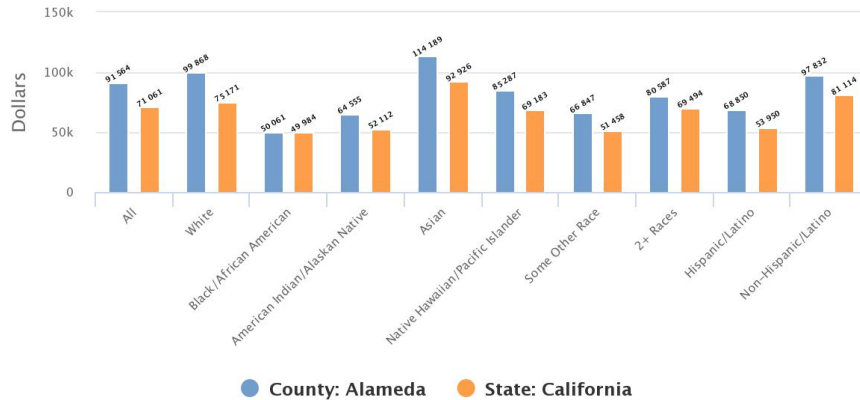
¹⁸³ *Oakland’s Displacement Crisis: As Told by the Numbers*, POLICYLINK (Sept. 2, 2016),

<http://www.policylink.org/sites/default/files/PolicyLink%20Oakland’s%20Displacement%20Crisis%20by%20the%20numbers.pdf>.

¹⁸⁴ *Id.*

¹⁸⁵ *2019 Demographics*, HEALTHY ALAMEDA CTY. (Jan. 2019), <http://www.healthyalamedacounty.org/index.php?module=demographicdata&controller=index&action=index>.

Median Household Income by Race/Ethnicity
County: Alameda



Claritas, 2018. www.healthyalamedacounty.org

When focusing specifically on disparities in Oakland, things look even bleaker. In a recent equity report issued by the city of Oakland, the city received an equity score of 33.5 on a scale of 100.¹⁸⁶ Categorical scores in order from highest to lowest included Neighborhood and Civic Life (50.6), followed by Economy (41.8), Housing (36.8), Education (29.0), Public Health (25.8), and finally Public Safety (17.3).¹⁸⁷ The report revealed that Black folks in Oakland disproportionately experience police use of force incidents.¹⁸⁸ Oakland's police academy has disproportionately high attrition rates.¹⁸⁹

Several of the findings of this report relate to the racialized impact of ability to pay programs and indigency determinations. First, Black folks in Oakland are 1.27 times more likely not to participate in the labor force than White folks.¹⁹⁰ Black individuals also experience the highest rate of unemployment at 8.9%, a rate that is 2.12 times higher than the unemployment rate of Whites.¹⁹¹ The median income for Black families is \$37,500, the lowest of all groups and 2.93 times less than the median

¹⁸⁶ CITY OF OAKLAND, OAKLAND EQUITY INDICATORS REPORT 5 (2018), <https://cao-94612.s3.amazonaws.com/documents/2018-Equity-Indicators-Full-Report.pdf>.

¹⁸⁷ *Id.* at 13.

¹⁸⁸ *Id.* at 115.

¹⁸⁹ *Id.* at 118.

¹⁹⁰ *Id.* at 29.

¹⁹¹ *Id.* at 10.

income of White families (\$110,000).¹⁹² Additionally, a quarter of Black families live at or below the federal poverty level.¹⁹³ According to the report, 46% of Latino families, 37.6% of Black families and 36.4% of Asian American families make under the living wage – \$14.86 per hour – which is defined as “the wage that is necessary to maintain a typical standard of living in a particular place . . . the minimum income that represents the fine line between financial independence and the need to seek out public assistance.”¹⁹⁴ Disproportionality also arises in health outcomes. For instance, Black children are ten times more likely to be hospitalized for asthma-related conditions.¹⁹⁵ Half of all Oakland residents are rent-burdened (meaning a household spends more than 30% of its annual household income on rent), with Black households being the most rent-burdened at 58.4%, followed by Latino households at 52.7%, Asian households at 49.2% and White households at 34.9%.¹⁹⁶ Finally, Black folks experience disproportionate rates of homelessness¹⁹⁷ and evictions.¹⁹⁸

Financial rubrics prove deficient and inappropriately narrow their focus when they fail to consider intersectional factors that impact the lives of applicants. Without consideration of various stressors on impacted communities, access to justice programs cannot achieve what they set out to do. As detailed above, financial rubrics, like 125% of the FPL in a place as expensive as the Bay area, forecloses access to justice for most of the working poor. Because financial struggles are not equally proportioned, any program that closes the door on the working poor necessarily closes the door on communities of color. Below, I discuss how a consistent standard could remedy these concerns.

X. ENVISIONING WIDE USE OF A CONSISTENT STANDARD

At a minimum, standards should be consistent across the cities within a county. This is true, particularly in places like Alameda County, where the lines between municipal jurisdictions are easily crossed and in regions like the Bay Area, where commute times, especially for lower

¹⁹² *Id.* at 34.

¹⁹³ *Id.* at 35.

¹⁹⁴ *Id.* at 38.

¹⁹⁵ *Id.* at 70.

¹⁹⁶ *Id.* at 89.

¹⁹⁷ *Id.* at 91.

¹⁹⁸ *Id.* at 94.

income workers, reach at least 90 minutes.¹⁹⁹

EBCLC's parking advocacy attempted to bridge the gap between the floor set by AB 503 and the actual cost of living by trying to pass a sample ordinance in three neighboring jurisdictions (Oakland, Berkeley, and Emeryville). Thus far, a version of the ordinance has only passed in Richmond, a city in Contra Costa County.²⁰⁰

The existence of separate but related political systems makes consistency difficult. Using the parking plan as an example, first the bill had to be passed through the state legislature. Then implementation of the bill had to be overseen on a municipality-by-municipality level, engaging with extremely different elected officials. Even if we were successful in having a consistent standard for cities within Alameda County that have a parking plan for indigent individuals, this likely would ensure consistent implementation on a case-by-case basis. Inconsistency could still arise in cities and the Superior Court due to differing political dynamics (i.e. Superior Court is run by a Court Executive Officer and a Presiding Judge). While these individuals have discretion, they must also conform to the minimal standards issued by the Judicial Council, a state body.

The solution calls for interagency, inter-jurisdictional participation in an equity plan. The data discussed above illustrates that, in terms of both traffic citations²⁰¹ and probation,²⁰² Black and Latino folks bear the economic and social burdens of Oakland as well as Alameda County more broadly. At a minimum, qualifications of ability to pay programs and indigency determinations must consider the full range of the experiences of the people the programs aim to help. In the next section, I lay out aspects of an intersectional analysis and an accompanying standard

XI. ENVISIONING STANDARDS THAT USE AN INTERSECTIONAL ANALYSIS

It has been known for some time that the FPL and other standards

¹⁹⁹ Michelle Robertson, *Stunning Increase in Bay Area 'Super Commuters' in the Last Decade Amid Housing Crisis*, SFGATE (Apr. 27, 2018), <https://www.sfgate.com/traffic/article/Bay-Area-commute-San-Francisco-traffic-12861808.php>.

²⁰⁰ *Richmond City Council Meeting*, CITY OF RICHMOND (Jul. 24, 2018), <http://www.ci.richmond.ca.us/ArchiveCenter/ViewFile/Item/8966>.

²⁰¹ BINGHAM ET AL., *supra* note 181.

²⁰² Wendy Still, *Final Budget Work Session*, ALAMEDA CTY. PROB. DEP'T (June 27, 2017), *supra* note 185.

fail to fully consider the impact of diverse life experiences on economic standing. Research entities such as the Insight Center in Oakland utilize data to create new standards. The Insight Center developed the Self Sufficiency Standard (“SSS”) in partnership with the University of Washington.²⁰³ According to their 2018 report:

The Standard is a “bare bones” budget that takes into account families of various sizes. It is representative of the actual costs of living, and includes housing, childcare, groceries, healthcare, transportation, some miscellaneous items (clothing, shoes, diapers, nonprescription medicines, cleaning products, household items, personal hygiene items, and telephone service) and taxes. It does not include a vacation, take-out food, loan payments, or taking a ride service.

The Standard gives an accurate picture of the minimum income needed for over 700 family types by county to meet their most basic needs, and is more useful than the FPL. Although groundbreaking when first created close to 50 years ago, the FPL is constrained by using a woefully archaic methodology in measuring poverty.²⁰⁴

According to the report’s key findings, “more than one in three households in California cannot meet their basic needs without help from government, community, or family and friends.”²⁰⁵ Unsurprisingly, the report found that different communities struggle differently, with communities of Color falling below the standard at double the rate of White communities.²⁰⁶ Latinx households struggle the most, with 52% falling below the standard, compared to 46% of Black households, 35% of Native American households, 30% of Asian/Pacific Islander households and 23% of White households.²⁰⁷ This disproportionate impact is also gendered.²⁰⁸ A majority of Black and Latinx women fall below the standard.²⁰⁹ The chart below provides a breakdown of racial

²⁰³ Jhumpa Bhattacharya & Anne Price, *The Cost of Being Californian: A Look at the Economic Health of Being California Families*, THE INSIGHT CENTER (Apr. 2018), https://insightcced.org/wpcontent/uploads/2018/04/Cost_of_Being_Californian_April_2018_final.pdf.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

and gendered dynamics.²¹⁰

PERCENTAGE OF SINGLE HOUSEHOLDERS THAT FALL
BELOW THE STANDARD BY RACE AND GENDER

	African American	Asian/Pacific Islander	Latinx	Native American	White
Women	56%	38%	63%	50%	34%
Men	47%	31%	45%	35%	26%

Alameda County has equally stark findings, with almost one-third of households living below the standard.²¹¹ The disparities persist across racial lines with 53% of Black households, 51% of Latinx households, 29% of Native American households, 28% of Asian American households and 20% of White households falling below the standard.²¹² Most fundamentally, however, Alameda County demonstrates the misaligned use of the FPL in determining indigency for access to justice through an ability-to-pay program. A single adult would need \$41,858 just to meet their basic needs.²¹³ This increases to \$79,933 if that single adult has a pre-school aged child and to \$98,296 for a family with two adults, a pre-school aged child and one school-aged child.²¹⁴

A stagnant figure like 125% of the FPL does not allow for any level of tailoring to meet an individual's actual needs. The SSS is different in that the online tool allows a user to input specific needs, and then it calculates the assumed outgoing money necessary for survival and the corresponding yearly and hourly wages.²¹⁵ The adaptability of the SSS makes it a far better standard than any of those currently used. Instead of simply saying that an individual has two children, it recognizes average costs of those children likely differ according to their age, so the tool allows an individual to select a childhood range from infant, toddler, preschool, school-age, or teenager and gives different figures for each.²¹⁶ While far from complete, the tool provides a foundation to build from.

²¹⁰ *Id.*

²¹¹ *California Self-Sufficiency Standard Fact Sheet: Alameda County Key Facts*, THE INSIGHT CENTER, <https://insightccd.org/wp-content/uploads/2018/04/AlamedaCounty-FactSheet-FINAL.pdf> (last visited Nov. 13, 2019).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Family Needs Calculator*, THE INSIGHT CENTER, <https://insightccd.org/2018-family-needs-calculator/> (last visited Dec. 13, 2019).

²¹⁶ *Id.*

Building upon the SSS framework, frameworks should consider additional factors: whether the person is formerly incarcerated or has an incarcerated loved one, whether the person has a disability or has a dependent with special needs, among countless other possibilities. Absent an easy way to account for diverse individual needs, indigency standards need to be adjusted to historic levels of push out, incarceration, criminal court debt, etc, that impact communities of Color. This could be accomplished with automatic approval for people who are formerly incarcerated or who have a loved one who is incarcerated. Formerly incarcerated persons often have court-ordered debt. Additionally, a recent report by the Ella Baker Center detailed the impact of having a loved one who is incarcerated on a family's financial stability, with women bearing the brunt of the financial strain. There could be automatic reductions for people impacted by gentrification with risk of push-out from their communities. Access to justice programs could have a restorative justice element, offering financial breaks for those at greater risk of police contact. Standards should be adjusted in ways that allows us to tangibly grapple with and dismiss the myth of blind justice, one size fits all approaches, and the idea that blanket procedures produce fair results. Impacted communities must be at the table, not just by proxy through public interest attorneys, but through surveys, working groups, and advisory roles.

CONCLUSION

The ubiquity of the FPL as the standard for eligibility for services currently wreaks havoc on the communities these programs aim to serve. Some, but not all, of these programs incorporate an access to justice framework into their design. That is, they are designed specifically to help low-income communities and communities of color that have been historically and currently marginalized. However, we cannot design the appropriate route to access justice without fully grappling with the meaning of justice and thinking about who we seek to provide justice to. Equity requires solutions that address historic and current harms that are disproportionately shouldered by communities with the least social, economic, and political power. To create working systems, those in power must look not only to data, but to history and the diversity of lived experiences of those at risk for further harm.