

Dear Mr. Balakrishnan Rajagopal and Mr. Olivier De Schutter,

We are delighted to learn about the planned joint report of the Special Rapporteur on the right to adequate housing and the Special Rapporteur on extreme poverty regarding the decriminalization of homelessness and extreme poverty. We are writing to share our article on “Poverty Penalties as Human Rights Problems,” which was published in July 2023 in the *American Journal of International Law*. This article was co-authored by the undersigned authors in their capacities as a faculty member and student at the University of Pennsylvania Carey Law School (along with additional co-authors). Like this letter, it reflects our individual views as scholars and does not represent the institutional views of the University of Pennsylvania.

In our article, we demonstrate the ways in which fines and other financial sanctions imposed by criminal justice systems around the world can act as “poverty penalties.” These poverty penalties disproportionately penalize vulnerable communities, including people living in poverty and people experiencing homelessness. In many cases, inability to pay can result in additional penalties like imprisonment or added financial sanctions.

Below are some summary findings relevant to the call for input:

- Fining practices that target and more punitively harm people living in poverty and those experiencing homelessness are widespread. As one example from a municipality in the United States, a Black woman who parked her car illegally received a \$151 fine, plus fees. The woman, who struggled financially and experienced periods of homelessness, faced new fines and fees for missing court dates and fine payments. In the span of seven years, she was arrested twice, went to jail for six days, and paid \$550 for events stemming from the single illegal parking incident. Even though she initially owed \$151 and despite having already paid \$550, after seven years she still owed the court \$541 due to added fines and fees. We identified examples of concerning fining laws and practices in many other countries, including Jordan, Qatar, Ghana, Kenya, India, South Korea, Australia, and France. See pp. 403-408, 412-417 for more details.
- The use of fines is sometimes intended as an alternative to imprisonment, particularly for less serious offenses. Yet in many countries, the typical consequence for default on payment of a fine or financial sanction is imprisonment. Unlike wealthier defendants, people living in poverty who face fines are at risk of imprisonment simply as a result of their inability to pay. See pp. 403-405, 412-415 for more details.
- In some countries, default on payment of fines and fees results in additional fines, fees, and other financial sanctions. These practices can create increasingly high debts that people living in poverty will never be able to pay. Coupled with the

threat of imprisonment for default on payment, poor persons are disproportionately harmed as a result of their inability to pay. See pp. 407-408, 415-417 for more details.

- These practices raise grave human rights concerns under human rights instruments, including the ICCPR and ICESCR. They act as a form of discrimination on the basis of property (among other protected statuses), subject people to arbitrary arrest and detention due to their inability to pay, can inflict grossly disproportionate sentences, and intrude on free enjoyment of economic rights. See pp. 409-412, 427-432 for more details.

We hope that you will find our article useful as you prepare your report.

Sincerely,

A handwritten signature in cursive script that reads "Jean Galbraith". The signature is written in black ink and is positioned above the printed name.

Jean Galbraith  
Professor of Law

A handwritten signature in cursive script that reads "Rheem Brooks". The signature is written in black ink and is positioned above the printed name.

Rheem Brooks  
J.D. Candidate, Class of 2024

## POVERTY PENALTIES AS HUMAN RIGHTS PROBLEMS

By Jean Galbraith, Latifa AlMarri, Lisha Bhati, Rheem Brooks, Zachary Green, Margo Hu, and Noor Irshaidat\*

### ABSTRACT

*Fines and other financial sanctions are frequently imposed by criminal justice systems around the world. Yet they also raise grave concerns about economic discrimination. Unless they are perfectly scaled to defendants' financial circumstances, they will penalize poor persons far more than rich ones—and poor defendants' inability to pay can lead to further penalties like imprisonment or additional financial sanctions. These “poverty penalties” have received attention in domestic jurisdictions but are understudied as a global phenomenon. This Article takes up this issue and makes three contributions. First, it demonstrates that poverty penalties are prevalent in criminal justice systems around the world. Second, it shows how poverty penalties came to be overlooked in international human rights law and describes how this is starting to change. Third, the Article makes the normative case for addressing poverty penalties within human rights law and offers suggestions for how this can be achieved.*

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## INTRODUCTION

Consider the following facts, drawn from practice around the world. In the United States, a Black woman who could not pay a \$150 parking fine faced arrest warrants and close to \$1000 in late fees.<sup>1</sup> In China, a rural family could not afford the fine for violating the then-applicable one-child policy, leading authorities to confiscate all their crops and the father to commit suicide.<sup>2</sup> In Brazil, the penalty for drug importation is years of imprisonment and a high mandatory minimum fine—and inability to pay this fine results in the deprivation of more rights.<sup>3</sup> In Kenya, the use of plastic bags triggers a minimum fine of two million shillings, which is ten

<sup>1</sup> U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (Mar. 4, 2015) [hereinafter FERGUSON REPORT] (also noting that she spent six nights in jail over this issue and that, seven years after the original ticket, she had paid \$550 and still owed \$541).

<sup>2</sup> *Farmer Drinks Poison After Being Fined for Violations of Family Planning Policy*, GLOB. TIMES (Dec. 8, 2013), at <https://www.globaltimes.cn/content/830847.shtml>.

<sup>3</sup> *A Short Prison Sentence, a Fine, or Life Imprisonment – All for the Same Offense: Exploring Sentencing Disparities in Ten Countries*, INST. CRIME & JUST. POL'Y RES. BLOG POST (Aug. 12, 2020), at <https://www.prisonstudies.org/news/short-prison-sentence-fine-or-life-imprisonment-%E2%80%93-all-same-offense-exploring-sentence> (noting that non-payment “would mean removal from the electoral roll and losing the right to work”); Catherine Heard & Jessica Jacobson, *Institute for Crime & Justice Policy Research Report on Sentencing Burglary, Drug Importation and Murder: Evidence from Ten Countries* 13 (2021), at [https://www.prisonstudies.org/sites/default/files/resources/downloads/sentencing\\_burglary\\_drug\\_importation\\_and\\_murder\\_full\\_report.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/sentencing_burglary_drug_importation_and_murder_full_report.pdf) (noting that five other countries of the ten surveyed might similarly impose a fine in addition to imprisonment and that non-payment in these countries would lead to more incarceration).

thousand times as much as the daily income of a third of the population.<sup>4</sup> In Switzerland, “roughly one half of prison entries concern fine defaulters.”<sup>5</sup>

These accounts all implicate the intersection of financial penalties and poverty. States frequently impose financial sanctions on individuals. And unless these sanctions are perfectly calibrated to financial circumstances, they have the effect of punishing poor persons more heavily than rich ones—both by their initial impact and through the further penalties that follow from failure to pay, such as imprisonment, added fees, property forfeiture, or deprivation of other rights. We call these “poverty penalties,” for they amount to additional punishment on low-income persons.<sup>6</sup>

Poverty penalties are deeply troubling. They have the effect of discriminating based on economic status. They lead frequently to imprisonment, as this is the consequence for non-payment of financial sanctions in many countries. They can result in grossly disproportionate punishments, as when fines for minor offenses vastly exceed what poor defendants are able to pay. Moreover, in a world where “[e]nding poverty in all its forms” is the very first Sustainable Development Goal,<sup>7</sup> it is counterproductive and oppressive for states to overburden poor persons with financial sanctions.

Yet it is striking how little international attention has been paid to poverty penalties in modern times. The drafters of the Universal Declaration of Human Rights and of subsequent universal human rights treaties did not include specific provisions banning excessive fines.<sup>8</sup> With no specific language on financial sanctions to serve as a focal point, international human rights attention has focused heavily on other aspects of criminal punishment. Even the widespread practice of imprisoning persons for inability to pay financial penalties has flown largely under the radar. The UN Office of Drugs and Crimes is aware of this practice, but it does not collect data on this issue in its periodic survey of criminal justice systems.<sup>9</sup>

This Article focuses on surfacing poverty penalties as a matter for international concern. The timing is ripe for at least two reasons. First, poverty penalties are increasingly attracting domestic and regional scrutiny. By way of example, reform efforts are underway in the United States, South Korea, and Ghana, and scholars are studying the ways in which “day fine” systems—which aspire to equalize the effect of financial sanctions across income levels—are or

<sup>4</sup> Lerato Mogoathe, *Arrest of 3 Kenyan Vendors Caught with Plastic Bags Is Sparking Outrage Over Inequality*, GLOB. CITIZEN (Feb. 24, 2020), at <https://www.globalcitizen.org/en/content/3-vendors-arrested-in-kenya-for-using-plastic-bags> (noting that a jail sentence of one to four years can be imposed instead of a fine).

<sup>5</sup> Elena Kantorowicz-Reznichenko & Michael Faure, *Comparative Law and Economics Perspective on Day Fines*, in *DAY FINES IN EUROPE: ASSESSING INCOME-BASED SANCTIONS IN CRIMINAL JUSTICE SYSTEMS* 366, 378 (Elena Kantorowicz-Reznichenko & Michael Faure eds., 2021).

<sup>6</sup> For more explanation of how we use this term, which is used in various ways in existing scholarship, see note 16 *infra* and accompanying text.

<sup>7</sup> GA Res. 70/1 (Oct. 21, 2015) [hereinafter Sustainable Development Goals].

<sup>8</sup> See generally Universal Declaration of Human Rights, GA Res 217 A (III), Dec. 10, 1948 [hereinafter UDHR]; see also, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 UNTS 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 UNTS 3 [hereinafter ICESCR].

<sup>9</sup> See note 127 *infra* and accompanying text (citing documents that demonstrate knowledge of this practice and concern about it); see also UNODC, *The 2018 United Nations Survey of Crime Trends and Operation of Criminal Justice Systems (2018-UN-CTS)*, at <https://www.unodc.org/unodc/en/data-and-analysis/statistics/crime/cts-data-collection.html> [hereinafter 2018 UNODC Survey] (not including questions about financial sanctions or about imprisonment for failure to pay them).

are not living up to these goals.<sup>10</sup> Yet the uses and consequences of poverty penalties have not been adequately studied through a global lens. Second, recognition of poverty penalties has started to emerge in international human rights discourse in the twenty-first century, most notably as one of many recommendations in the Guiding Principles on Extreme Poverty and Human Rights adopted by the Human Rights Council.<sup>11</sup> But while the seeds have been planted, they remain mostly nascent.

The first contribution of this Article is a description of comparative practice. It looks to legal systems around the world and shows that poverty penalties are widespread but can take very different forms. Countries vary sharply in whether and how they consider individual financial circumstances in imposing financial sanctions and also in how much they add on other costs, fees, and surcharges. They also differ in how they respond to non-payment, with many countries using imprisonment as a sanction. In other countries, non-payment can trigger other penalties, including snowballing collection costs, revocation of driver's licenses, and deprivation of political rights. In general, poverty penalties often fall heavily on persons who are already vulnerable for reasons besides poverty, such as race, religion, gender, or disability.

This Article's second contribution is also descriptive, but from an international rather than comparative perspective. Remarkably, the most high-profile international discussion of poverty penalties to date took place all the way back in 1905, at a major international conference of criminal justice reformers.<sup>12</sup> Later international human rights instruments omitted reference to "excessive fines," and the issue of poverty penalties was neglected in both the criminal justice and the human rights communities of the United Nations. This is now starting to change, as domestic and international rights advocates increasingly recognize the widespread impacts of poverty penalties. But it remains to be seen whether this is the cusp of a "norms cascade."<sup>13</sup>

Third, this Article argues that poverty penalties *should* receive greater attention as a matter of human rights law, and also within international discourse around poverty reduction and criminal justice reform. The human rights guarantees around equal protection, non-discrimination, the avoidance of arbitrary detention, and an adequate standard of living are all implicated by poverty penalties. We argue that imprisonment due to inability to pay raises grave human rights concerns. We also identify four other circumstances where poverty penalties are particularly problematic: where they serve as grossly disproportionate sentences; where the consequences of non-payment are likely to trigger severe further poverty penalties; where the imposition of poverty penalties heavily impacts groups that are otherwise specially protected by human rights law; or where the poverty penalties are notably higher than state interests in administrative convenience can justify. Given the importance of the issue,

<sup>10</sup> See notes 42–46, 86–89, 97 *infra* and accompanying text (also discussing day fine systems at greater length).

<sup>11</sup> UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON EXTREME POVERTY AND HUMAN RIGHTS 17 (2012) [hereinafter GUIDING PRINCIPLES] (including as one of many recommendations that states should "[r]eview sanctions procedures that require the payment of disproportionate fines by persons living in poverty, especially those related to begging, use of public space and welfare fraud, and consider abolishing prison sentences for non-payment of fines for those unable to pay").

<sup>12</sup> See notes 109–111 *infra* and accompanying text (discussing the 1905 meeting of the International Penal and Penitentiary Congress).

<sup>13</sup> See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 896 (1998) (describing how norms can develop internationally).

international actors should try to gather more information about poverty penalties and provide opportunities for states to discuss best practices and further reforms.

The rest of the Article proceeds along the lines described above. Part I defines our use of “poverty penalties” and provides comparative analysis of how poverty penalties are used in criminal sentences. Part I also discusses how poverty penalties can particularly affect groups that are vulnerable for reasons beyond poverty, including along lines of race, religion, gender, or disability. Part II describes how further poverty penalties can arise from non-payment, including imprisonment, more financial sanctions (such as late fees, interest, and collection costs), the deprivation of other rights or benefits, and the forfeiture of property. Part III moves from a comparative to an international lens. It describes the past neglect of poverty penalties in international discourse, including the absence of specific treaty provisions focused on excessive fines. It also shows that human rights actors are increasingly paying attention to poverty penalties and suggests the development of a norm may be underway. Finally, Part IV argues that poverty penalties can be matters of serious human rights concern—including imprisonment due to inability to pay. It also identifies ways that the international human rights and criminal justice communities can raise awareness around poverty penalties and develop best practices aimed at minimizing them.

We emphasize that this Article is not comprehensive in its description of practice around poverty penalties. Indeed, one research challenge has been the difficulty in identifying state practice, especially given the relative lack of international attention to this topic and the high variance that can occur not only between but also within countries. In some cases, we have found scholarly work detailing state practices, but much of our work has involved reviewing state constitutions and criminal codes, conversing with local practitioners, and scouring the Internet for references to on-the-ground cases. Over the course of this Article, we reference law or practice in many countries, including (among others): Australia, Brazil, China, Croatia, Denmark, Democratic Republic of the Congo, France, Germany, Ghana, Great Britain, Hungary, India, Japan, Jordan, Kenya, Mexico, Nicaragua, Nigeria, Papua New Guinea, Poland, Qatar, Romania, Russia, South Korea, Switzerland, and the United States.<sup>14</sup> These references reflect small windows into the countries’ practices and inevitably miss many nuances.<sup>15</sup> We also do not attempt to evaluate whether poverty penalties are typically worse in certain kinds of jurisdictions (such as common law states or federalist states or states in particular geographic regions). In short, we have only scratched the surface of research on the use of poverty penalties around the world. Indeed, as discussed in Section IV.B.1, one of the most important takeaways from this Article is the need for more information.

<sup>14</sup> Methodologically, we began our research by identifying and then studying a diverse group of countries where at least one author had the language skills and/or personal connections to surface information about state practice—Brazil, China, Ghana, India, Jordan, Qatar, and the United States. This research persuaded us that poverty penalties were a widespread issue. We then searched more broadly for information on practice in other states. This second round of searches relied on English-language sources.

<sup>15</sup> In particular, for some countries we have been able to survey only the codified law, which may differ significantly from on-the-ground practices. Some unwritten poverty penalties likely escaped our notice. Conversely, there are likely to be situations in which laws on-the-books are not applied as harshly as written.

## I. THE EXTENSIVE USE OF POVERTY PENALTIES IN COMPARATIVE PRACTICE

We use the term “poverty penalties” to refer to monetary sanctions that disproportionately burden lower-income people and to the cascade of adverse legal consequences that can flow from these disproportionate sanctions. Our definition of poverty penalties thus includes fines that are not scaled to financial circumstances; fixed court costs and other surcharges; the use of imprisonment as a consequence of inability to pay; and other sanctions imposed for inability to pay, such as late fees, interest charges, forfeiture, and deprivation of rights. Our use of this term draws from scholarship focused on U.S. practice but differs from this scholarship by including fines (and other initial financial penalties) that are designed in ways that inordinately burden lower-income persons.<sup>16</sup>

This Part focuses on describing comparative practice with respect to the first part of our definition—the imposition of monetary sanctions that disproportionately burden lower-income people. Part II subsequently describes comparative practice with respect to the second

<sup>16</sup> For examples of uses in U.S. criminal justice scholarship, see, e.g., Beth Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 22, 23 (2017) (describing poverty penalties as the imposition of “interest and collections costs, probation and a host of related fees for probation services, the loss of government licenses and benefits, and even incarceration” resulting from someone’s inability to pay their criminal fines); Rebecca Vallas & Roopal Patel, *Sentenced to a Life of Criminal Debt: A Barrier to Reentry and Climbing Out of Poverty*, 46 CLEARINGHOUSE REV. J. POV. L. & POL'Y 131, 133 (2012) (describing poverty penalties as including “late fees, interest charges, payment plan fees, and steep collection fees”); Jennifer M. Lechner & B. Leigh Wicclair, *Driven to Despair: Confronting Racial Inequity in North Carolina’s License Suspension Practices*, 43 CAMPBELL L. REV. 203, 207 (2021) (describing the “economic snowballing effect” of monetary sanctions as constituting “poverty penal[ies]”).

These definitions typically focus on sanctions levied after a defendant fails to immediately pay a fine, not on the initial fine itself. By contrast, we use a broader definition here to include design choices at the point of sentencing that fail to take account of poverty and thus have the effect of disproportionately punishing lower-income people. Such design choices can include fixed fines, mandatory minimum fines, and fines that are not adequately scaled to financial circumstances, all discussed in Section I.A.2 *infra*. These practices are sometimes referred to in U.S. practice as “regressive penalties,” or are analyzed under the broader umbrella of “legal financial obligations” (LFOs). Compare, e.g., COUNCIL OF ECON. ADVISORS ISSUE BRIEF, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1, 3 (Dec. 2015), at [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) (“Fixed payments for a given offense create regressive penalties, or penalties more punitive for poorer individuals than for wealthier individuals.”) with Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 2018 ANN. REV. CRIMINOLOGY 471, 472–73 (defining “legal financial obligations” to include fines, restitution, court fees, and surcharges and assessments). We include these regressive penalties in our conception of “poverty penalties” because of their disproportionate impact on lower-income persons—and because they frequently lead to inability to pay and thus to further punitive consequences.

Our definition focuses on *penalties*—formal sanctions. It does not encompass all the ways that justice systems can disproportionately harm poor people, such as by inequitable access to adequate legal representation, by cash bail systems, or by the criminalization of poverty itself. Nor does it address forms of economic injustice that are not formal sanctions. We focus our attention on monetary *criminal* sanctions but also include some discussion of monetary administrative sanctions that are particularly harsh or that can lead to additional poverty penalties. Finally, we mostly omit discussion in this Article of one further poverty penalty that does fall within our definition: restitution, which is court-ordered payments by defendants to victims as part of a criminal sentence. Given its implications for third parties, restitution is too complex a topic for us to discuss meaningfully here while keeping this Article to a manageable length. For a recent exploration of the impact of restitution orders on low-income juveniles in the U.S. criminal justice system, see Juvenile L. Ctr., *Reimagining Restitution: New Approaches to Support Youth and Communities* 7–15 (2022). Finally, we note that the term “poverty penalty” is sometimes also used by social scientists for a very different purpose that is unconnected to criminal justice—to describe the extra costs that lower-income people face in accessing goods or services. E.g., C.K. PRAHALAD, *THE FORTUNE AT THE BOTTOM OF THE PYRAMID* 11 (2006). Our use of “poverty penalties,” by contrast, centers on financial penalties imposed by states through their justice systems.



part of our definition—the cascade of adverse legal consequences that can flow from these disproportionate monetary sanctions, including imprisonment for failure to pay, the imposition of more monetary sanctions, and the revocation of various rights and privileges.

Among monetary sanctions, the paradigmatic form of poverty penalties is the use of fines. Unless fines are perfectly scaled to the financial status of defendants, they will disproportionately burden lower-income persons. The bulk of this Part therefore describes how fines are set in countries around the world. This Part also briefly describes the practice in at least a few countries, most notably the United States, of burdening defendants with another kind of poverty penalty: fixed costs, fees, or surcharges that are separate from fines. The Part closes by describing how poverty penalties can disproportionately impact persons who are already vulnerable for other reasons, including race, religion, gender, or disability.

### A. Fines

Fining practices vary around the world. Countries differ in the offenses for which they impose fines and in the extent to which they impose fines as sole penalties or as additions to other penalties (such as prison sentences). Countries also differ as to the extent that fines are “fixed”—that is, a certain offense is punishable by a fine of a specific amount of money—or instead vary based on any number of subjective or objective criteria, potentially including the defendant’s financial circumstances.

#### 1. *The Use of Fines as a Sanction*

Fines are a common sanction. As described below, criminal codes frequently require or authorize judges to impose fines—sometimes standing alone and sometimes in combination with other penalties such as imprisonment.<sup>17</sup> While fines seem like a distinct penalty from imprisonment, these two penalties are often intertwined in practice for lower-income people.

Criminal codes sometimes make fines the only penalty for certain offenses. For example, Pakistan’s Penal Code specifies that intentionally publishing false statements about election candidates “shall be punished with fine.”<sup>18</sup> In Japan, someone who causes injury through negligence “shall be punished by a fine of not more than 300,000 yen or a petty fine.”<sup>19</sup>

Criminal codes also frequently give judges discretion about whether to impose a fine, a term of imprisonment, or both. Ghana’s Criminal Procedure Code, for example, provides that: “Where a person is convicted of any felony or misdemeanour or any offence punishable by imprisonment (other than an offence for which the sentence is fixed by law) the Court may, in its discretion, sentence him to a fine in addition to or in lieu of any other punishment

<sup>17</sup> There is considerable variation among countries as to how much they rely on fines and what they use fines for. In some countries, for example, fines are imposed more frequently for crimes involving money or greed than for other types of crimes. See generally, e.g., CRIM. LAW OF THE PEOPLE’S REPUBLIC OF CHINA, July 1, 1979, translated in LEGISLATIVE AFFAIRS COMM’N OF THE STANDING COMM. OF THE NAT’L PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA, THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA, 1979–82, at Pt. II (China) [hereinafter CRIM. LAW OF THE PEOPLE’S REPUBLIC OF CHINA] (imposing fines for most offenses related to “disrupting the order of the socialist market economy,” see Chapter III, but not for most offenses related to “endangering national security,” see Chapter I, “endangering public security,” see Chapter II, or “infringing upon citizens’ right of the person and democratic rights,” see Chapter IV).

<sup>18</sup> PAK. PENAL CODE, 171-G (Pak.).

<sup>19</sup> KEIHO (PEN. C.), Art. 209 (Japan).

to which he is liable.”<sup>20</sup> In cases involving non-fatal suicide behavior—which is criminalized in Ghana—judges have sentenced defendants to a combination of custodial sentences and fines.<sup>21</sup> As another example, Chinese law provides that fines are “supplementary punishments” but also “may be imposed independently.”<sup>22</sup>

Criminal codes often also identify offenses for which both incarceration and a fine is required. In Turkey, someone convicted of illegally helping a non-citizen enter or remain in the country for the purpose of material gain “shall be sentenced to a penalty of imprisonment for a term of three to eight years and a judicial fine of up to ten thousand days.”<sup>23</sup> Ethiopia’s Criminal Code provides that the crime of illicitly trafficking in gold, currencies, or foreign exchange “is punishable with rigorous imprisonment not exceeding ten years, and fine not exceeding fifty thousand Birr, without prejudice to the confiscation of the subject matter of the crime.”<sup>24</sup> Japan punishes acceptance of stolen property with “imprisonment with work for not more than 10 years and a fine of not more than 500,000 yen.”<sup>25</sup> In Brazil, many crimes listed in the Penal Code indicate a penalty of a period of detention as well as a fine.<sup>26</sup>

Finally, in practice, criminal law systems frequently allow rich defendants to pay fines while sending poor defendants to prison. Sometimes, sentencing practices explicitly incorporate this difference. The Brazilian Penal Code, for example, provides that “[i]n the case of a conviction equal to or less than one year, the replacement may be made by a fine or a penalty restricting rights.”<sup>27</sup> Replacement through a fine of course requires the means to pay a fine. In Kenya, sentences apparently can be given explicitly in the alternative—such as two years in prison *or* a fine of Kshs. 50,000.<sup>28</sup> Again, such a choice exists in practice only for defendants who can pay the fine. And even if the sole sentence is a fine, this will often have the effect of sending poor defendants to prison because, as discussed in Part II, many countries incarcerate defendants who are unable to pay off their fines. Therefore, unless fines

<sup>20</sup> GHANA CRIM. PROC. CODE, 1960 (Act 30), § 297(1) (Ghana)[hereinafter GHANA CRIM. PROC. CODE].

<sup>21</sup> Mensah Adinkrah, *Crim. Prosecution of Suicide Attempt Survivors in Ghana*, 57 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1477, 1486 (2013) (describing how “[f]or the suicide charges, they each received a custodial sentence of 12 months in hard labor and [were] fined the equivalent of US\$300” and further explaining that “[i]n default of the payment of the fine, they were each to serve an additional 6 months in prison”).

<sup>22</sup> CRIM. LAW OF THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 17, Art. 34 (also identifying the deprivation of political rights and the confiscation of property as other supplementary punishments). For another example (among many) where judges have some discretion in choosing between fines, imprisonment, or both, see KENYA PEN. CODE, ch. 63, § 26(3) (Kenya) (“A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment: Provided that—(i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment. . . .”).

<sup>23</sup> PEN. CODE OF TURK., Art. 79 (Turk.). The penal code defines a “judicial fine” as a fine amount calculated by multiplying a specified number of days by a daily amount of at least twenty Turkish lira and less than one hundred Turkish lira. *Id.* Art. 52(1)–(2). The daily amount is set with regard to the “personal and economic conditions” of the defendant. *Id.* Art. 52(2). Unless otherwise specified (as in this example), the number of days is supposed to be greater than five days but less than seven hundred and thirty days. *Id.* Art. 52(1).

<sup>24</sup> ETH. CRIM. CODE, Art. 346 (Eth.).

<sup>25</sup> KEIHŌ (PEN. C.), *supra* note 19, Art. 256.

<sup>26</sup> *See, e.g.*, CÓDIGO PENAL [BRAZIL C.P.] [PENAL CODE], § IV, Art. 197 (Braz.); *id.* § V, Art. 227(3).

<sup>27</sup> *Id.* Art. 44, § 2. For sentences that exceed one year, the code provides that “the custodial sentence may be replaced by a penalty restricting rights and a fine or by two [penalties] restricting rights.” *Id.*

<sup>28</sup> Sarah Muringa Kinyanjui & Migai Akech, *Towards Structured Sentencing in Kenya: A Case For Reform*, 9 AFR. J. CRIM. & JUST. STUD. 266, 270 (2016) (giving other examples as well).

are sufficiently scaled to financial circumstances, fines can be tantamount to prison sentences for lower-income defendants.

## 2. *The Wide Variation as to Whether Fines Are Scaled to Defendants' Finances*

There is wide international variance in how fines are set. Different countries take different approaches as to whether and how their fine-setting methodologies ignore, authorize, or require consideration of defendants' wealth (or of other matters related to the defendants' circumstances). Some approaches have inherently regressive distributive effects by ignoring the defendants' finances. Others protect lower-income persons in principle, but not always in practice.

Under "fixed" fine structures, offenses are punishable by specifically enumerated fines. Fixed fines are obviously poverty penalties, as lower-income persons will find it harder to pay them off than will rich persons. Minor offenses such as traffic violations can trigger fixed fines, as in some U.S. municipalities.<sup>29</sup>

More commonly, criminal codes denote a minimum and/or a maximum fine that can be set. In Qatar, for example, there is a minimum QR3,000 fine for the offense of attempting to pay with a check that bounces.<sup>30</sup> In Kenya, the use of plastic shopping bags carries a minimum fine of two million shillings and a maximum fine of around four million shillings.<sup>31</sup> Like fixed fines, the use of mandatory minimums inevitably creates poverty penalties, as lower-income people will feel the sting of these minimums more keenly.

One issue that can arise with both fixed fines or statutory maximums and minimums is that the amounts do not keep pace with inflation or currency fluctuations. Some countries address this problem by using "penalty units" and then adjusting the value assigned to a penalty unit over time. Ghana adopted this system in 2000, in response to wide currency swings that made pre-existing fine amounts either laughably low or exorbitantly high.<sup>32</sup> Apparently, lawmakers intended that the conversion rate of one penalty unit into currency should amount to no more

<sup>29</sup> *E.g.*, Clay County, Missouri, Traffic Violation Bureau – Fines and Costs as of Jan. 1, 2020, at <http://www.circuit7.net/traffic/violation-fines> (listing the fines for various types of violations).

<sup>30</sup> QATAR CRIM. PROC. CODE (LAW NO. 11 OF 2004), Art. 357 (Qatar), at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/91461/106075/F1506630289/QAT91461%20Eng.pdf> (English translation).

<sup>31</sup> Mogoathe, *supra* note 4. To give yet another example, many states across the United States employ minimum fine structures even as they vary widely from each other. For example, judges in Illinois, North Carolina, Washington, and Texas have discretion not to impose any fine on someone who drives with a suspended license, but judges in Missouri, New York, California, and Georgia must charge defendants at least \$150, \$200, \$300, and \$500, respectively, for the same offense. Alexes Harris et al., *Monetary Sanctions in the Criminal Justice System: A Review of Law and Policy in California, Georgia, Illinois, Minnesota, Missouri, New York, North Carolina, Texas, and Washington* 13–14 tbl. 2 (2017) [hereinafter *Monetary Sanctions in the Criminal Justice System*]. These are just the minimums; maximum fines for that charge can range from \$200 (North Carolina) to \$2500 (Illinois), not counting any fees, surcharges, or interest. *Id.*

<sup>32</sup> E. Owusu-Dapaa, *Injecting Commercial Sense into Penal Enactment: A Critique of the Fines (Penalty Units) Act, 2000 (Act 572)*, 3 KNUST. L.J. 94, 95 (2006); Neny Kwasi, *Sentencing Persons Convicted of Minor Offenses in Ghana: Reducing Judicial Over-Reliance on Imprisonment* 82 (Apr. 2019) (L.L.M. thesis, Dalhousie University) (on file with Schulich School of Law, Dalhousie University Digital Commons). As another example, penalty units are used for traffic violations in Victoria, Australia. Penalties and Values: Penalty Units, Victoria State Government, at <https://www.justice.vic.gov.au/justice-system/fines-and-penalties/penalties-and-values> (accessed June 21, 2023) (noting that the penalty for failing to obey a stop sign is a minimum of two penalty units and a maximum of ten penalty units, with each penalty unit currently set at AUS\$192.31).

than one third of the monthly earnings for an average worker.<sup>33</sup> The use of penalty units deals with concerns about inflation and currency swings, but it still amounts to a poverty penalty because it remains constant for all defendants, rich or poor. When a penalty unit goes up, it goes up for everyone. And in practice, fines can get set in amounts higher than people can pay.<sup>34</sup>

Except where fixed fines are used, judges typically have discretion in setting the amount of a fine, as long as they are within any statutory maximums or minimums. There is a wide range of practices in terms of how discretion is used and whether judges take defendants' wealth into account. In India, for example, the Penal Code specifies that "[w]here no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive."<sup>35</sup> Case law has developed some guidelines for excessive fines, but the direction is still open-ended.<sup>36</sup> In many U.S. jurisdictions, fines are set without any hearing on a defendant's ability to pay—such a hearing is held only after the defendant has failed to make a payment, frequently with the burden on the defendant to prove their poverty.<sup>37</sup>

Wide judicial discretion can allow judges to assign fines that are excessive, unfair, or inconsistent. In Brazil, for example, the vast majority of offenses in the criminal code specify only that there is a fine, not what the fine should be for that particular offense.<sup>38</sup> Brazilian courts are instructed to take into account a defendant's circumstances when justifying the sentence, but the onus is on the defendant to present evidence of those circumstances.<sup>39</sup> This lack of guidance and accompanying onus on the defendant can lead to inequitable results: one impoverished man arrested for possessing a few grams of hard drugs was sentenced following appeal to the starkly high fine of R\$15,900, in addition to a prison sentence.<sup>40</sup> The practitioner we interviewed observed that because of this latitude, some judges exhibit a pattern of calculating the same fine (the same number of days at the same income level) for the same offenses, regardless of the defendant's circumstances.<sup>41</sup>

<sup>33</sup> Owusu-Dapaa, *supra* note 32, at 98.

<sup>34</sup> *E.g.*, Kwasitsu, *supra* note 32, at 98, 82 n. 51 (describing a case in which a farmer faced an unaffordable fine).

<sup>35</sup> INDIA PEN. CODE, § 63 ("Amount of Fine") (Ind.).

<sup>36</sup> *See, e.g.*, Gambhir Singh v. State of Madhya Pradesh, Cr.A. No. 3217 of 2013, decided on Sept. 7, 2020 (Madhya Pradesh HC at Jabalpur) (engaging in a lengthy discussion of the relationship between financial circumstances and fines, reducing defendant's fine from Rs 5,00,000 to Rs 15,000 in light of defendant's occupation as "wage labourer," and providing that non-payment would result in one year of incarceration); Baby Thomas v. State of Kerala (2009) CRL.R.P. No. 36 of 2002 (reducing the trial court's imposition of a fine and also reducing the corresponding period of imprisonment that would derive from default).

<sup>37</sup> Brittany Friedman et al., *What Is Wrong with Monetary Sanctions? Directions for Policy, Practice, and Research*, 8 RUSSELL SAGE FOUND. J. SOC. SCI., No. 1, at 221, 225 tbl. 2 (2022) [hereinafter *What Is Wrong with Monetary Sanctions?*].

<sup>38</sup> *See generally* BRAZIL C.P., *supra* note 26.

<sup>39</sup> Interview with Carolina Haberbeck Brandão, Brazilian criminal attorney and Human Rights Scholar at the University of Pennsylvania (Oct. 3, 2022).

<sup>40</sup> *Id.* After defense attorneys joined the case pro bono, the amount was reduced on further appeal to the considerably lower amount of twenty-four installments of R\$219.95.

<sup>41</sup> *Id.* This is true even though Article 49 of Brazil's Penal Code of 1940 requires all fines to be "calculated in fine-days," with a minimum of ten and a maximum of 360 days. Unlike "day-fine" jurisdictions discussed in the next few paragraphs, the value of Brazil's fine-day is affixed not to the defendant's salary, but to a multiple of the minimum monthly wage of the country. Judges have discretion to employ a wage scale of between 1/30 and five times the current minimum wage in calculating their fines, but the Brazilian penal code fails to specify how judges should choose what coefficient to use—and some judges use the same coefficient regardless of the defendant's financial status. Interview with Carolina Haberbeck Brandão, *supra* note 39.

Some systems of fining do require judges to set fines in proportion to defendants' finances. Most notable is the "day fine" system used by some countries, including many in Europe.<sup>42</sup> Day fine values are first determined by the seriousness of the offense and then deliberately scaled in proportion to the defendant's financial situation. The sentencing authority identifies the number of days that the fine should last based on the severity of the offense and then sets the "daily unit" to be charged each day according to the defendant's finances.

If done perfectly, day fines would not be poverty penalties, as they would not place disproportionate burdens on lower-income persons. Because of this, we think the use of day fines has considerable promise and return to this topic in Part IV. But the day fines system has pitfalls as well. First, countries may be limited in how they use the day fines system—for example, some European countries that are nominally on the day fines system make use of fixed fines as well.<sup>43</sup> Second, the details of how a country structures its day fines system matter. Where countries measure defendants' financial situations using income instead of wealth, for example, day fines will continue to fall disproportionately on lower-wealth persons.<sup>44</sup> Third, the effectiveness of the day fines system depends on the quality of the governmental structures supporting it. When Poland adopted a day fines system after the end of the Cold War, for example, judges found the system too complicated and challenging given a rampant underground economy that made income calculations extremely difficult.<sup>45</sup> Similarly, as a recent report on Germany indicates, judicial discretion and limited available financial information frequently cause daily rates to be set at unmanageable levels; in 2018, 7,600 people entered German prisons for failure to pay their fines for the petty crime of fare evasion.<sup>46</sup> In short, poverty penalties can persist even under a day fines regime.

### B. Costs, Fees, and Surcharges

A related financial burden that criminal justice systems can impose disproportionately on lower-income persons comes in the form of costs, fees, and surcharges. These are distinct from fines in that they ostensibly seek to recoup costs from the defendants' enmeshment in the justice system. As a result, they may not be directly tied at all to the underlying offense, but rather to the mechanisms of the justice system itself. They do not appear as prevalently as fines but are present in some jurisdictions.

U.S. state and local jurisdictions are perhaps the vanguard employers of these financial sanctions. States frequently outsource administrative costs of the judicial system to defendants, sometimes characterized as "user fees" for the defendants' "use" of the justice system.<sup>47</sup> A Tennessean convicted of simple drug possession, an offense carrying a \$250 fine, might find

<sup>42</sup> See generally DAY FINES IN EUROPE, *supra* note 5.

<sup>43</sup> Kantorowicz-Reznichenko & Faure, *supra* note 5, at 384.

<sup>44</sup> See *id.* at 368–70.

<sup>45</sup> See, e.g., Krzysztof Krajewski, *Sentencing in Poland: Failed Attempts to Reduce Punitiveness*, 45 CRIME & JUST. 175, 212–14 (2016).

<sup>46</sup> Mitali Nagrecha, *The Limits of Fairer Fines: Lessons from Germany*, CRIM. JUST. POL'Y PROG. 6 (June 2020), at [https://www.fairtrials.org/app/uploads/2022/01/Day\\_Fines\\_Report.pdf](https://www.fairtrials.org/app/uploads/2022/01/Day_Fines_Report.pdf).

<sup>47</sup> See ALEXIS HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 27–42 (2016) (defining user fees and outlining their use in every U.S. state). While costs are sometimes framed as administrative, they also have a punitive nature and at least one U.S. appellate court has held that "they are punishment for criminal wrongdoing." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1038 (11th Cir. 2020) (en banc); see also *id.* at 1039 (noting that the applicable "fees and costs . . . are penalties, not taxes").

herself on the hook for as much as \$946 in court costs like drug testing, arrest-related fees, and the services of a public defender, plus \$1,035 paid to private companies contracted by the court to provide probation services.<sup>48</sup> Some U.S. states or localities go so far as to bill defendants for their own incarceration.<sup>49</sup>

These added financial burdens can also take the form of “surcharges” which often bear little or no relationship to the actual costs associated with the defendant’s case. In U.S. jurisdictions, these can include general surcharges for peace officer and prosecutor training, for funding local law libraries, and others with vague titles (e.g., “felony” surcharges, “criminal conviction” surcharges, and “Victim Penalty Assessment” surcharges).<sup>50</sup> The United Kingdom has imposed similar “victim” and “criminal courts” surcharges, sometimes on destitute defendants whose crimes arise from their poverty. These surcharges can exceed the fine for the crime itself; for example, in one case, “[a] 30-year-old homeless woman” who was convicted of “begging in a car park in Coventry, West Midlands” was “ordered to pay a £150 criminal courts charge, a £30 fine and a £20 victim surcharge.”<sup>51</sup> Kenya similarly imposes court fees “dependent on court activities and nature of matters,” and those charges are a source of revenue for the judiciary.<sup>52</sup> South Australia law requires criminal defendants who go to trial and are found guilty to pay \$150 AUS per charge to the court as a “prosecution” fee.<sup>53</sup>

Costs, fees, and surcharges fit squarely within the definition of poverty penalties. They explicitly attempt to shift the costs of criminalization onto defendants, frequently ignoring not only the payee’s financial circumstances but often all other circumstances of their alleged offense, except that they have been hauled into court. For the purpose of explaining how poverty penalties function, we consider them together with fines, as they share many of the same qualities in the jurisdictions that make use of them.

<sup>48</sup> Hum. Rts. Watch, *US: Private Probation Harming the Poor* (Feb. 20, 2018), at <https://www.hrw.org/news/2018/02/20/us-private-probation-harming-poor>.

<sup>49</sup> See *What Is Wrong with Monetary Sanctions?*, *supra* note 37, at 227 tbl. 3; Pat Eaton-Robb, *At \$249 Per Day, Prison Stays Leave Ex-Inmates Deep in Debt*, AP NEWS (Aug. 27, 2022), at <https://apnews.com/article/crime-prisons-lawsuits-connecticut-074a8f643766e155df58d2c8fbc7214c>.

<sup>50</sup> *Monetary Sanctions in the Criminal Justice System*, *supra* note 31, at 12 (noting that “California imposes a 20 percent criminal conviction surcharge; Georgia allows for a 10 percent or \$50, whichever is least, peace officer and prosecutor training surcharge; Minnesota imposes a surcharge for local law libraries; New York enables a \$300 felony surcharge, and Washington imposes a \$250 Victim Penalty Assessment for all misdemeanor convictions and a \$500 Victim Penalty Assessment for all felony convictions”).

<sup>51</sup> Owen Bowcott, *Howard League Criticises “Unfair and Unrealistic” Court Fees*, GUARDIAN (Aug. 5, 2015), at <https://www.theguardian.com/law/2015/aug/05/howard-league-criticises-unfair-and-unrealistic-court-fees> (also giving other examples).

<sup>52</sup> Judiciary of Kenya, *State of the Judiciary and Administration of Justice Annual Report 164* (2016–2017) (Ken.) (also noting that “[t]he judiciary collects revenue in the form of court fines and fees”).

<sup>53</sup> *Criminal Procedures Act 1921* (SA), Sec. 189A (Austl.), as implemented by *Criminal Procedure (General) Regulations 2017* (SA), cl. 10 (Austl.). A defendant may request remission or reduction of court fees on account of poverty or “other proper reason,” but must affirmatively submit a nine-page affidavit detailing the income, expenses, assets, and liabilities of the defendant and all household members. See *Joint Criminal Rules* (SA), div. 4, r. 19.1 (Austl.) (requiring defendants to fill out Form 91Ae, “Application to Registrar for Remission or Reduction of Court Fees,” at <https://www.courts.sa.gov.au/wp-content/uploads/wp-download-manager-files/court-forms/joint-criminal-rules-2022/Cat7-Pretrial-applns-hearings-orders/Form%2091Ae%20Application%20to%20Registrar%20for%20Remission%20or%20Reduction%20of%20Court%20Fees.pdf> (accessed Mar. 19, 2023)).

### C. Poverty Penalties and Intersectional Oppression

In many countries, the “under-the-radar” quality of poverty penalties makes them a means for oppressing members of vulnerable groups, including along lines of race, religion, gender, and disability. To the extent that these groups are disproportionately impoverished, it is inevitable that they will be affected more by poverty penalties. But this effect can be enhanced by discriminatory enforcement or by design choices that embed greater poverty penalties into certain types of offenses.

In the United States, considerable scholarship demonstrates how poverty penalties are disproportionately inflicted upon Black and Indigenous communities.<sup>54</sup> The Ferguson Report produced by the U.S. Department of Justice’s investigation of the police department in Ferguson, Missouri, for example, found that local police brought certain low-level charges “almost exclusively against African Americans”; Black Americans comprised 95 percent of all “Manner of Walking in Roadway” charges and 94 percent of all “Failure to Comply” charges, despite comprising only 67 percent of Ferguson’s population.<sup>55</sup> Investigators found that this discrepancy was a result of racial bias on the part of officers.<sup>56</sup>

Similarly, in Europe, fines have sometimes been used specifically and intentionally against the members of the Roma ethnic minority. An instance of this was described in the 2017 Hungarian Supreme Court case between the Hungarian Civil Liberties Union and the Heves County Police Headquarters, where the court ruled that the police committed direct discrimination against the Roma community through the department’s petty offense practice and related fines that disproportionately targeted the local Roma population.<sup>57</sup> In that case:

Vigilante groups descended on the Hungarian village of Gyöngyöspata for two months in 2011, forming “patrols” and harassing local Roma inhabitants. Rather than intervening to protect the villagers, the police started imposing fines on Roma for the most minor offences, following an apparently deliberate practice of singling Roma out for this treatment. . . . [The trial court] held that the police by means of its petty offense practice engaged in direct discrimination against members of the Roma community in Gyöngyöspata.<sup>58</sup>

<sup>54</sup> See, e.g., Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 87–88 (2019) (noting that Black Americans with felony convictions were more likely than people with felony convictions overall to have criminal debt that prevented them from voting); Robert Stewart et al., *Native Americans and Monetary Sanctions*, 8 RUSSELL SAGE FOUND. J. SOC. SCI. 137, 138 (2022), at <https://www.rsfjournal.org/content/rsfjss/8/2/137.full.pdf> (“On several measures, Native Americans appear to experience much worse [Legal Financial Obligation] outcomes relative to any other group.”).

<sup>55</sup> FERGUSON REPORT, *supra* note 1, at 4–5.

<sup>56</sup> *Id.* at 5 (“For example, we discovered emails circulated by police supervisors and court staff that stereotype racial minorities as criminals, including one email that joked about an abortion by an African-American woman being a means of crime control.”).

<sup>57</sup> Eger Court, Number 12.P.20.065/2013/128, at [https://hclu.hu/files/tasz/imce/gyongyospata-i-decision\\_part\\_1-en.pdf](https://hclu.hu/files/tasz/imce/gyongyospata-i-decision_part_1-en.pdf); Open Soc’y Just. Initiative, *Ethnic Profiling in Gyöngyöspata Litigation Report*, at <https://www.justiceinitiative.org/litigation/ethnic-profiling-gy-nygy-spata> [hereinafter *Gyöngyöspata Report*].

<sup>58</sup> *Gyöngyöspata Report*, *supra* note 57. In addition:

[T]he police aggravated the harassment suffered by the local Roma community by engaging in practices of disproportionately and unnecessarily fining persons of Roma origin in that same settlement for minor offenses, usually traffic violations. These traffic violations included walking or pushing a stroller on the street as opposed to the dilapidated sidewalk; throwing away cigarettes or seed shells on the street; the lack of

Another instance recently litigated in the European Court of Human Rights involved an unhoused Roma woman in Switzerland, who was charged 500 Swiss francs for begging in the streets and sentenced to five days in prison when she was unable to pay.<sup>59</sup> (The Court did not reach her claim that she was singled out as an ethnic minority, instead deciding the case on the basic guarantee of dignity enshrined in Article 8 of the European Convention on Human Rights.<sup>60</sup>)

Even in European countries that make significant use of day fines, other kinds of fines have been the tools of choice in campaigns to ban Muslim women from wearing religious dress. As of 2018, penalties for wearing clothing that conceals the face—a conspicuous statutory proxy for the traditional Muslim niqab and burqa—included €15 to €25 (multiplied by a factor of 5.5) and/or up to a week in jail in Belgium; up to 1,500 leva in Bulgaria; 1,000 kroner in Denmark; up to €150 and/or a requirement to take citizenship classes in France; and up to €150 in Austria.<sup>61</sup>

More recently, France also used fines to impose pandemic lockdown restrictions, allegedly applied discriminatorily toward minority groups. By using only fines as penalties, the government could bypass traditional due process protections: “the penalty notices [we] reprocessed through a simplified legal procedure resulting in convictions without a hearing, a trial, or an opportunity to be defended by a lawyer.”<sup>62</sup> These penalties pushed those individuals further into poverty and sometimes into thousands of Euros of debt—and simultaneously blemished their record, causing those individuals to be turned down from work and thus making it nearly impossible for them to lift themselves out of debt.<sup>63</sup> Similar lockdown-related fines were employed in the United Kingdom, where an investigation found that racial minorities in England were 54 percent more likely to be fined.<sup>64</sup>

compulsory bicycle accessories, even when the bike was merely being pushed to transport sacks of flour and potatoes—violations that are usually overlooked in the case of the non-Roma.

*Id.*; see also Hungarian Civ. Liberties Union, *Supreme Court: The Police Discriminated Against the Roma of Gyöngyöspata*, (Feb. 17, 2017), at <https://hclu.hu/en/articles/supreme-court-the-police-discriminated-against-the-roma-of-gyongyospata-1> (detailing the complete procedural history of the case in the Hungarian courts).

<sup>59</sup> Eur. Ct. H.R. Press Release, *The Penalty Imposed on the Applicant for Begging in Public Breached the Convention*, ECHR 021 (Jan. 19, 2021).

<sup>60</sup> *Id.*

<sup>61</sup> Open Soc’y Just. Initiative, *Restrictions on Muslim Women’s Dress in the 28 EU Member States: Current Law, Recent Legal Developments, and the State of Play* 9, 13 (July 2018).

<sup>62</sup> Open Soc’y Just. Initiative Press Release, *The Justice Initiative Supports French Youth in Complaint Against Wrongful Lockdown Fines* (Dec. 9, 2021), at <https://www.justiceinitiative.org/newsroom/the-justice-initiative-supports-french-youth-in-complaint-against-wrongful-lockdown-fines> [hereinafter Open Society Justice Initiative Press Release] (noting that “[t]hirty-one of the 32 people charged are young men, with an average age of 25 years, and are perceived to be Black or Arab”).

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

<sup>64</sup> Open Soc’y Just. Initiative, *Justice Initiative Calls on UK Government to Address Racial Discrimination by Law Enforcement During COVID-19 Lockdown* (May 31, 2020), at <https://www.justiceinitiative.org/newsroom/justice-initiative-calls-on-uk-government-to-address-racial-discrimination-by-law-enforcement-during-covid-19-lockdown>; see also *Black People in England and Wales Twice as Likely to Be Fined for Breaking Lockdown Rules*, GUARDIAN (Aug. 17, 2022), at <https://www.theguardian.com/world/2022/aug/17/black-people-in-england-and-wales-twice-as-likely-to-be-fined-for-breaking-lockdown-rules> (noting racial disparities regarding quarantine-related fines).



As the example of face coverings suggests, poverty penalties can also target or disproportionately harm women.<sup>65</sup> A recent study in the U.S. state of Washington found that rates of female incarceration were higher in those counties that relied most heavily on fines and fees for revenue—suggesting that aggressive poverty penalties affect women particularly strongly.<sup>66</sup> Even when women are not themselves fined, a recent study in Alabama suggests that they are disproportionately likely to pay fines for others, such as a relative.<sup>67</sup> Poverty penalties can also sometimes reinforce male supremacy. A study of municipal courts in Papua New Guinea in the 1980s and early 1990s, for example, described various ways in which these courts would use fines or other financial penalties to give husbands more control over their wives.<sup>68</sup> In the Democratic Republic of the Congo, “female rape survivors [have] sometimes [been] forced to pay a fine to return to their families and to gain access to their children.”<sup>69</sup>

Finally, poverty penalties can intersect with other forms of vulnerability, including disability. A 2017 report by the Australian Law Commission pointed to testimony that “fines have disproportionate and serious adverse impacts on disadvantaged sections of the community: Indigenous Australians, the young, homeless, the welfare dependent, mentally ill, people with intellectual disabilities and prisoners.”<sup>70</sup> Not only were these “groups . . . more vulnerable to being fined in the first place,” but “[t]hey are less likely to be able to pay [off] fines or to negotiate the processes available to contest them or otherwise mitigate their impact.”<sup>71</sup> An investigation by a U.S. government commission similarly noted that fines and fees can particularly affect persons with disabilities, including where defendants are required to pay extra fees because of their disabilities.<sup>72</sup>

<sup>65</sup> See note 61 *supra* and accompanying text. In other countries, the failure of women to wear religious coverings is criminalized, as with Iran’s laws requiring the hijab. THE ISLAMIC PENAL CODE OF THE ISLAMIC REPUBLIC OF IRAN, Book 5, Art. 638 (Iran), at <https://iranhrdc.org/islamic-penal-code-of-the-islamic-republic-of-iran-book-five> (English translation) (punishing failure to wear a hijab with either ten days to two months’ imprisonment or a fine of fifty thousand to five hundred Rials).

<sup>66</sup> Kate K. O’Neill, Tyler Smith & Ian Kennedy, *County Dependence on Monetary Sanctions: Implications for Women’s Incarceration*, 8 RUSSELL SAGE FOUND. J. SOC. SCI. 157, 165–68 (2022), at <https://www.rsfjournal.org/content/8/2/157> (further noting particularly high effects for Native American women).

<sup>67</sup> Alabama Appleseed Ctr. L. & Just., *Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama’s Racial Wealth Divide* 33–34 (2018), at <https://alabamaappleseed.org/underpressure>. The study found this was especially true for Black women with a median age of forty-nine. *Id.* at 33. See note 181 *infra* for further discussion on the harmful effects of shouldering family members with a defendant’s fines.

<sup>68</sup> Cyndi Banks, *Engendering the Courts in Papua New Guinea*, 42 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 27, 32 (1998). In one example, a husband got a local court to fine his wife and, since she could not pay the fine, she had to spend five weeks in jail. *Id.* at 35. In other cases, women who left their husbands were ordered to pay restitution and then imprisoned due to inability to pay. *Id.* at 34 (noting that some of these cases were reversed by national courts).

<sup>69</sup> U.S. DEP’T OF STATE, HUMAN RIGHTS REPORT ON THE DEMOCRATIC REPUBLIC OF THE CONGO 42 (2021) [hereinafter 2021 U.S. STATE DEP’T REPORT ON DRC].

<sup>70</sup> AUSTRALIAN L. REFORM COMM’N, PATHWAYS TO JUSTICE: AN INQUIRY INTO THE INCARCERATION RATE OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES 387 (2017), at [https://www.alrc.gov.au/wp-content/uploads/2019/08/final\\_report\\_133\\_amended1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf) [hereinafter 2017 AUSTRALIA L. REFORM COMM’N REPORT] (quoting a submission by two professors).

<sup>71</sup> *Id.*

<sup>72</sup> U.S. COMMISSION ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 19 (2017); see also *id.* at 31 (noting that “approximately 12 percent of all states allow courts to charge a deaf or hearing-impaired individual for the cost of a sign-language interpreter” where these individuals seek to contest violations).

In sum, poverty penalties not only place disproportionate burdens on lower-income people, but can also disproportionately impact individuals who are vulnerable for other reasons. And as this Part has shown, poverty penalties are common rather than rare, even though there is considerable variation across and sometimes within countries about when fines and other fees are imposed and to what extent, if any, the defendants' finances are considered. Moreover, as the next Part will show, the imposition of fines and other fees is just the beginning of the poverty penalties placed upon lower-income defendants. The collection process leads swiftly to further inequities.

## II. THE CONSEQUENCES OF POVERTY PENALTIES IN COMPARATIVE PRACTICE

Poverty penalties are iterative. Fines or fees that disproportionately burden lower-income people are poverty penalties in and of themselves. And all too often they lead to other poverty penalties—further sanctions that accrue because people lack the immediate means to pay off their fines and fees. The most serious of these sanctions is imprisonment, which is a frequent penalty for failure to pay. Other possible sanctions include: the addition of more financial penalties (such as late fees, interest charges, and collection costs); and other penalties such as the revocation of driver's licenses or forfeiture of property. These additional poverty penalties can occur singly or in combination with each other, and there is considerable variation across and sometimes within countries as to their use. This Part describes these additional poverty penalties.

### A. *Imprisonment for Failure to Pay Fines*

Monetary sanctions are sometimes espoused as alternatives to imprisonment that reduce incarceration rates and decrease prison overcrowding. But in many countries, the standard consequence for default on payment of a fine is imprisonment either until the fine is paid or until a designated amount of time has elapsed. For lower-income persons, in practice this means that a nominal alternative to imprisonment instead often becomes a direct pathway to imprisonment.

Criminal codes frequently specify imprisonment as the consequence for failure to pay fines. In Jordan, the penal code stipulates that a person must serve time in prison that corresponds proportionately to the unpaid amounts.<sup>73</sup> If defendants do not pay fines imposed at sentencing, they are imprisoned for one day for every ten dinars or its fractions unpaid, so long as the term of imprisonment is one year or shorter.<sup>74</sup> Similarly, in Qatar, a person is imprisoned for one day for every one hundred riyals or less of their fines that are unpaid, with the condition that confinement not exceed seven days if it was an irregularity, and six months if it was a felony or misdemeanor.<sup>75</sup>

In countries that employ day fines, imprisonment is frequently the default consequence of failure to pay.<sup>76</sup> In Denmark, Germany, Hungary, France, Croatia, Switzerland, and

<sup>73</sup> JORDAN PEN. CODE, ART. 22 (Jordan) (further noting that fines are to “rang[e] between five and two hundred dinars, unless the law provides otherwise”). Some penalties significantly exceed the five hundred dinar limit; in 2022, for example, a mandatory penalty of between 1,000 and 5,000 dinars was added to the offense of banknote forgery, which was already punishable by at least 5 years hard labor. *Id.* Art. 240.

<sup>74</sup> *Id.*

<sup>75</sup> QATAR CRIM. PROC. CODE (LAW NO. 23 OF 2004), *supra* note 30, Art. 367.

<sup>76</sup> Kantorowicz-Reznichenko & Faure, *supra* note 5, at 371.

Romania, for example, each unpaid “daily unit” of fine converts to a day in prison.<sup>77</sup> Many of these countries allow for community service to replace these converted prison sentences, but others, such as Croatia, France, Germany, Poland, Romania, and Slovenia, make no such allowance.<sup>78</sup>

In other countries, criminal codes give judges discretion to imprison defendants who fail to pay their fines. In Ghana, for example, the criminal code provides:

Where a person convicted of any offence is sentenced to pay a fine the Court may direct that if he fails to pay it within the time appointed for payment (which may be either forthwith or within a specified time, as the Court thinks fit) he shall suffer imprisonment until it is paid. Such imprisonment shall be in addition to any imprisonment to which [he] is sentenced for his offence.<sup>79</sup>

Kenya and India have similar provisions.<sup>80</sup> In Kenya, the practice of imposing unpayable mandatory fines for certain offenses has become enough of a problem that even Kenya’s official sentencing guidelines note explicitly that “[t]here are many instances where the fines are in effect excessive and offenders end up serving imprisonment terms in default of payment.”<sup>81</sup> The guidelines further remark that “even where the amount is minimal, indigent offenders are usually unable to pay and are imprisoned as a result.”<sup>82</sup> As another example of governmental concern, the Australia Law Reform Commission has expressed dismay about how Aboriginal and Torres Strait Islanders in particular are overrepresented in prisons for having defaulted on fines.<sup>83</sup>

In South Korea, judges imposing fines are supposed to “simultaneously [decree] a substitute term of lockup at a workhouse when payment of such fine or minor fine is not made in full” within thirty days.<sup>84</sup> For unpaid minor fines, these substitute sentences can be for up to

<sup>77</sup> *Id.* Austria, Spain, and Poland require a day in prison for every two unpaid daily units, and Finland requires a day in prison for every three. *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> GHANA CRIM. PROC. CODE, *supra* note 20, § 297(3); see D. K. Afreh, *The Prisons and Sentencing Policies*, 20 REV. GHANA L. 141, 154 (1996–2000) (observing that “[m]any people go to prison or suffer additional prison terms because they cannot pay fines imposed on them by the court”); see also Adinkrah, *supra* note 21 (describing how a Ghanaian judge converted an unpaid fine for attempted suicide into an additional period of incarceration). In the Democratic Republic of Congo, “[p]risoners unable to pay their fines often remain[] indefinitely in prison.” 2021 U.S. STATE DEP’T REPORT ON DRC, *supra* note 69, at 10.

<sup>80</sup> The Kenya Penal Code provides that whenever a defendant is sentenced to a fine, the court “may, in its discretion . . . direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced.” KENYA PEN. CODE, *supra* note 22, Sec. 28 § 1(c). This provision applies even in “case[s] of an offence [that is] punishable with fine only.” *Id.* The Indian Penal Code has an equivalent provision. INDIA PEN. CODE, *supra* note 35, § 64.

<sup>81</sup> *Situational Analysis*, Sentencing Guidelines § 11.3, 2970 KENYA GAZETTE 1869 (Apr. 29, 2016), at <http://kenyalaw.org/kl/index.php?id=6275>.

<sup>82</sup> *Id.*

<sup>83</sup> 2017 AUSTRALIA L. REFORM COMM’N REPORT, *supra* note 70, at 385–89 (“recommend[ing] that statutory provisions permitting imprisonment resulting from unpaid fines should be repealed”).

<sup>84</sup> Criminal Act, Art. 70 (S. Kor.), translated in Korea Legislation Research Institute’s online database, at [https://elaw.klri.re.kr/eng\\_service/main.do](https://elaw.klri.re.kr/eng_service/main.do) (search required) [hereinafter South Korea Criminal Act]. Workhouses are camps where people are committed to hard labor. See Shin Min-jung & Jang Su-gyung, *Hard Labor an Increasing Punishment for Poor People Unable to Pay Fines*, HANKYOREH (Apr. 24, 2018), at [http://english.hani.co.kr/arti/english\\_edition/e\\_national/841857.html](http://english.hani.co.kr/arti/english_edition/e_national/841857.html).

twenty days; for other unpaid fines, they can be for up to three years.<sup>85</sup> The Supreme Prosecutor's Office acknowledged in August 2022 that “[a]bout 93 percent of those currently serving a prison term because they couldn’t pay a fine couldn’t handle a fine of 5 million won . . . or less,” and about 60 percent could not pay fines of 1 million won or less.<sup>86</sup>

The effect of these practices is that many lower-income people are going to prison as compared to their wealthier peers because they cannot afford to pay fines imposed on them. In some countries, the harshness of these practices is beginning to attract attention. In South Korea, a microcredit group started by the NGO Human Rights Solidarity has begun lending money to people who were unable to pay their criminal fines and were consequently sent to jail.<sup>87</sup> Its goal is to create a more equitable system where poor people are not imprisoned because of their inability to pay fines.<sup>88</sup> Similarly, in Ghana, the Crime Check Foundation, a Ghanaian NGO, launched the Petty Offenders Project in 2018 to pay the criminal fines for people who were charged with petty offenses, sentenced to pay fines that they could not pay, and subsequently ordered to serve between three and twelve months in prison for defaulting.<sup>89</sup>

One way to reduce immediate imprisonment for failure to pay fines is to permit installment payment plans. This practice is authorized in many countries,<sup>90</sup> but it can be problematic for several reasons. First, even where the use of installment payments is authorized by the criminal code, defendants may not have access to it in practice. This appears to be the case in Kenya and Qatar.<sup>91</sup> Second, the option of installment payments is only really an option

<sup>85</sup> South Korea Criminal Act, *supra* note 84, Art. 69(1); *see also id.* Arts. 45–47 (defining a minor fine as a punishment between two thousand and fifty thousand won, and other fines as typically above fifty thousand won).

<sup>86</sup> Ko Dong-hwan, *Jail Term for Unpaid Fines Too Harsh*, KOREATIMES (Aug. 11, 2022), at [https://www.koreatimes.co.kr/www/nation/2022/08/251\\_333862.html](https://www.koreatimes.co.kr/www/nation/2022/08/251_333862.html). The number of cases of unpaid fines worth 5 million won or less was 199,000 in 2021. *Id.*

<sup>87</sup> *See generally* Chang-Keun Han, *Jean Valjean Bank in Korea: An Innovative Approach to Poor Defendants Sentenced to Pay Fines*, 28 ASIA PAC. J. SOC. WORK & DEV. 168 (2018).

<sup>88</sup> *Id.*

<sup>89</sup> Crime Check Ghana, *Foundation Releases Inmates* (Oct. 25, 2019), at <https://crimecheckghana.org/foundation-releases-inmates>.

<sup>90</sup> *E.g.*, GHANA CRIM. PROC. CODE, *supra* note 20, § 297(3) (permitting the court to require payment of a fine “either forthwith or within a specified time, as the Court thinks fit”); NIGERIA CRIM. PROC. ACT of 2004 § 392(2) (Nigeria) (“Where time has been allowed for the payment of a sum adjudged to be paid by a conviction or order, further time may, on an application by or on behalf of the person liable to pay such sum, be allowed by a court . . .”). While Nigeria nominally requires that judges consider defendants’ financial circumstances in setting fines, *see id.* § 391, imprisonment for failure to pay fines is common in practice. *See* Claire Wilmot, *Set Them Free! The Judge Who Liberates Nigerians Forgotten in Jail*, GUARDIAN (Feb. 26, 2020), at <https://www.theguardian.com/global-development/2020/feb/26/set-them-free-judge-liberates-nigerians-jail> (describing a Nigerian judge, who leads a presidential committee on prison reform and decongestion, releasing people from prison who “had been imprisoned for failing to pay tiny fines for minor offences”). Up to 90% of people released through the committee were imprisoned because of unpayable legal debt, for which many serve between six and twelve months in prison. *Id.*

<sup>91</sup> In Kenya, defendants end up serving prison terms for non-payment and “the option of paying fines in installments is seldom used.” Juliet Okoth, *The Pursuit Of Consistency In Sentencing: Exploring Kenya’s Sentencing Guidelines*, 33 S. AFRICAN J. CRIM. JUST. 106, 116 (2020). In Qatar, the power to allow payment by installments is not even vested in the judge at all, but in the Public Prosecution, who “may” allow for payment in installments for up to three years at the request of the defendant. QATAR CRIM. PROC. CODE, *supra* note 30, Art. 370 (further providing that “if the convicted is late in payment of any installment without an acceptable reason, all the other installments are nullified”).

for defendants who can pay off their installments. It assumes access to a disposable income stream that will not exist for the most vulnerable members of a community. Finally, installment payments can become their own trap. In the United States, the Supreme Court held in the 1970s and 1980s that it was a violation of constitutional due process and equal protection to imprison defendants because they are unable to pay their fines.<sup>92</sup> These rulings provide important protections, even though violations by state and local courts are rampant.<sup>93</sup> But in recommending installment payments as an alternative, the Court failed to realize what is shown in the next Section—that installment payments can trigger self-reinforcing cycles that dig poor defendants ever deeper into debt.

### *B. Imposition of Additional Financial Penalties*

In some countries, failure to pay fines and fees results in the imposition of additional fees, such as further fines, late penalties, interest charges, or collection costs. These additional fees can become self-reinforcing cycles, in some cases creating debts that lower-income defendants will never be able to pay.

U.S. states and municipalities make heavy use of these kinds of poverty penalties. In its Ferguson Report, the U.S. Department of Justice determined that “the City [of Ferguson] considers revenue generation to be the municipal court’s primary purpose” and gave many examples of snowballing poverty penalties.<sup>94</sup> The investigators

spoke, for example, with an African-American woman who has a still-pending case stemming from 2007, when, on a single occasion, she parked her car illegally. She received two citations and a \$151 fine, plus fees. The woman, who experienced financial difficulties and periods of homelessness over several years, was charged with seven Failure to Appear offenses for missing court dates or fine payments on her parking tickets between 2007 and 2010. For each Failure to Appear, the court issued an arrest warrant and imposed new fines and fees. From 2007 to 2014, the woman was arrested twice, spent six days in jail, and paid \$550 to the court for the events stemming from this single instance of illegal parking. . . . As of December 2014, over seven years later, despite initially owing a \$151 fine and having already paid \$550, she still owed \$541.<sup>95</sup>

<sup>92</sup> *Williams v. Illinois*, 399 U.S. 235, 241 (1970); *Tate v. Short*, 401 U.S. 395, 397–99 (1971); *Bearden v. Georgia*, 461 U.S. 660, 666 (1983). For discussion of the problematic uses of installment payments in the wake of these opinions, see generally Beth A. Colgan & Jean Galbraith, *The Failed Promise of Installment Fines*, — U. PA. L. REV. — (forthcoming 2024), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4381349](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381349).

<sup>93</sup> See FEES, FINES, AND THE FUNDING OF PUBLIC SERVICES: A CURRICULUM FOR REFORM 47 (Brian Highsmith ed., 2020), at [https://law.yale.edu/sites/default/files/area/center/liman/document/fees\\_fines\\_and\\_the\\_funding\\_of\\_public\\_services.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/fees_fines_and_the_funding_of_public_services.pdf) (giving examples of state and local jurisdictions where over 15% of incarcerations were due to failure to pay criminal justice debt); Ferguson Report, *supra* note 1, at 57–58 (concluding that the City of Ferguson’s practices were “directly at odds” with the constitutional requirements set forth by the U.S. Supreme Court).

<sup>94</sup> FERGUSON REPORT, *supra* note 1, at 14.

<sup>95</sup> *Id.* at 4.

Ferguson is one of many examples of U.S. states and municipalities that sanction people with heavy additional charges for missed payments, resulting in additional fines and fees.<sup>96</sup> Some efforts for reform are underway.<sup>97</sup>

At least some other countries also use additional financial sanctions to penalize failure to make timely payments on fines. In South Korea, if someone is unable to pay their fine for a minor offense, they are required to pay the original fine plus an additional fine of 20 percent of the original penalty within twenty days of the original payment deadline.<sup>98</sup> If the person does not pay by this new deadline, the prosecuting authority can request a “summary trial” to impose an additional fine, and the individual can get the proceeding dismissed only if they pay the original penalty plus a 50 percent surcharge.<sup>99</sup> In France, surcharges can similarly add up quickly where initial fines are unpaid.<sup>100</sup>

### C. Other Legal Sanctions

In at least a few countries, the inability to pay fines and fees can lead to other legal consequences. This can include the revocation of driver’s licenses, denial of access to public benefits, denial of the right to vote, and forfeiture of other property.

Many of these consequences are imposed by jurisdictions within the United States. Driver’s license suspensions are common: “at least 11 million people [in the United States] are not allowed to drive simply because they cannot afford to pay fines and fees.”<sup>101</sup> In many U.S. states, payment of criminal justice debt is a condition of probation and parole—and violations can therefore lead to denial of federal welfare benefits, including cash assistance, food stamps, housing assistance, and supplemental social security income.<sup>102</sup>

<sup>96</sup> Alexes Harris, Mary Pattillo & Bryan L. Sykes, *Studying the System of Monetary Sanctions*, 8 RUSSELL SAGE FOUND. J. SOC. SCI. 1, 1–3 (2022) (noting widespread additional charges imposed for failure to pay); Ray Khalfani, *Regressive Revenue Perpetuates Poverty: Why Georgia’s Fines and Fees Need Immediate Reform*, GA. BUDGET & POL’Y INST. (Dec. 6, 2022), at [https://gbpi.org/regressive-revenue-perpetuates-poverty-why-georgias-fines-and-fees-need-immediate-reform/#\\_ednref14](https://gbpi.org/regressive-revenue-perpetuates-poverty-why-georgias-fines-and-fees-need-immediate-reform/#_ednref14) (noting Georgia practice of assigning court fee debt to private probation companies that charge monthly fee charges which frequently total double or triple the initial fine debt); *What Is Wrong with Monetary Sanctions?*, *supra* note 37, at 226–27 (noting widespread additional criminal legal sanctions resulting from unpaid monetary sanctions in eight U.S. states); Devah Pager, Rebecca Goldstein, Helen Ho & Bruce Western, *Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment*, 87 AM. SOCIO. REV. 529, 532–34 (noting how missed payments of Oklahoma court costs lead to warrants for failure to pay, carrying new and separate warrant fees).

<sup>97</sup> E.g., Fines & Fees Just. Ctr., *National Efforts to Reform Local Fines & Fees Announces New City and County Champions* (Aug. 3, 2022), at <https://finesandfeesjusticecenter.org/2022/08/03/press-release-national-effort-to-reform-local-fines-fees-announces-new-city-and-county-champions> (describing various local reforms).

<sup>98</sup> Punishment of Minor Offenses Act, Art. 8 (S. Kor.), *translated in* Korea Legislation Research Institute’s online database, at [https://elaw.klri.re.kr/eng\\_service/main.do](https://elaw.klri.re.kr/eng_service/main.do) (search required).

<sup>99</sup> *Id.* Art. 9.

<sup>100</sup> Open Soc’y Just. Initiative Press Release, *supra* note 62 (describing how surcharges on fines for COVID lockdown violations imposed on minority youths caused the fines to go from € 18,000 to more than € 50,000).

<sup>101</sup> ACLU, *Reckless Lawmaking: How Debt-Based Driver’s License Suspension Laws Impose Harm and Waste Resources* 9 (2021), at [https://www.aclu.org/sites/default/files/field\\_document/reckless\\_lawmaking\\_aclu\\_final\\_4.19.21.pdf](https://www.aclu.org/sites/default/files/field_document/reckless_lawmaking_aclu_final_4.19.21.pdf) (noting divergent policies among U.S. states). This in turn can make it harder for low-income people to pay their court debt, as they cannot drive to work or to court hearings. *Id.* at 19; *see also* FERGUSON REPORT, *supra* note 1, at 50 (giving an example).

<sup>102</sup> Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. JUST., 28 (2010), at <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.

Similarly, inability to pay fines and fees frequently results in denial of the restoration of the right to vote.<sup>103</sup>

While the United States may be the heaviest user of other legal sanctions, some can be found in other countries as well. In Australia and New Zealand, for example, failure to pay fines can trigger driver's license suspensions.<sup>104</sup> And at least a few countries authorize forfeiture of property as a failure to pay fines. In Kenya, a court can issue a warrant for the seizure of someone's property for failure to pay a fine.<sup>105</sup> If a sentence indicates that in default a person shall be imprisoned and that person has served the entire such default term of imprisonment, then a court is supposed to issue a warrant for the seizure of property only if it finds "special reasons" to do so.<sup>106</sup> In China, forfeiture of property can also follow failure to pay a fine.<sup>107</sup>

In short, the failure to pay fines and fees can lead quickly to other, harsher consequences. These harsher consequences may be intended to catch scofflaws—to incentivize well-resourced people to pay their fines and fees and thereby avoid worse outcomes. Yet in practice they serve as added poverty penalties on people who are already burdened by fines and fees that are beyond their means. These effects can add up, both within nations and around the world. But as shown in the next section, poverty penalties have received relatively light international attention.

### III. POVERTY PENALTIES IN INTERNATIONAL LAW

As the prior Parts have demonstrated, poverty penalties are pervasive. Yet they have long been underdeveloped in international human rights discourse. This Part describes this absence of attention and links it to a lack of specific provisions on financial sanctions in

<sup>103</sup> Colgan, *supra* note 54, at 60–61 (concluding that "wealth-based penal disenfranchisement is sanctioned under the laws of forty-eight states and the District of Columbia, potentially preventing up to a million people or more from voting, particularly in low-income communities and communities of color") (internal citations omitted).

<sup>104</sup> *E.g.*, New South Wales Gov't, *Unpaid Fines – License Suspension*, at [https://www.lawaccess.nsw.gov.au/Pages/representing/lawassist\\_fines/lawassist\\_licence\\_fine/lawassist\\_unpaidfinesuspension\\_fine.aspx](https://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_fines/lawassist_licence_fine/lawassist_unpaidfinesuspension_fine.aspx) (allowing for payment in installments but taking an unforgiving approach to missed installments); N.Z. Min. Just., *Fines Enforcement*, at <https://www.justice.govt.nz/fines/about-fines/fines-enforcement> (noting that unpaid fines can result in wage garnishment, car clamping, property forfeiture, passport confiscation, and driver's license suspension). Driving with a suspended license can in turn become its own crime. 2017 AUSTRALIA L. REFORM COMM'N REPORT, *supra* note 70, at 384–85.

<sup>105</sup> KENYA PEN. CODE, *supra* note 22, § 28(1)(c)(ii). U.S. states also employ a variety of other ways to collect criminal debt, including liens, tax rebate interceptions, and wage garnishments. See Bannon, Nagrecha & Diller, *supra* note 102, at 27 (noting collection practices in fifteen U.S. states).

<sup>106</sup> KENYA PEN. CODE, *supra* note 22, §28(1).

<sup>107</sup> CRIM. LAW OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 17, Art. 53 (providing that if a fine is not paid within a specified time, the People's Court can seize property to execute the fine, and where the person has difficulties paying the fine "because of an irresistible disaster," the fine can be reduced or remitted as the circumstances demand). Other serious penalties besides forfeiture are also possible in practice. During the one-child policy, for example, some persons who failed to pay fines were prevented from registering their children, thus depriving these children of access to schooling, health care, and travel documents. Sui-Lee Wee, *China Mother, Fined \$54,200 for Flouting One-Child Policy, Sues for Basic Rights*, REUTERS (Dec. 4, 2013), at <https://www.reuters.com/article/china-onechild/china-mother-fined-54200-for-flouting-one-child-policy-sues-for-basic-rights-idINDEE9B30FL20131204> (giving one example where the initial fine was fourteen times the yearly wage of the mother). For a description of how some provincial governments sought to scale these fines at least partly to income, see Heng Shao, *Enforcement of One-Child Policy Targets "The Rich and Famous" in Zhangzhou, China*, FORBES ASIA (Sept. 20, 2013), at <https://www.forbes.com/sites/hengshao/2013/09/20/enforcement-of-one-child-policy-targets-the-rich-and-famous-in-zhangzhou-china/?sh=3c73aa106e24>.

leading human rights instruments. We close the Part by pointing to relatively recent developments which show that poverty penalties are starting to attract more widespread international interest.

### A. *Early Attention and Early Neglect*

Intriguingly, the most high-profile international discussion of fines and poverty happened more than a century ago. In 1905, the topic received attention at the International Penal and Penitentiary Congress (IPPC). Founded in 1872 to bring together government officials and prison reformers, the IPPC met roughly every five years until 1950 and became the leading forum for international conversations around criminal justice reform.<sup>108</sup> At its 1905 meeting in Budapest, the IPPC debated how fines should be set and how to deal with the widespread practice of imprisonment for failure to pay fines.<sup>109</sup>

The IPPC came up with a set of succinct recommendations that were impressively humane for the time. It resolved that:

1. In the judgement the fine should be fixed proportionately to the fortune of the convicted person. . . . If [the person] is without means, the judge should declare the fine irrecoverable. That fine [must be] regarded as irrecoverable whose payment would encroach upon the necessities of life of the condemned.
2. The authority charged with the execution of the judgment should be authorized to permit the payment of the fine by installments or by public work. . . .
3. The remainder of the fine should be remitted to the person who punctually [paid by installments] when due three-quarters. . . .
4. In case of the insolvency of the condemned person the substitution of imprisonment for the fine should be avoided by resort[ing] to other means, and especially [to public] labor. . . .<sup>110</sup>

Consistent with the era, these resolutions were presented not in the language of human rights but rather as progressive reforms that could be enacted by criminal codes.<sup>111</sup> These resolutions would influence comparative practice, including the rise of the day fines system and the developing use of installment payments as alternatives to immediate incarceration for

<sup>108</sup> Nir Shafir, *The International Congress as Scientific and Diplomatic Technology: Global Intellectual Exchange in the International Prison Congress, 1860–90*, 9 J. GLOBAL HIST. 72, 73, 82–84 (2014). The Congress included some representation from outside the United States and Europe. See *id.* at 72–73; see also SAMUEL J. BARROWS, REPORT OF THE PROCEEDINGS OF THE SEVENTH INTERNATIONAL PRISON CONGRESS: BUDAPEST, HUNGARY, SEPTEMBER, 1905, at 9–11, 19–20 (1907) [hereinafter 1905 IPPC PROCEEDINGS] (noting that the 1905 Congress included female delegates from the United States and delegates from Cuba, Japan, and Mexico).

<sup>109</sup> 1905 IPPC PROCEEDINGS, *supra* note 108, at 23–32 (1907) (noting that the Congress considered ten reports on the topic of fines and was motivated by the concern that “[u]nder the system in vogue, a fine which cannot be collected is converted into imprisonment”). As illustrative of the magnitude of this issue, data from the 1910 U.S. Census established that more than 275,000 individual imprisonments occurred in that year solely for failure to pay fines. BUREAU OF THE CENSUS, PRISONERS AND JUVENILE DELINQUENTS IN THE UNITED STATES 1910, at 94, tbl. 84 (1918) (noting that for 1910 this added up to 63% of all total commitments for Black persons and 55% for white persons).

<sup>110</sup> 1905 IPPC PROCEEDINGS, *supra* note 108, at 31–32 (also considering when fines should be imposed as an additive punishment to imprisonment and proposing that this be done for crimes motivated by greed).

<sup>111</sup> *Id.* at 21 (placing these issues in the context of reform to penal legislation).



inability to pay.<sup>112</sup> Yet as the twentieth century continued, imprisonment due to inability to pay continued to be a common poverty penalty.

In contrast to the IPPC, the most important human rights document in the world makes no specific reference to fines. Adopted by the General Assembly in 1948, the Universal Declaration of Human Rights both enshrined fundamental rights and set the stage for the later development of human rights treaties. It contains important rights related to criminal trials and has guarantees around non-discrimination, equal protection, economic security, and an adequate standard of living.<sup>113</sup> Importantly, Article 5 prohibits “cruel, inhuman or degrading . . . punishment” and Article 9 prohibits “arbitrary arrest [or] detention.”<sup>114</sup> Yet it has no provision related to fines. A specific ban on imprisonment for failure to pay fines would of course have been highly unlikely given the prevalence of this practice, and the same is true for a mandate requiring countries to set financial penalties in a way that equalized their effects across wealth. But it was not preordained that the Universal Declaration would make *no* reference to financial penalties. For language embodying more modest but still specific protections regarding financial penalties—language prohibiting “excessive fines”—existed in some rights-granting texts and could trace its origins all the way back to Magna Carta.<sup>115</sup>

Although the Universal Declaration does not include an excessive fines clause, the *travaux préparatoires* shows that the delegates had access to texts that included such a clause. The Philippines, Liberia, Mexico, and the United States all provided copies of their excessive fines clauses as contributions to the discussion around national constitutions.<sup>116</sup> In addition, the drafters had a copy of Brazil’s Constitution, which at the time provided for “no civil

<sup>112</sup> Colgan & Galbraith, *supra* note 92, at 12–15.

<sup>113</sup> See UDHR, *supra* note 8, Arts. 2, 7, 10, 11, 22, 23.

<sup>114</sup> *Id.* Arts. 5, 9.

<sup>115</sup> E.g., MAGNA CARTA, chs. 20–21 (1215), available at <https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede> (as translated) (providing that financial penalties should be imposed “in proportion to the degree of his offence” and should not be fined “so heav[y] as to deprive [a person] of his livelihood”); Pennsylvania Frame of Government, Laws Agreed Upon in England, &c. § XVIII (1682), available at [https://avalon.law.yale.edu/17th\\_century/pa04.asp](https://avalon.law.yale.edu/17th_century/pa04.asp) (providing “[t]hat all fines shall be moderate, and saving men’s contentements, merchandise, or wainage”); English Declaration of Rights of 1689, Art. 10, reprinted in LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 297 (1981) (“excessive bail ought not to be required, nor excessive fines imposed”); U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed . . .”). Commenting on the importance of the Magna Carta provision, English historian F.W. Maitland remarked that “[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about” financial penalties. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CON. L. Q. 833, 854 (2013) (quoting F.W. MAITLAND, PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER xxxiv (1884)); see also *id.* at 854–72 (showing that the Magna Carta’s protection historically encompassed consideration of individual defendants’ financial situations).

<sup>116</sup> THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE *TRAVAUX PRÉPARATOIRES*, VOL. I, at 351, 352, 365, 512, 522 (William A. Schabas ed., 2013). In addition, Mexico’s Constitution contained an article providing that for certain regulatory offenses, a “day labourer or a workman . . . shall not be punished by a fine greater than the amount of his weekly wage or salary” and also that “should [an] offender not pay the fine that may have been imposed, his punishment shall be changed to a corresponding arrest that in no case may exceed fifteen days.” *Id.* at 366. Mexico’s current Constitution retains a similar but more forgiving clause. Constitución Política de los Estados Unidos Mexicanos [CP], Art. 21, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.) (limiting these fines for non-salaried workers to no more than one day of wages and providing that a “fine may be exchanged by the appropriate incarceration term, which shall never exceed thirty-six hours”). For the English translation of this Constitution and for all constitutional provisions cited in notes 117, 118, and 213 *infra*, we relied on the Constitute Project, at <https://www.constituteproject.org>. We also used the search features of this project (using “fine” as the keyword) for the findings given in notes 117–118 *infra*.

imprisonment for debt, fines, or costs.”<sup>117</sup> The decision of the drafters not to include a provision regarding the intersection of fines and poverty in turn reduced the likelihood that future national constitutions would include such provisions.<sup>118</sup> Moreover, it foreshadowed the absence of attention that UN human rights instruments and bodies would give to this topic in the future.

### *B. Between Criminal Justice and Human Rights*

In the years since the Universal Declaration, poverty penalties continued to be largely overlooked. At least until recently, attention to the issue has been faint within the United Nations, both in its criminal justice arm and in its various entities devoted to human rights.

UN efforts around criminal justice are centered in Vienna. In 1950, the United Nations took over the IPPC and created a successor entity under the auspices of the Economic and Social Council, while continuing the practice of holding Congresses every five years.<sup>119</sup> This entity became the Committee on Crime Prevention and Control, a group of independent experts who did considerable work at the intersection of human rights and criminal justice.<sup>120</sup> Perhaps alarmed by the scope of these efforts, the Economic and Social Council abolished the Committee in 1991, converting it into the more state-led Commission on Crime Prevention

<sup>117</sup> THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 116, at 375. The successor of this provision now provides only for “no civil imprisonment for debt.” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], Art. 5, cl. LXVIII (Braz.). Today, only a few constitutional texts explicitly prohibit imprisonment due to inability to pay fines. ECUADOR CONST. Art. 27 cl. 66(c) (Ecuador) (“no person can be incarcerated for debt, costs, fines, taxes or other obligations”); FIJI CONST. Art. 9(2) (Fiji) (prohibiting courts from “mak[ing] an order depriving a person of personal liberty on the ground of failure to pay maintenance or a debt, fine, or tax, unless the court considers that the person has willfully refused to pay despite having the means to do so”); MARSH. IS. CONST. Art. 2, § 10 (Marsh Is.) (“nor shall any person be imprisoned for failure to pay a fine assessed as punishment for a crime unless he has been afforded a reasonable time to make payment and has been found to have the means to do so”).

<sup>118</sup> In addition to the countries mentioned in note 116 and accompanying text, *supra*, only the Marshall Islands, the Federated States of Micronesia, and Palau have come to include excessive fines clauses into their constitutions. See MICR. CONST. Art. 4 §8 (Micr.); MARSH. IS. CONST., *supra* note 117, Art. 2, § 6(3); PALAU CONST. Art. 4, § 10 (Palau); see also PARA. CONST. Art. 44 (Para.) (prohibiting “outrageous fines”). For a discussion of how the Universal Declaration has influenced national constitutions, see generally Zachary Elkins & Tom Ginsburg, *Imagining a World Without the Universal Declaration of Human Rights*, 74 WORLD POL. 327 (2022) (finding that the Universal Declaration “significantly accelerated the adoption of a particular set of constitutional rights”). Of the other modern constitutions that mention fines, many seem to implicitly recognize the practice of imprisoning persons for failure to pay. For example, one relatively common provision in constitutions in former British colonies in Africa and the Caribbean is that past imprisonment for failure to pay a fine shall not disqualify a candidate from membership in the legislature (unlike other types of imprisonment, which are disqualifying). *E.g.*, TRIN. & TOBAGO CONST. Arts. 42(3)(b), 48(3)(b) (Trin. & Tobago); TANZ. CONST. Art. 67(7)(b) (Tanz.). To the extent that European countries continued harsher practices in their colonies even as they were improving practices at home, high uses of poverty penalties in former colonies may relate to the legacies of colonialism and racism. This is an issue on which further research is needed. For an example of a colonial power imposing racialized poverty penalties, see, e.g., ANNUAL REPORT ON THE SOCIAL AND ECONOMIC PROGRESS OF THE PEOPLE OF THE UGANDA PROTECTORATE, 1937, at 37 (1938) (observing, in a report prepared by colonial administrators, that “it is probable that there is a higher proportion of offenders imprisoned for non-payment of fines [in the then-colony of Uganda] than in more developed countries” but attributing this to “the less settled residence of many Africans, particularly those of criminal habits”).

<sup>119</sup> GA Res. 415 & Annex (1950). From around the time of the IPPC’s 1935 Congress (held in Berlin) through World War II, the IPPC became beholden to Nazi funding and influence; an American reformer was appointed chair in 1949 to preside over its closure and incorporation into the United Nations. See SŁAWOMIR MAREK REDO, *BLUE CRIMINOLOGY: THE POWER OF UNITED NATIONS IDEAS TO COUNTER CRIME GLOBALLY* 109 (2012).

<sup>120</sup> For an account of this work, see Roger S. Clark, *Human Rights and the U.N. Committee on Crime Prevention and Control*, 506 ANNALS AM. ACAD. POL. & SOC. SCI. 68 (1989).

and Criminal Justice, which in turn works closely with the UN Office on Drugs and Crime (UNODC).<sup>121</sup>

While most of the work of the Committee on Crime Prevention and Control focused on prisons, it did undertake one major project around non-custodial measures. This was the United Nations Standard Minimum Rules for Non-custodial Measures, known as the Tokyo Rules, which the General Assembly adopted in 1990.<sup>122</sup> The Tokyo Rules aim to promote non-custodial measures as a means to avoiding “unnecessary use of imprisonment.”<sup>123</sup> Their only reference to fines is very brief: a long list of possible non-custodial sanctions includes “[e]conomic sanctions and monetary penalties, such as fines and day-fines.”<sup>124</sup> The Tokyo Rules say nothing specific about how economic sanctions can place a heavier burden on poorer defendants, although the reference to day fines and some other language in the rules signals recognition of the importance of considering individual circumstances.<sup>125</sup> Nor do the Tokyo Rules recognize how fines commonly trigger imprisonment for persons who are unable to pay them.<sup>126</sup>

Since the Tokyo Rules, there has been little further discussion in the Commission or UNODC of economic sanctions in criminal justice—or of how such sanctions can serve as poverty penalties. There is awareness of these issues within UNODC, but it tends to be submerged within hefty documents produced by staff rather than receiving formal approval from the Commission or state parties.<sup>127</sup> The five-year Congresses have not focused in on this topic, and their energies in recent years have gone heavily to crime prevention with respect to drugs, terrorism, corruption, and organized crime.<sup>128</sup> And while the Commission and

<sup>121</sup> REDO, *supra* note 119, at 111, 128 (noting that this restructuring came amid concern that the Committee lacked “sufficient governmental participation or oversight”).

<sup>122</sup> GA Res. 45/110 A, The Tokyo Rules (Dec. 14, 1990).

<sup>123</sup> *Id.* § 2(3).

<sup>124</sup> *Id.* § 8.2(d).

<sup>125</sup> *See id.*; *see also id.* § 1(5) (noting need to “tak[e] into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender”); *id.* §§ 2(3), 3(2) (referencing the need to consider the “background of the offender”). A commentary to the Tokyo Rules observes that “[t]he disadvantage of fines is that offenders with little money have difficulty in paying them” and that “[d]ay-fines can solve this problem by linking the amount to be paid to the level of disposable income of the offender.” Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) 18 (1993), at <https://www.ojp.gov/pdffiles1/Digitization/147416NCJRS.pdf>.

<sup>126</sup> *See generally* The Tokyo Rules, *supra* note 122.

<sup>127</sup> *See* UNODC, *Custodial and Non-Custodial Measures: Alternatives to Incarceration* 5, 9, in CRIMINAL JUSTICE ASSESSMENT TOOLKIT (2006) (suggesting that, among many other issues, investigators inquire into “[w]hat percentage of the prison population is serving a term of imprisonment in lieu of payment of a fine” and noting that “many people cannot afford the fines prescribed”); UNODC, ALTERNATIVES TO IMPRISONMENT: HANDBOOK OF BASIC PRINCIPLES AND PROMISING PRACTICES 29–30, 44, 70 (2007) (advising that fixed fines be used only for “relatively petty offences” like speeding violations; that fines scaled to income like day fines be used otherwise; and that failure to pay fines should not automatically lead to imprisonment); UNODC, HANDBOOK ON STRATEGIES TO REDUCE OVERCROWDING IN PRISONS 31, 46, 115 (2013) (noting among other points that “[b]est practice indicates that fine defaulters should not be imprisoned automatically” and expressing support for day-fine systems).

<sup>128</sup> *See* REDO, *supra* note 119, at 133–34 (describing the major themes of the twelve five-year UN Congresses on criminal justice that took place between 1955 and 2010, none of which specifically mention economic sanctions); Fourteenth United Nations Congress on Crime Prevention and Criminal Justice, Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development (2021) (covering numerous topics but putting a heavy emphasis on crime prevention and not addressing the issue of poverty penalties).

UNODC have continued to take some high-salience actions related to human rights, the topic of poverty penalties has been absent.<sup>129</sup>

Attention to poverty penalties in the Geneva-based human rights entities has been similarly thin. Following the approach taken by the Universal Declaration, the foundational human rights treaties do not have provisions about excessive fines or other specific provisions targeting poverty penalties.<sup>130</sup>

This was not an entirely unconsidered omission. During the drafting of what would become the International Covenant on Civil and Political Rights (ICCPR), there were two efforts by the Philippines to add a prohibition on excessive fines. First, the Philippines tried to add a clause prohibiting excessive fines to what would become Article 7, the provision that bans torture and other cruel, inhuman, or degrading punishment.<sup>131</sup> After the Greek delegate discouraged this clause as “introducing a provision of detail in an article . . . recognized as being in the nature of a general principle,” the Philippines withdrew the proposal.<sup>132</sup> It made another faint effort during the drafting of what would become Article 11, which is the provision that bans imprisonment for inability to pay contractual obligations.<sup>133</sup> But this attempt was rejected by eleven votes to none, with two abstentions.<sup>134</sup> The lack of such a provision may in turn have contributed to the overall lack of protections against abusive financial sanctions in national constitutions.<sup>135</sup>

<sup>129</sup> An example is the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women, known as the Bangkok Rules, which were adopted by the General Assembly in 2011. GA Res. 65/229 (Mar. 16, 2011). Rules 57–66 cover non-custodial sanctions and measures for women but say nothing specific about poverty penalties. *Id.* §§ 57–67.

<sup>130</sup> See generally, e.g., ICCPR, *supra* note 8; ICESCR, *supra* note 8. As discussed in Section IV.A *infra*, both these treaties have broader human rights provisions that have important implications for poverty penalties.

<sup>131</sup> See Comm’n on Human Rights, 6th Sess., Compilation of the Comments of Governments on the Draft International Convention on Human Rights and the Proposed Additional Articles, 25, E/CN.4/365 (Mar. 22, 1950) (noting the Philippines’ proposal of a clause stating that “[n]o excessive fines shall be imposed” and its assertion that “[t]his is . . . one of the well-established guarantees in many countries”). In March of 1950, the drafters were focused on civil and political rights and had not yet decided how to engage with economic, social, and cultural rights or whether these various rights would be addressed in the same treaty instrument. See DAVID J. WHELAN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* 66–74 (2010). For a broader account of the drafting process and these decisions, see *id.* at 59–154.

<sup>132</sup> Comm’n on Human Rights, 6th Sess., Summary Record of the Hundred and Forty-First Meeting 9, E/CN.4/SR.141 (Mar. 31, 1950) [hereinafter ICCPR March 31, 1950 Drafting Meeting] (remarks of the Greek delegate) (also complaining that the term “excessive” had too relative a meaning”). After several other delegates indicated agreement with the Greek delegate, the Philippine delegate withdrew the proposal but “reserved the right to submit it again” when they came to later provisions. *Id.* Confusingly, the Philippine delegate seemed to equate the idea of an “excessive fine” with a high pre-trial bail. See *id.*

<sup>133</sup> Comm’n on Human Rights, 6th Sess., Summary Record of the Hundred and Fiftieth Meeting 8, E/CN.4.SR.150 (Apr. 10, 1950) (noting the rejection of the Philippines’ proposed addition that “No one shall be subjected to excessive fines”). Once again, the Greek delegate complained that “excessive” was a “relative” term. *Id.* at 6.

<sup>134</sup> *Id.* at 8. Article 11’s prohibition on imprisonment due to inability to fulfill contractual obligations has become an important human rights protection. See, e.g., American Convention on Human Rights, Art. 7.7, Nov. 22, 1969, 1144 UNTS 123 [hereinafter American Convention] (enshrining a similar protection); Hum. Rts. Watch, “*We Lost Everything*”: Debt Imprisonment in Jordan 42 (Mar. 16, 2019), at <https://www.hrw.org/report/2021/03/16/we-lost-everything/debt-imprisonment-jordan> (emphasizing in critiquing Jordan’s ongoing practices that “[i]nternational human rights law unequivocally prohibits the deprivation of liberty for failure to fulfill a contractual obligation”). It is interesting to contrast the extent to which the international community has decried the less prevalent practice of imprisonment for inability to pay contractual obligations with its comparative silence when those debts are to the government.

<sup>135</sup> See note 118 *supra* and accompanying text; see also Zachary Elkins, Tom Ginsburg & Beth A. Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 34 HARV. INT’L L.J.

The drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also did not include discussion of excessive fines.<sup>136</sup> As a general matter, ICESCR engages with poverty far more than the ICCPR via its emphasis on economic rights. But unlike the ICCPR, it has no provisions that directly engage with criminal justice and therefore had less occasion to consider inequities arising from criminal sanctions. The separateness of these covenants—one more engaged with criminal justice, the other dealing more with poverty—left the intersection between these two bodies of rights not as developed as it could have been.<sup>137</sup>

As more human rights treaties were negotiated, the absence of specific prohibitions related to financial sanctions continued. The human rights treaty devoted most specifically to punishment—the Convention Against Torture—focuses on physical harms.<sup>138</sup> It has no prohibition on excessive fines and does not elaborate beyond the ICCPR as to the meaning of “cruel, inhuman or degrading treatment or punishment.”<sup>139</sup> Other human rights instruments prohibit varying forms of discrimination (with which excessive fining practices may intersect), but they also do not expressly prohibit excessive fines.<sup>140</sup> Regional human rights treaties similarly lack specific provisions regarding to poverty penalties, even as they have robust provisions around non-discrimination and equality.<sup>141</sup>

The absence of specific treaty provisions of course does not foreclose human rights consideration. Yet until recently, we have found little attention in international human rights settings to the ways in which economic sanctions that are not scaled to finances can disproportionately harm lower-income persons. Human rights actors have expressed concern about the magnitude of fines. But these concerns have often arisen in contexts where the unscaled fine is not seen as a problem in and of itself, but rather as something that results

61, 84–88 (2013) (showing that the ICCPR as well as the UDHR has influenced what rights have been included in national constitutions).

<sup>136</sup> See generally BEN SAUL, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: TRAVAUX PRÉPARATOIRES*, VOL. I (2016); BEN SAUL, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: TRAVAUX PRÉPARATOIRES*, VOL. II (2016).

<sup>137</sup> For a description of the decision to develop two treaties rather than one consolidated treaty (and of the dynamics behind this decision), see generally WHELAN, *supra* note 131; see also Preparation of Two Draft International Covenants on Human Rights, Feb. 5, 1952, GA Res. 543 (VI) (requesting the United Nations Economic and Social Council [ECOSOC] to ask the Commission on Human Rights to craft one covenant for economic, social, and cultural rights and the other for civil and political rights, indicating that both should be submitted for consideration simultaneously, be opened for signature simultaneously, and “contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible. . .”).

<sup>138</sup> See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

<sup>139</sup> Compare *id.* Art. 1(1) (defining torture) with *id.* Art. 16 (not further defining “cruel, inhuman or degrading treatment or punishment”).

<sup>140</sup> See generally International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, GA Res. 2106 (entered into force Jan. 4, 1969) [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 UNTS 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, GA Res. 61/106 (entered into force May 3, 2008) [hereinafter CRPD].

<sup>141</sup> See generally African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 UNTS 217 (1982); European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 UNTS 222 (as amended, most recently on Aug. 1, 2021) [hereinafter European Convention]; American Convention, *supra* note 134. The American Convention does expressly prohibit imprisonment for debt. *Id.* Art. 7.7.

in another problem. One example is high fines used to penalize speech or media activity—a topic flagged on occasion in the Universal Periodic Review or one of the human rights committees as problematic with respect to freedom of speech and associated rights.<sup>142</sup> Another example comes from a 2006 Report of the Working Group on Arbitrary Detention following a visit to Nicaragua, in which the Working Group raised important concerns about “exorbitant fines” for drug crimes, noting that “[f]or those unable to pay, the fine is converted into an additional one year’s rigorous imprisonment.”<sup>143</sup> Here the concept of the poverty penalty is squarely recognized, but in the specific context of drug crimes rather than as a phenomenon that deserves independent attention. As an illustration of how absent the issue of imprisonment for failure to pay unaffordable fines can be, it does not even get mentioned in the Human Rights Committee’s 2014 General Comment on the liberty and security of person.<sup>144</sup>

### C. Recent Developments

Poverty penalties are now gaining salience in international discourse. The developments so far are modest, but conditions look promising for further attention.

Importantly, domestic actors around the world are starting to pay attention to poverty penalties and raise concerns about them. As described earlier, U.S. practice is finally receiving substantial attention within the United States, and judges or advocates in South Korea, Kenya, and Ghana are pressing for reforms.<sup>145</sup> Concerns are being raised in other countries as well. As examples, Rwanda’s judges have complained about the heaviness of fines; an EU-funded report highlights some of the problematic aspects of fines as penalties; and Australia’s Law Reform Commission and Human Rights Commission have expressed concern about how Aboriginal and Torres Strait Islander incarceration often stems from failure to pay

<sup>142</sup> *E.g.*, Human Rights Council, Report of the Working Group on the Universal Periodic Review of Azerbaijan, para. 109.129, UN Doc. A/HRC/24/13 (July 5, 2013) (containing a concern raised by the Netherlands about excessive fines on the media); OHCHR Press Release, Human Rights Committee Considers Third Periodic Report of Togo (Oct. 22, 2002), at <https://www.ohchr.org/en/press-releases/2009/10/human-rights-committee-considers-third-periodic-report-togo> (describing Togo as objecting to claims of excessive fines against journalists in the context of discussing the rights of freedom of expression, freedom of association, and freedom of assembly). More recently, an expert at the UN Human Rights Committee raised concerns about Russia’s use of fines to censor certain speech. Human Rights Committee, Meeting Summary, Human Rights Committee Considers Report of the Russian Federation in the Absence of a Delegation, Experts Raise Issues on the Persecution of Journalists and the Arrests of Protesters (Oct. 20, 2022), at <https://www.ungeneva.org/en/news-media/meeting-summary/2022/10/human-rights-committee-considers-report-russian-federation>.

<sup>143</sup> Human Rights Council, Report of the Working Group on Arbitrary Detention Following a Visit to Nicaragua, para. 87, UN Doc. A/HRC/4/40/Add.3 (Nov. 9, 2006), at <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F4%2F40%2FAdd.3&Language=E&DeviceType=Desktop&LangRequested=False> [hereinafter 2006 Nicaragua Report]; *see also id.*, para. 102(c) (suggesting that Nicaragua reduce its drug fines and that the “fine could be set in accordance with the economic capacity . . . of the person being sentenced”); *see also* Committee on Economic, Social and Cultural Rights, Concluding Observations on the Third Periodic Report of Estonia, UN Doc. E/C.12/EST/CO/3 (Mar. 27, 2019), at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/082/54/PDF/G1908254.pdf?OpenElement> (raising concern about “excessive fines imposed on drug users, leading to a de facto criminalization of drug use as many drug users cannot afford to pay the fine and end up in prison”).

<sup>144</sup> *See generally* Human Rights Committee, General Comment No. 35 on the Liberty and Security of Person, para. 44(c), UN Doc. CCPR/C/GC/35 (Dec. 16, 2014), at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451.pdf?OpenElement>.

<sup>145</sup> *See* notes 87–89, 97 *supra* and accompanying text.

finer.<sup>146</sup> This groundswell of domestic interest is promising given that “[m]any international norms beg[i]n as domestic norms.”<sup>147</sup>

At the international level, poverty penalties have similarly generated more attention in recent years. An early and important instance occurred in 2012, when the United Nations Human Rights Council adopted Guiding Principles on Extreme Poverty and Human Rights.<sup>148</sup> As one of many recommendations, the Principles state that:

States should . . . [r]eview sanctions procedures that require the payment of disproportionate fines by persons living in poverty, especially those related to begging, use of public space and welfare fraud, and consider abolishing prison sentences for non-payment of fines for those unable to pay.<sup>149</sup>

While the Principles use hortatory rather than mandatory language, they clearly signal the need for concern around poverty penalties.

In the years since, there have been other references to poverty penalties. As one notable example, the special rapporteur for extreme poverty and human rights devoted a section of his 2018 report on the United States of America to the “[t]reatment of the poor in the criminal justice system.”<sup>150</sup> He observed that:

In many cities and counties, the criminal justice system is effectively a system for keeping the poor in poverty while generating revenue to fund not only the justice system but many other programmes. . . . So-called fines and fees are piled up so that low level infractions become immensely burdensome, a process that affects only the poorest

<sup>146</sup> INSTITUTE OF LEGAL PRACTICE AND DEVELOPMENT, STUDY OF ALTERNATIVES TO IMPRISONMENT IN RWANDA FOCUSING ON THE MAINSTREAMING OF TIG (“TRAVAUX D’INTÉRÊTS GÉNÉRAL”) AND BEST PRACTICE GUIDELINES FOR JUDGES IN THE EXERCISE OF THEIR DISCRETION WHEN IMPOSING NON-CUSTODIAL SENTENCES 32–34 (2013), at [https://ilpd.ac.rw/fileadmin/user\\_upload/ILPD\\_Document/Publications/STUDY\\_ON\\_ALTERNATIVE\\_TO\\_IMPRISONMENT.pdf](https://ilpd.ac.rw/fileadmin/user_upload/ILPD_Document/Publications/STUDY_ON_ALTERNATIVE_TO_IMPRISONMENT.pdf); CATHERINE HEARD, ALTERNATIVES TO IMPRISONMENT IN EUROPE: A HANDBOOK OF GOOD PRACTICE 15 n. 4, 19, 36 (2016), available at <http://www.prisonobservatory.org/upload/Good%20practice%20handbook%20AS.pdf>; Australia Human Rights Commission, Presentation on Australia’s Criminal Justice System (2021), at [https://humanrights.gov.au/sites/default/files/australias\\_criminal\\_justice\\_system\\_-\\_australias\\_third\\_upr\\_2021.pdf](https://humanrights.gov.au/sites/default/files/australias_criminal_justice_system_-_australias_third_upr_2021.pdf); 2017 AUSTRALIA L. REFORM COMM’N REPORT, *supra* note 70, at 386–89.

<sup>147</sup> Finnemore & Sikkink, *supra* note 13, at 893. Other theories of international legal change also depend on interactions between domestic and international advocates. *E.g.*, Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996) (noting the importance of domestic and non-state actors). Finnemore & Sikkink’s description of legal change and norms-based vocabulary serves as a useful frame for our account, but the developments that we observe are also compatible with other perspectives on international legal change.

<sup>148</sup> GUIDING PRINCIPLES, *supra* note 11. The Guiding Principles have 108 paragraphs, many with subparagraphs. See generally *id.*

Even before adopting these guidelines, the Office of the UN High Commissioner for Human Rights contemplated the intersection between poverty and criminal justice outcomes. Its report, “Human Rights and Poverty Reduction: A Conceptual Framework,” pointed to recent empirical work for the “striking revelation [of] the extent to which the police and official justice systems side with the rich, persecute poor people and make poor people more insecure, fearful and poorer.” HR/PUB/04/1, at 21 (2004) (*citing* DEEPA NARAYAN ET AL., VOICES OF THE POOR VOL. 2: CRYING OUT FOR CHANGE (2000), which collated responses from 40,000 people from fifty countries from the World Bank’s participatory poverty assessments).

<sup>149</sup> *Id.*, para. 66(d). This recommendation falls under the broader heading of “[r]ights to liberty and security of the person.” See *id.*, paras. 65–66.

<sup>150</sup> Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America 13 (2018), at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/125/30/PDF/G1812530.pdf?OpenElement>.

members of society, who pay the vast majority of such penalties. Driving licenses are also commonly suspended for a wide range of non-driving related offences, such as a failure to pay fines. . . . In some states, minor offences are routinely punished by placing the offender on probation, overseen by a for-profit corporation, entirely at the expense of the usually poor offender. Those who cannot pay are subject to additional fees, supervision and testing.<sup>151</sup>

He expressed grave concern over “[l]ocking up the poor precisely because they are poor,” observing that this “is not a strategy to reduce or eliminate poverty.”<sup>152</sup>

There are other recent examples as well. In 2017, two special rapporteurs raised concerns about the high proportion of Aboriginal women imprisoned for non-payment of fines in Australia.<sup>153</sup> In 2021, a trio of special rapporteurs raised concern with Cambodia about its high fines related to COVID precautions, noting that “[i]mposing fines of up to USD 5,000 for breaking health or administrative measures under the Law are vastly disproportionate to the earnings of average Cambodians.”<sup>154</sup> Similarly, in 2022, the special rapporteur on the situation of human rights defenders decried Russia’s effort to stifle discussion of sexual orientation and gender identity issues by imposing a one million RUB administrative fine for the broadly defined offense of “propaganda of non-traditional sexual relations among minors.”<sup>155</sup> That same year, the Committee on the Elimination of Racial Discrimination asked some pointed questions of France about its application of excessive fines to the Traveler community.<sup>156</sup> And international NGOs are increasingly engaging on these issues.<sup>157</sup>

<sup>151</sup> *Id.* at 13–14; *see also id.* at 7 (noting the deprivation of access to the vote for those who fail to pay fines and fees in nine states). The Working Group on Arbitrary Detention has similarly expressed dismay that “some indigent people are jailed for failure to pay court-ordered fines” in the United States. Human Rights Council, Report of the Working Group on Arbitrary Detention on Its Visit to the United States of America 13, 19 (July 17, 2017) (noting that “some indigent people had been imprisoned for failure to pay court-ordered fines and fees” and recommending more use of non-carceral alternatives for those unable to pay).

<sup>152</sup> *UN Rights Expert Chides US Government’s “Systematic Assault” on Welfare*, UN NEWS (June 4, 2018), at <https://news.un.org/en/story/2018/06/1011371>.

<sup>153</sup> AUSTRALIA L. REFORM COMM’N REPORT, *supra* note 70, at 387.

<sup>154</sup> Special Rapporteurs on the Situation of Human Rights in Cambodia, on the Rights to Freedom of Peaceful Assembly and of Association, and on the Independence of Judges and Lawyers, Letter to the Government of Cambodia (Mar. 31, 2021), at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26266>.

<sup>155</sup> OHCHR Press Release, Russia: UN Expert Alarmed at Continued Targeting of Human Rights Defenders (Sept. 14, 2022), at <https://www.ohchr.org/en/press-releases/2022/09/russia-un-expert-alarmed-continued-targeting-human-rights-defenders>.

<sup>156</sup> United Nations Information Service, Experts of the Committee on the Elimination of Racial Discrimination Commend France on Ceasing Police Checks of French Traveler Community, Ask Questions on Closures of Places of Worship and Dismissal of Racial Discrimination Complaints (Nov. 16, 2022), at <https://www.ungeneva.org/en/news-media/meeting-summary/2022/11/experts-committee-elimination-racial-discrimination-commend>.

<sup>157</sup> Human Rights Watch, for example, has reported on problematic U.S. practices. *See generally* Chris Albin-Lackey, *Profiting from Probation: America’s “Offender-Funded” Probation Industry*, HUM. RTS. WATCH (2014), at [https://www.hrw.org/sites/default/files/reports/us0214\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf) [hereinafter *Profiting from Probation*]. As a more recent example, in 2022 a coalition of activists from twenty-eight countries gathered in South Africa and unveiled a declaration, the “Cape Declaration,” which included an explicit recommendation that “[n]on-payment of fines should never lead to prison sentences being imposed.” Campaign to Decriminalise Poverty & Status, The Cape Declaration 3 (Sept. 29, 2022), at <https://cdn.penalreform.org/wp-content/uploads/2023/01/Cape-Declaration.pdf>.



Given the recent rise in engagement, this may be the cusp of what Martha Finnemore and Kathryn Sikkink have famously called a “norms cascade.”<sup>158</sup> But the answer is not clear yet. Perhaps tellingly, in the Universal Periodic Review of the United States that occurred in 2020—well after the special rapporteur’s report—the issue of poverty penalties received no attention.<sup>159</sup> Yet as discussed in the next Part, there are good reasons why poverty penalties should receive significant consideration in international human rights discourse and action.

#### IV. IMPLICATIONS

The prior Parts show that poverty penalties are a significant issue around the world and yet have received relatively little international attention. This Part offers a normative justification for why poverty penalties should receive attention and gives preliminary thoughts about how this goal could be actualized. We begin by discussing how poverty penalties implicate serious human rights concerns and run counter to international objectives around poverty reduction. Imprisonment due to inability to pay poverty penalties is especially problematic, but other aspects of poverty penalties also deserve close human rights scrutiny. The Part then offers some practical suggestions for how international actors within and outside of human rights settings can raise the issue of poverty penalties and about what best practices might look like in this area. We highlight the ongoing need for data about on-the-ground practices and the importance of ensuring that substantive reforms do not lead unintentionally to other problematic consequences.

##### A. *Human Rights Law and Beyond*

Poverty penalties are a human rights problem. Yet because they have flown largely under the radar, there is an absence of scholarly explanation about why this is the case. In what follows, we begin to articulate the human rights concerns raised by poverty penalties. The goal here is modest: to discuss situations in which poverty penalties raise especially strong human rights concerns and to articulate what these concerns are. Our focus is on general principles rather than on trying to identify precisely when poverty penalties rise to the level of human rights violations under the many overlapping but varied worldwide and regional human rights treaty regimes.<sup>160</sup>

One such principle—always applicable—is the need for non-discrimination and equal protection. This is embodied in Article 26 of the ICCPR, which provides that “[a]ll persons are . . . entitled without any discrimination to the equal protection of the law” and that the law must therefore “guarantee to all persons equal and effective protection against discrimination

<sup>158</sup> Finnemore & Sikkink, *supra* note 13, at 896.

<sup>159</sup> See generally Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America (Dec. 15, 2020), at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/348/52/PDF/G2034852.pdf?OpenElement> (noting that many countries expressed concern about the U.S. criminal justice system, particularly policing practices, but not documenting any references to fines, fees, or other poverty penalties).

<sup>160</sup> Our discussion is therefore selective. To keep it to a manageable length, we focus mainly on provisions of the ICCPR and the ICESCR, while cognizant that many worldwide and regional human rights treaties have provisions of relevance. We do not discuss the extent to which poverty penalties may violate customary international law. In short, this is a first pass on the relationship between poverty penalties and human rights law—one that we hope others will build on down the road.

on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, *property*, birth or other status.”<sup>161</sup> Article 2 of the ICESCR has similar protections against discrimination.<sup>162</sup> Importantly, these protections can apply against facially neutral policies that have discriminatory effects. As the Human Rights Committee has observed, “a violation of article 26 may result from a rule or measure that is apparently neutral or lacking any intention to discriminate but has a discriminatory effect,” although such rules or measures can be permissible if “based on reasonable and objective criteria, in pursuit of an aim that is legitimate under the Covenant.”<sup>163</sup> The Committee on Economic, Social and Cultural Rights has similarly made clear that “laws policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights” can amount to discrimination under the ICESCR.<sup>164</sup>

Poverty penalties conflict with this non-discrimination principle. They disproportionately subject lower-income persons to deeper and longer involvement in criminal legal systems, while those of wealthier means simply pay their penalties immediately and walk free. Poverty penalties also can raise concerns regarding arbitrary detention, disproportionate punishment, and discrimination around other types of protected status, and they can stand in the way of enjoyment of economic rights more generally. These concerns are particularly acute where individuals are imprisoned for inability to pay poverty penalties, but they arise in other

<sup>161</sup> ICCPR, *supra* note 8, Art. 26 (emphasis added); *see also id.* Art. 14 (“All persons shall be equal before the courts and tribunals.”). The Office of the UN High Commissioner for Human Rights has stated that “[t]he twin principles of equality and non-discrimination require States to take special measures to prohibit discrimination against the poor and to provide the poor with equal and effective protection against discrimination.” Office of the UN High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, para. 46 (2007), at <https://www.ohchr.org/en/publications/policy-and-methodological-publications/principles-and-guidelines-human-rights-approach>.

<sup>162</sup> ICESCR, *supra* note 8, Art. 2(2) (“The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); *see also* Committee on Economic, Social and Cultural Rights, General Comment No. 20, para. 25 (July 2, 2009) [hereinafter ICESCR General Comment No. 20] (interpreting “property” in the ICESCR context as “includ[ing] real property . . . and personal property (e.g., intellectual property, goods and chattels, and income), or the lack of it”). Poverty penalties differ from many other issues at the intersection of poverty and human rights. They do not raise the issue of the extent to which states must provide resources to combat poverty. *Compare, e.g.*, POLLY VIZARD, POVERTY AND HUMAN RIGHTS: SEN’S “CAPACITY PERSPECTIVE” EXPLORED 140–94 (2006) (considering the relationship between poverty and human rights from this perspective). Instead, they implicate the extent to which a state is obligated to administer its criminal justice system in a substantively non-discriminatory manner.

<sup>163</sup> Human Rights Committee, Comm. No. 2979/2017 (Elena Genero v. Italy), para. 7.3. During the drafting of ICCPR Article 26, delegates recognized that the principle of equality “did not refer to the substance of the law itself, but to the conditions under which the law was to be applied.” MARC BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 482 (1987) (also noting that “[t]he provision was intended to ensure equality, not identity, of treatment”). The Human Rights Committee has consistently taken this view. Human Rights Committee, General Comment 18, para. 7 (interpreting this provision to apply to any distinction or preference “which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”); *id.*, para. 10 (noting that “the principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”); *see also* PAUL M. TAYLOR, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: THE UN HUMAN RIGHTS COMMITTEE’S MONITORING OF ICCPR RIGHTS 738–42 (2020) (discussing the Committee’s views and comments on this issue).

<sup>164</sup> ICESCR General Comment No. 20, *supra* note 162, para. 9(b) (describing this as “indirect discrimination”); *see also id.*, para. 8(b) (stating that states must “adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetrate substantive or de facto discrimination”).

contexts as well. Moreover, looking beyond human rights law, poverty penalties stand in tension with other international objectives. These points are elaborated below.

### 1. *Imprisonment Due to Inability to Pay as a Human Rights Concern*

One practice that should receive special human rights attention is imprisonment due to inability to pay poverty penalties. As mentioned earlier, this practice is widespread.<sup>165</sup> It raises concerns not only with respect to equality and non-discrimination principles, but also regarding ICCPR Article 9's directive that "[n]o one shall be subjected to arbitrary arrest or detention."<sup>166</sup>

As Article 9 indicates, special scrutiny is necessary when a state seeks to deprive individuals of personal liberty. This is true even though the ICCPR does not have a specific provision banning imprisonment for inability to pay fines (unlike for inability to pay contractual obligations), and even though imprisonment for non-compliance with a court order is not necessarily a human rights violation.<sup>167</sup> For there are two reasons why incarcerating defendants solely because they are unable to pay poverty penalties feels deeply arbitrary.

First, it is problematic to imprison someone for something over which they have no control. As an English court put it in 1965, "[i]t is . . . wrong in principle to impose such a fine as may be utterly beyond the Accused's means, and will only result in the prison sentence . . . as a sanction for failure to pay."<sup>168</sup> If the criminal code or a court using its discretion has decided that economic sanctions are the proper punishment, then it seems not in "conform[ance] to the principle of justice"<sup>169</sup> to impose the harsher punishment of imprisonment as a consequence of someone's non-willful inability to pay these sanctions.

Second, it is discriminatory to make poverty the dividing line between imprisonment and freedom. Indeed, this was the reasoning that underlay the U.S. Supreme Court's decisions striking down imprisonment due to inability to pay a fine on equal protection and due process grounds.<sup>170</sup> As the Court explained in banning the practice of immediately imprisoning

<sup>165</sup> See Section II.A *supra*. Countries that use day fines in theory have protections against this practice, because day fines are not supposed to be poverty penalties in the first place (since they are scaled to financial circumstances) and because they are supposed to be set at affordable levels. But the practice does not reliably line up with the theory. See Kantorowicz-Reznichenko & Faure, *supra* note 5, at 368–70, 372 (noting that imprisonment is commonly imposed for default); see also Nagrecha, *supra* note 46, at 83 (finding that day fines are calculated problematically in Germany, with the result that "poor people in Germany face fines well above what they can afford"); see also *id.* at 74 (estimating that about 10% of prison admissions in Germany are for failure to pay fines).

<sup>166</sup> ICCPR, *supra* note 8, Art. 9(1).

<sup>167</sup> See *id.* Art. 11 (providing that "[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation"). The drafters of Article 9 also considered it not to bar detention for non-compliance with a lawful court order. See BOSSUYT, *supra* note 163, at 188–90; cf. European Convention, *supra* note 141, Art. 5(b) (authorizing imprisonment for "noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law"). The Human Rights Committee has at least once raised concerns about imprisonment for failure to pay fines where these fines arise from non-payment of contractual obligations. Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Ireland 6 (Aug. 19, 2014), at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/141/79/PDF/G1414179.pdf?OpenElement>.

<sup>168</sup> Queen v. Lewis [1964] EWCA Crim. J. 1130, at 8 (English Ct. Crim. App.).

<sup>169</sup> BOSSUYT, *supra* note 163, at 198 (noting that some delegates in the drafting of the ICCPR "argued that by using the word 'arbitrary' all legislation would have to conform to the principle of justice"); see also *id.* at 201 (noting debate over whether arbitrariness simply imposed a requirement of judicial consideration or also included "any act which violated justice, reason or legislation").

<sup>170</sup> See generally *Williams*, 399 U.S. at 241; *Tate*, 401 U.S. at 397–99; *Bearden*, 461 U.S. at 666. Violations of these decisions continue to occur in practice. See notes 92–93 *supra* and accompanying text.

defendants who were unable to pay their fines in full, “a law nondiscriminatory on its face may be grossly discriminatory in its operation.”<sup>171</sup> Or to quote more recently from comments made by the Working Group on Arbitrary Detention in a related context, “the right to personal liberty belongs equally to everyone, irrespective of their economic or other status.”<sup>172</sup> Unless economic sanctions are perfectly scaled to financial circumstances, they penalize lower-income persons more than higher-income persons. Where this extra penalty leads to deprivation of liberty, it is “grossly discriminatory” indeed.

The Human Rights Committee’s comment on Article 9 reinforces these principles. While the Committee says nothing specific about imprisonment due to inability to pay fines, it makes clear that detention can be arbitrary even if it is lawful under domestic law.<sup>173</sup> Instead, “‘arbitrariness’ . . . include[s] elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”<sup>174</sup> Imprisoning a person because they are unable to fulfill a non-carceral sentence is both inappropriate and disproportionate, especially if reasonable alternatives are available. Indeed, the fact that a fine was imposed initially indicates that incarceration is not necessary for punitive purposes. And the fact that this consequence falls on poor persons and not on rich persons suggests that it is neither just, reasonable, nor necessary. Add to all this the likely heightened effects on individuals who are already vulnerable for reasons such as race, religion, gender, or disability, and the human rights problems become still stronger.

These concerns are not new ones. As far back as 1905, members of the IPPC recognized the “weaknesses of the fine system” in which a rich person can “easily pay the fine while the poor man is committed to prison because he has not the means to pay it.”<sup>175</sup> Yet well over a century later, the practice of incarcerating people who are unable to pay poverty penalties remains all too common.

## 2. Other Human Rights Concerns Regarding Poverty Penalties

Poverty penalties are problematic from a human rights perspective in ways that go beyond the harsh consequence of imprisonment. They raise serious concerns about the extent to which states are in fact providing “equal and effective protection against discrimination.”<sup>176</sup> It is hard to see what legitimate penal interest in punishment or in deterrence is promoted by making poor defendants suffer more than rich defendants for the same offense. To the extent that the state has an interest at stake, it is an interest in administrability: it would be unrealistic to require that all economic sanctions be perfectly set so that they deliver the exact same

<sup>171</sup> *Williams*, 399 U.S. 235 at 242 (quoting *Griffin v. Illinois*, 351 U.S. 12, 17 n. 11 (1956)). In a later case, the Court similarly found it “fundamentally unfair or arbitrary for the State” to automatically revoke probation “when an indigent is unable to pay” remaining installments on a fine. *Bearden*, 461 U.S. at 666. The Court held that instead states had to consider alternative measures, such as whether the state could “establish a reduced fine or alternative public service in lieu of a fine . . . given the defendant’s diminished financial resources.” *Id.* at 672.

<sup>172</sup> Report of the Working Group on Arbitrary Detention, para. 58, UN Doc. A/HRC/45/16 (July 2020) (stating that it is “de facto discrimination” to allow electronic monitoring as an alternative to incarceration but to condition this monitoring on the ability of the defendant to pay the costs of it).

<sup>173</sup> Human Rights Committee, General Comment 35, *supra* note 144, para. 12.

<sup>174</sup> *Id.*, para. 12 (internal citations omitted) (providing that detention following a criminal sentence should be for punitive reasons).

<sup>175</sup> 1905 IPPC Proceedings, *supra* note 108, at 25.

<sup>176</sup> ICCPR, *supra* note 8, Art. 26.

impact on defendants of all financial circumstances.<sup>177</sup> Yet at some point, this interest in administrability should not justify the use of poverty penalties. There are at least four contexts in which the human rights interests at stake will be particularly strong.

One context is the excessiveness of the economic sanction as applied to a particular individual. In 2021, for example, the highest court in the U.S. state of Washington struck down economic sanctions of \$540 imposed for a parking infraction on an indigent and unhoused man, holding that these sanctions were excessive fines and therefore constitutionally impermissible.<sup>178</sup> The specific prohibition against excessive fines is found in only some national constitutions, and, as noted earlier, the drafters of the ICCPR declined to include such a clause.<sup>179</sup> But the absence of this specific clause does not negate the human rights considerations at stake. To the contrary, the delegates declined to include this clause at least partly on the ground that it would be a mere “provision of detail in an article . . . recognized as being in the nature of a general principle.”<sup>180</sup> In keeping with this view, the broader human rights prohibition against cruel, unusual, and inhuman punishments found in Article 7 of the ICCPR (and in other human rights instruments) is best interpreted as protecting against grossly disproportionate sentences.<sup>181</sup> This aligns with the broader principle of proportionality within human rights law.<sup>182</sup>

Another context is the extent to which disproportionate economic sanctions lead in turn to more poverty penalties, such as additional financial penalties or deprivation of legal rights. This cascade creates additional punishments that will be experienced in practice only by

<sup>177</sup> The Human Rights Committee has concluded that rules which have discriminatory effect may be nonetheless permissible if based on “objective and reasonable grounds.” See Human Rights Committee, Comm. No. 998/2001, para. 10.2 (Sept. 22, 2003) [hereinafter Communication No. 998/2001]. In the specific context of the European Convention, the “margin of appreciation” available to states might also provide some buffer for considerations of administrative convenience. See European Convention, *supra* note 141, at pmb1. As noted in note 16 *supra*, our analysis applies to poverty penalties paid to the state and not to restitution. The interests of victims in restitution could provide a justification for poverty penalties that goes beyond state administrative convenience.

<sup>178</sup> *City of Seattle v. Long*, 493 P.3d 94, 110–16 (Wash. 2021) (also noting that the man was a member of the Confederated Salish and Kootenai Tribes).

<sup>179</sup> See notes 131–135 *supra* and accompanying text.

<sup>180</sup> See ICCPR March 31, 1950 Drafting Meeting, *supra* note 132, at 9.

<sup>181</sup> See, e.g., Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MOD. L. REV. 541, 542 (2004). Principles of human rights law further suggest that the effect of the financial penalty should be measured with respect to the individual defendant—and not rely on expectations that family or friends will pay the penalty. See, e.g., Inter-American Commission on Human Rights, *Juvenile Justice and Human Rights in the Americas*, para. 320, at <https://www.cidh.oas.org/countryrep/JusticiaJuvenileng/jjiv.eng.htm> (opposing juvenile fines in part because these “are generally paid by the parents, which is a violation of Article 5(3) of the American Convention, according to which punishment shall not be extended to any person other than the criminal”); *Queen v. Lewis*, *supra* note 168, at 8 (“It is the Accused’s part in this transaction that has to be considered, and it would be wrong to impose, so to speak, a penalty on the father . . . [and it] would be equally wrong to allow the father by his wealth to relieve the son of punishment.”). The expectation that family members will pay economic sanctions—especially to prevent incarceration—is a persistent issue. See, e.g., Nagrecha, *supra* note 46, at 89 (“And it’s always amazing when the arrest warrant is out . . . [t]hen somebody steps in and pays for him. The grandmother, the father-in-law.”).

<sup>182</sup> For one summary of this complex principle, see Human Rights Committee, General Comment No. 27 on Freedom of Movement, para. 14 (Nov. 2, 1999), available at <https://www.refworld.org/pdfid/45139c394.pdf> (observing that this principle requires that restrictions imposed by states “be appropriate to achieve their protective function; . . . be the least intrusive instrument amongst those which might achieve the desired result; and . . . be proportionate to the interest to be protected”). For a discussion of proportionality in criminal law theory, see generally Mitchell N. Berman, *Proportionality, Constraint, and Culpability*, 15 CRIM. L. & PHIL. 373 (2021).

poor persons, such as the added surcharge that South Korea puts on late fines even for those unable to pay or the many, many additional poverty penalties imposed by U.S. jurisdictions.<sup>183</sup> If states fail to scale fines to financial circumstances in the first place, then their obligations to protect against discrimination should at the very least require them to avoid the further snowballing of poverty penalties. This principle is reinforced by human rights protections against discrimination on the basis of property found in both the ICCPR and the ICESCR, as well as the ICESCR's further protections regarding the non-discriminatory enjoyment of economic rights.<sup>184</sup>

A third context is whether disproportionate economic sanctions are having discriminatory effects that go beyond poverty. As noted earlier, poverty penalties are often disproportionately experienced by vulnerable groups, including along lines of race, religion, gender, and disability, and sometimes due to intentional discrimination. To point again to the United States, this is all the more problematic where these sanctions are serving the goal of revenue extraction—where criminal justice is the excuse for generating fines and fees to fund local government.<sup>185</sup> Where poverty penalties are disproportionately affecting persons who are protected from non-discrimination for reasons besides poverty under the ICCPR and ICESCR (and by other human rights instruments, including the CERD, CEDAW, and CRPD), then the human rights concerns should be amplified.

Finally, human rights abuses can occur where poverty penalties are unreasonably high. Poverty penalties do not arise simply because a state lacks resources to combat poverty; they arise because the state has *chosen* to impose a sanction that disproportionately impacts lower-income persons. Administrative convenience can justify the decision not to scale economic penalties perfectly to income—but only up to a point.<sup>186</sup> Even if a fine is not *per se* excessive and even if it does not snowball into other poverty penalties, it can nonetheless have a sufficiently disproportionate impact on lower-income people to amount to impermissible economic discrimination. Criminal codes that impose high fixed fines or high minimum fines run the risk of violating the non-discrimination obligations of human rights law, as do sentences imposed on the ground that unreasonably discriminate against poor people.

As discussed earlier, human rights actors are increasingly raising concerns relating to poverty penalties. Each of the four contexts raised here has attracted recent concern from experts. They have expressed dismay about excessive fines; about snowballing poverty penalties; about economic penalties that disproportionately harm indigenous persons and ethnic minorities; and about high fixed or minimum fines.<sup>187</sup> Their remarks demonstrate that the problematic human rights implications of poverty penalties extend well beyond the use of incarceration for inability to pay.

<sup>183</sup> See Section II.B *supra*.

<sup>184</sup> See ICCPR, *supra* note 8, Art. 26; ICESCR, *supra* note 8, Art. 2; *id.* Art. 4 (providing that states may limit economic ICESCR rights only by “limitations . . . in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare”); *id.* Art. 11 (providing for a right to an adequate standard of living).

<sup>185</sup> FERGUSON REPORT, *supra* note 1, at 14 (“Court staff are keenly aware that the City considers revenue generation to be the municipal court’s primary purpose.”).

<sup>186</sup> Communication 998/2001, *supra* note 177, para. 10.2 (noting that state-imposed measures that indirectly discriminate against groups protected by the principle of non-discrimination may nonetheless be permissible where “objective and reasonable”).

<sup>187</sup> See notes 142–155 *supra* and accompanying text.

### 3. *Poverty Penalties as an Obstacle to Criminal Justice and Poverty Eradication*

The normative focus in this Article is on the human rights implications of poverty penalties. This is because human rights law is the branch of modern international law that most emphasizes state obligations to treat people under their jurisdiction fairly, proportionately, and without discrimination. Although poverty penalties have received inadequate attention from human rights law to date, they fall naturally within its broader conceptual and legal ambit.

While we focus on human rights principles, we think that poverty penalties should be of interest not only to human rights bodies but also to other international institutional actors. This is especially important because of the nature and structure of international practice. For one thing, human rights bodies have many issues to address and considerable challenges in improving practices on the ground. For another, human rights considerations are crucial not only to human rights bodies but also to international actors in other institutional forums.

One of these other forums is criminal justice. As noted earlier, international conversations about poverty penalties pre-dated modern human rights law, and the criminal justice organs of the United Nations continue to pursue penological improvements. The 2011 Bangkok Rules are an example of how the criminal justice institutions of the United Nations can advocate for progressive and human-rights-infused reforms.<sup>188</sup> These institutions should similarly have an interest in the reduction of poverty penalties.

Poverty penalties should also be of interest in forums focused on development. The first of the seventeen Sustainable Development Goals (SDGs) set by the United Nations in 2015 is “[e]nding poverty in all its forms.”<sup>189</sup> Placing disproportionately high economic sanctions on poor people undermines this goal in ways that merit attention from the United Nations Development Programme and other anti-poverty advocates.

In short, poverty penalties merit consideration from a range of international actors. In what follows, we raise some specific suggestions about how this can be achieved.

#### *B. International Practice*

As poverty penalties receive more international attention, what should be said and done? In what follows, we offer some preliminary thoughts. As an initial matter, more international scrutiny and information around poverty practices is needed. As states begin to discuss best practices, they can draw on research and practice in domestic jurisdictions around how economic sanctions are set, around how collections practices and penalties for non-payment, and around the extent to which revenue-based incentives may affect the use of financial sanctions. We end by noting some potential pitfalls.

<sup>188</sup> See note 129 *supra* (describing the adoption of the Bangkok Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders and noting the role in developing these rules that was played by UNODC, the Commission on Crime Prevention and Justice, and the UN Congresses on Crime Prevention and Criminal Justice).

<sup>189</sup> Sustainable Development Goals, *supra* note 7. Two other goals emphasize reducing inequality and promoting justice. See *id.* These goals could all be promoted by reducing the use of poverty penalties in criminal justice systems (and other systems too). For discussion of how tailoring civil penalties to “the resources of the regulated entity” can be desirable, see Cary Coglianese, *Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy*, 54 *STAN. L. REV.* 1217, 1222–25 (2002).

### 1. *Increasing Salience and Transparency*

Poverty penalties should be of concern to many different stakeholders. They relate to criminal justice, to poverty, and to arbitrary detention. They can place disproportionately high burdens on groups that are vulnerable for reasons beyond poverty, including along lines of race, religion, gender, and disability. In other words, they merit attention from the human rights community writ large, as well as from criminal justice leaders and anti-poverty advocates.

As noted earlier, international human rights leaders are starting to pay attention to poverty penalties. The Working Group on Arbitrary Detention and several special rapporteurs have made important recent contributions; attention from NGOs is growing; and conditions are ripe for more discussion within the human rights treaties' committees and the Universal Periodic Review process.<sup>190</sup> Given the rising interest in this issue among domestic advocates, more international and regional attention may lie ahead.

Increased international attention to poverty penalties is itself a crucial first step. The more that UN officials ask states about poverty penalties—and the more that states ask each other about poverty penalties—the more the potential for impact rises.<sup>191</sup> Cosette Creamer and Beth Simmons have recently theorized that “elite socialization, learning and capacity building, domestic mobilization, and law development” can all arise from human rights dialogue and can contribute to improved conditions on the ground.<sup>192</sup> The reduction of poverty penalties may be an issue that is comparatively amenable to these mechanisms. Because it has largely flown under the radar up to now, it has considerable potential for socialization, learning, and new energy around mobilization. And the fact that it is relatively apolitical may increase openness to learning and law development.

An important additional step is gathering more information. The use of fines can be a valuable alternative to incarceration, as the Tokyo Rules recognize<sup>193</sup>—but unless great care is taken, these fines will amount to poverty penalties and may lead to other problematic consequences (including incarceration). Access to data can help identify problematic practices while giving stakeholders the tools to evaluate the impacts of economic sanctions. And continued monitoring can help track implementation of reforms, revealing whether new policies are in fact being properly executed and if they are having the desired effect.

Currently, there is an absence of good international data on poverty penalties. The UN Office on Drugs and Crime gathers considerable data related to crime through a periodic survey,

<sup>190</sup> See Sections II.B–C *supra*.

<sup>191</sup> That international attention can influence state behavior is widely acknowledged in theories of state behavior, even though scholars disagree about the mechanisms and the likely magnitudes of effects. For a few examples (from scholars advancing different theories of state behavior), see, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 118 (1998); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1862–63 (2002); Finnemore & Sikkink, *supra* note 13, at 902; Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421, 479 (2014). There is of course also a significant body of empirical work with various findings on the relationship between international human rights and on-the-ground reforms. See generally, e.g., BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Christopher J. Fariss, *The Changing Standard of Accountability and the Positive Relationship Between Human Rights Treaty Ratification and Compliance*, 48 BRIT. J. POL. SCI. 239 (2018); Kevin L. Cope, Cosette D. Creamer & Mila Versteeg, *Empirical Studies of Human Rights Law*, 15 ANN. REV. L. & SOC. SCI. 155 (2019).

<sup>192</sup> Cosette D. Creamer & Beth A. Simmons, *The Proof is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AJIL 1, 3 (2020).

<sup>193</sup> The Tokyo Rules, *supra* note 122, § 8.2(d).



but it does not include data that offers any clear window into poverty penalties.<sup>194</sup> Similarly, the reporting procedure established for the Human Rights Committee does not include any questions that are specific to poverty penalties.<sup>195</sup> Moving forward, it would be valuable for these actors to seek information from countries on some or all of the following issues:

- *Assessment of sanctions:* In what situations are economic sanctions imposed by courts? To what extent are sanctions scaled to the financial circumstances of individual defendants?
- *Penalties for non-payment:* How many individuals are incarcerated annually for failure to pay economic sanctions? What other penalties are applied to individuals who fail to pay?
- *Revenue distribution:* How is revenue collected from economic sanctions distributed among local, regional, and national governments and to what units does it go within these governments?

Other treaty committees might seek data on poverty penalties as they relate to particular populations, including regarding race, gender, or disability.

These questions are meant as starting points. There are more inquiries that could be helpful—such as what procedural protections are available to defendants in fine-only offenses, the extent to which suspended sentences are used for fines, how fines collection is administered, and whether back-end forgiveness mechanisms exist and are used in practice.<sup>196</sup> But given how little information is collected at present, initial statistics would improve on the status quo and could be a launching pad for deeper inquiry.

## 2. Promoting Substantive Changes

As international attention to poverty penalties increases, more conversation will occur around substantive reforms. Based on comparative practice and ongoing policy reform in

<sup>194</sup> UNODC makes data from the United Nations Survey of Crime Trends and Operations of Criminal Justice Systems publicly available at <https://dataunodc.un.org>. The data on prisoners does not include information on the number incarcerated for failure to pay economic sanctions. See UNODC, Prisons & Prisoners, at <https://dataunodc.un.org/dp-prisons-persons-held>. UNODC now asks for data on persons held under forms of supervision other than imprisonment, but it does not ask for any data on economic sanctions. For the survey questionnaire, see 2018 UNODC Survey, *supra* note 9.

<sup>195</sup> See generally Human Rights Committee, Guidelines for the Treaty-Specific Document to Be Submitted by State Parties Under Article 40 of the ICCPR (Nov. 22, 2010) (focusing its questions regarding Article 9 of the ICCPR on pre-trial detention). The common core document that states are supposed to use in reporting to all human rights treaty committees includes a request for data on “information indicating . . . sentences passed and carried out” and a request for data related to non-discrimination and equity, including “information . . . on steps taken to ensure that discrimination in all its forms and on all grounds is prevented and combated in practice, including” in relation to “existing penal laws.” UN International Human Rights Instruments, Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties 9, 14 (June 3, 2009).

<sup>196</sup> In addition, there is the risk that these questions can miss nuances. A report in 2017 by the Australian Law Reform Commission, for example, found that imprisonment arising from fines default is often not categorized as such because it comes from intervening poverty penalties—such as where the imprisonment is formally attributed to driving with a suspended license (but the reason the license was suspended was for failure to pay a fine). 2017 AUSTRALIA L. REFORM COMM’N REPORT, *supra* note 70, at 384–85 (also noting that failure to pay fines can trigger community service orders, and non-compliance with these orders results in imprisonment that is categorized as a “justice procedure offence” rather than an imprisonment from non-payment of the fine).

various countries, we expect these conversations to focus around three issues: setting economic sanctions; collections and penalties for non-payment; and revenue considerations. As these conversations develop, they might someday lead to established minimum standards.

The first issue is how economic sanctions are set. Day fines have strong normative appeal, as they try to equalize the impact of economic sanctions across individual financial circumstances. There have been and probably will continue to be more calls for their use.<sup>197</sup> But some caution is in order, as day fine systems can suffer from design flaws, and because the success of their adoption may depend on factors like judicial or administrative capacity and the formality of the economic system.<sup>198</sup> For example, in the case of Japan, legislators considered adopting a day fines system multiple times in the 1960s and 1970s, and again in 1990, but efforts failed at least in part because public prosecutors feared that the system would “create the difficult task of proving the defendant’s income.”<sup>199</sup> Elena Kantorowicz-Reznichenko and Michael Faure recently edited a useful volume on comparative day fines practices within Europe that sheds light on best practices within day fines systems.<sup>200</sup>

Even if countries do not adopt day fine systems, they can take economic circumstances into account through ability-to-pay hearings, through presumptions of indigency if certain criteria are met, or through the use of bench cards detailing how a judge should calculate and consider a sentenced person’s ability to pay.<sup>201</sup> Given the common challenge of poverty penalties, discussion of best practices would be fruitful—as suggested by the example of the IPPC more than a century ago.

As states and human rights actors discuss how economic sanctions are set, they should also consider the circumstances under which economic sanctions should not be imposed in the first place. In calling for a ban on fines for school-aged juveniles, for example, the Inter-American Commission on Human Rights emphasizes that such fines “may have the effect of forcing children to engage in work that . . . is inappropriate for their age.”<sup>202</sup> The

<sup>197</sup> See, e.g., Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55 AM. CRIM. L. REV. 333, 338 (2018) (suggesting that United States should consider increased use of day fines); see generally FAIR TRIALS, DAY FINES SYSTEMS: LESSONS FROM GLOBAL PRACTICE (2020), at <https://www.fairtrials.org/articles/publications/day-fines-systems-lessons-from-global-practice> (recommending best practices while acknowledging limits of day fines).

<sup>198</sup> See notes 43–46 *supra* and accompanying text; see also Jiří Kindl & Jan Kupčák, *Day Fines in Czech Republic*, in DAY FINES IN EUROPE, *supra* note 5, at 340–43 (noting judicial indifference to the putative day fine system after its adoption in the Czech Republic); Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017) (describing how experiments with day fines in some U.S. localities failed in the 1980s while emphasizing the promise of linking financial sanctions to defendants’ economic circumstances).

<sup>199</sup> See Nagata Kenji, *Fines in the Japanese Criminal Justice System*, 34 KANSAI U. REV. L. & POL. 1, 9–10 (Mar. 2013).

<sup>200</sup> See generally DAY FINES IN EUROPE, *supra* note 5.

<sup>201</sup> Fines & Fees Just. Ctr., *First Steps Toward More Equitable Fines and Fees Practices: Policy Guidance on Ability-to-Pay Assessments, Payment Plans, and Community Service 2* (Nov. 17, 2020), at [https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC\\_Policy\\_Guidance\\_Ability\\_to\\_Pay\\_Payment\\_Plan\\_Community\\_Service\\_Final\\_2.pdf](https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC_Policy_Guidance_Ability_to_Pay_Payment_Plan_Community_Service_Final_2.pdf) [hereinafter FFJC Policy Guidance] (discussing ability to pay); April D. Fernandes, Michele Cadigan, Frank Edwards & Alexes Harris, *Monetary Sanctions: A Review of Revenue Generation, Legal Challenges, and Reform*, 15 ANN. REV. L. SOC. SCI. 397, 409 (2019) (discussing the use of bench cards); see also Valsamis Mitsilegas & Foivi Sofia Mouzakiti, *Day (Unit) Fines in England and Wales*, in DAY FINES IN EUROPE, *supra* note 5, at 212 (outlining current system in England and Wales of calculating a guidepost for a fine as a percentage of the defendant’s weekly income based on the severity of the offense, with considerable judicial discretion allowed).

<sup>202</sup> *Juvenile Justice and Human Rights in the Americas*, *supra* note 181, para. 320 (also noting the risk of work that involves violence or exploitation).

Commission suggests well-designed community service programs as a better non-carceral option.<sup>203</sup> Scholars and advocates in the United States have expressed grave skepticism about economic penalties that are imposed as add-on penalties to imprisonment, since individuals coming out of prison are particularly likely to lack resources and be limited in their employment options.<sup>204</sup> They have also advocated for the eradication of costs, fees, and surcharges, so that the only financial penalties imposed on individuals are fines and restitution.<sup>205</sup> And there are broader conversations about decriminalization of certain low-level offenses.<sup>206</sup> Dialogue between states could help clarify the advantages and disadvantages of various approaches in practice.

The second issue involves collection practices and penalties for non-compliance. How can states collect economic sanctions while minimizing the cascade of poverty penalties? The collection of economic sanctions from poor defendants is fraught with abusive potential. Incarceration for non-payment will result in the imprisonment of persons who are unable to pay (rather than just unwilling to pay), unless the most stringent steps are taken to ward off this outcome.<sup>207</sup> Installment payment plans can theoretically offer employed defendants a reasonable opportunity to pay—but can also turn into long-term traps.<sup>208</sup> The use of aggressive collection tactics and the imposition of late fees, collection costs, and interest will lead to snowballing poverty penalties.<sup>209</sup> The substitution of other non-carceral penalties for those unable to pay—alternatives like probation or community service—has potential but requires well-designed infrastructure and may prove challenging for particularly vulnerable defendants, such as those with disabilities.<sup>210</sup>

These are difficult matters. The challenges they pose highlight how crucial it is for states to be thoughtful in how they impose economic sanctions in the first place, including by taking defendants' financial circumstances into account. So far, there has been relatively little international discourse on this issue. But precisely because they are difficult issues, conversation about how best to enforce economic sanctions while meeting human rights objectives is

<sup>203</sup> *Id.*, para. 327. By contrast, a recent study of community service programs in Los Angeles, California, concludes that “community service often replicates or exacerbates the problems of court debt” because people who are unable to complete their requirements face snowballing consequence and because even those who are able to complete their requirements are overly punished (as where it takes fifty-one hours of work to erase a \$520 traffic ticket). UCLA LABOR CENTER, WORK, PAY, OR GO TO JAIL: COURT-ORDERED COMMUNITY SERVICE IN LOS ANGELES 3 (Oct. 2019).

<sup>204</sup> *E.g.*, *What Is Wrong with Monetary Sanctions?*, *supra* note 37, at 234 (observing that “ceasing the practice of assessing monetary sanctions in addition to custodial sentences” “would go a long way to reducing” the “harms associated with monetary penalties”); *see also* 2006 Nicaragua Report, *supra* note 143, para. 87 (raising concerns about this issue as default leads to additional incarceration).

<sup>205</sup> *E.g.*, Brennan Ctr. Just., *The Steep Costs of Criminal Justice Fines and Fees: A Fiscal Analysis of Three States and Ten Countries* 5, 7 (2019) (calling for the abolition of criminal justice fees and court costs, broadly defined).

<sup>206</sup> *E.g.*, GUIDING PRINCIPLES, *supra* note 11, para. 66(c) (calling for “repeal or reform [of] any laws that criminalize life-sustaining activities in public places, such as sleeping, begging, eating or performing personal hygiene activities”).

<sup>207</sup> *See* notes 76–83, 90–93 *supra* and accompanying text.

<sup>208</sup> Colgan & Galbraith, *supra* note 92, at 3.

<sup>209</sup> *See* note 96 *supra*; *see also* ABBY SHAFROTH, DAVID SELIGMAN, ALEX KORNYA, RHONA TAYLOR & NICK ALLEN, *CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE TO POLICY REFORM* 17 (2016) [hereinafter *CONFRONTING CRIMINAL JUSTICE DEBT*] (noting how aggressive collection tactics lead to broader financial challenges).

<sup>210</sup> *CONFRONTING CRIMINAL JUSTICE DEBT*, *supra* note 209, at 20.

essential. Recent work highlights the potential for amnesty options.<sup>211</sup> With more information (including the information called for above), states that opt to use financial penalties can strive for practices that: (1) set penalties at reasonable and fair levels; (2) have appropriate mechanisms for identifying and getting compliance from those who are unwilling to pay; and (3) have appropriate mechanisms for not over-penalizing those who are unable to pay.

A third issue that merits consideration relates to revenue. In the United States, subnational governments that impose economic sanctions in the name of criminal justice are heavily motivated by revenue generation—an unsavory fact that has surfaced in recent years.<sup>212</sup> We do not have enough information from our research to answer whether this is a problem that is largely unique to the United States or whether instead it is a broader international problem. The more that economic sanctions go to governmental actors closely connected with the judges, police, and prosecutors who impose these sanctions, the greater the risk. There is varying practice among states. Ghana’s Constitution, for example, provides that revenue from all fines go into a central fund, while Panama’s Constitution provides that municipal fines shall go into municipal funds.<sup>213</sup> Conversation around best practices could help ensure that financial motives do not taint the administration of criminal justice.

In the long run, the criminal justice and human rights arms of the United Nations could consider developing a set of minimum standards and/or best practices surrounding economic sanctions. This would build out on the initial start made in the Tokyo Rules, which recommend the use of fines and day fines as alternatives to incarceration but without providing guidance on how they are to be administered.<sup>214</sup> Minimum standards or best practices that address the relationships between economic sanctions, poverty, and governmental fiscal considerations could help improve criminal justice systems around the world.

### 3. Avoiding Pitfalls

Increased international attention could lead to reductions in poverty penalties. But just as domestic experiences provide ideas about best practices, so too can they remind us of unintended problems. In what follows, we briefly identify three potential pitfalls and emphasize the need for ongoing monitoring.

The first is the obvious but sometimes overlooked need to tailor solutions to capacity. Polish judges have found day fines too cumbersome to implement; Ghana lacks strong

<sup>211</sup> E.g., Joni Hirsch & Priya Sarathy Jones, *Driver’s License Suspension for Unpaid Fines and Fees: The Movement for Reform*, 54 U. MICH. J. L. REF. 875, (2021) (describing some recent programs in U.S. jurisdictions that forgive certain criminal justice debt or reduce its consequences).

<sup>212</sup> See generally Siân Mughan, *Municipal Reliance on Fine and Fee Revenues: How Local Courts Contribute to Extractive Revenue Practices in U.S. Cities*, PUB. BUDGETING & FIN. (2020), at [https://finesandfeesjusticecenter.org/content/uploads/2021/10/Mughan\\_2020\\_PBF.pdf](https://finesandfeesjusticecenter.org/content/uploads/2021/10/Mughan_2020_PBF.pdf) (studying cities’ use of and reliance on municipal court fines and fees to fund general operations); see also Carl Reynolds & Jeff Hall, Conference of State Court Administrators, *Courts are Not Revenue Centers*, NAT’L CTR. STATE CTS., 7 (2012), at [https://cosca.ncsc.org/\\_data/assets/pdf\\_file/0019/23446/courtsarenorevenuecenters-final.pdf](https://cosca.ncsc.org/_data/assets/pdf_file/0019/23446/courtsarenorevenuecenters-final.pdf) (acknowledging the “tension, and at times, direct conflict, that exists between themes [of avoiding undue reliance on court-generated revenue] and the realities of government, governance, politics, the economy and fiscal practices and policies in each individual [U.S.] state”).

<sup>213</sup> Compare GHANA CONST. Art. 160 (Ghana) (“The fees, fines and other moneys paid to the Courts shall form part of the Consolidated Fund”) with PAN. CONST. Art. 246 (Pan.) (providing that “Fines imposed by Municipal authorities” “shall be sources of Municipal income”); see also MYANMAR CONST. Art. 254, sch. 5(9) (Myan.) (providing that fines collected by regional or state courts shall go into the regional or state budget).

<sup>214</sup> The Tokyo Rules, *supra* note 122, § 8.2(d).

infrastructure for offering probationary alternatives; post-sentencing processes for reducing fines are available but underused in U.S. states.<sup>215</sup> As nations consider reforms, they need to think carefully about what will feasibly advance the goal of reducing poverty penalties given their particular national circumstances and constraints. Close engagement with on-the-ground administrators and advocates is likely to be essential to the success of any reforms.

The second potential pitfall is the risk of Whac-A-Mole—that one ugly set of practices will get replaced with another ugly set of practices. In the 1970s and 1980s, the U.S. Supreme Court found it unconstitutional to imprison persons for inability to pay economic sanctions.<sup>216</sup> But since then, rampant violations have continued, *and* state and local governments have also placed defendants on endless installment payment plans, dramatically increased fees and collection costs, and added on other poverty penalties like the deprivation of driver's licenses or of political rights.<sup>217</sup> To the extent that other states move toward ending incarceration for inability to pay poverty penalties, they must take care to avoid net-widening and other problematic consequences.<sup>218</sup> Holistic consideration is essential.

A third hazard is the well-known gap between law on the books and its application—a gap that can occur even in the absence of capacity limits. In the United States, there are judges who have imprisoned indigent persons for non-payment on the theory that they are able to pay fines because they can sell their blood plasma.<sup>219</sup> In Germany, “system actors do not fully grasp poverty” and therefore “often believe that individuals who fail to pay must have willfully made that choice (despite evidence to the contrary).”<sup>220</sup> Incarceration for failure to pay is meant as an incentive to prod along the unwilling, but in practice it often ends up as a trap for the unable. Where there is considerable evidence of misuse of judicial discretion, it may be time to change the ground rules—such as by mandating a very rigorous process before someone can be incarcerated as unwilling to pay or by taking incarceration entirely off the table as a consequence for failure to pay.<sup>221</sup>

<sup>215</sup> See Krajewski, *supra* note 45, at 212–14 (2016); Kwasitsu, *supra* note 32, at 88–89; Lawyers' Comm. Civil Rts. Under L., *Too Poor to Pay: How Arkansas's Offender-Funded Justice System Drives Poverty & Mass Incarceration* 3 (2019), at <https://indd.adobe.com/view/f3b39ab5-1da5-409e-97a6-a0b060d2f578>.

<sup>216</sup> *Williams*, 399 U.S. at 241; *Tate*, 401 U.S. at 397–99; *Bearden*, 461 U.S. at 666.

<sup>217</sup> See *e.g.*, Colgan & Galbraith, *supra* note 92, at 48–56; Ferguson Report, *supra* note 1, at 57–58.

<sup>218</sup> It is similarly important to avoid “human rights backsliding”—the risk that international norms “can undermine efforts to adopt or maintain high levels of protection in countries that would otherwise offer protections above the international norm.” Andrew T. Guzman & Katerina Linos, *Human Rights Backsliding*, 102 CAL. L. REV. 603, 605 (2014); see also *id.* at 614–22 (providing examples).

<sup>219</sup> *Commonwealth v. Diaz*, 191 A.3d 850, 852–53, 863 (Pa. Super. Ct. 2018) (describing lower court proceedings, in which the court noted in its order of incarceration that the defendant said he could sell his blood plasma); see also Campbell Robertson, *For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time*, N.Y. TIMES (Oct. 19, 2015), at <https://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html> (describing how a judge instructed indigent defendants who were unable to pay their economic sanctions to donate blood or be incarcerated); PROFITING FROM PROBATION, *supra* note 157, at 34–35 (describing how a court incarcerated a defendant for failure to pay where the defendant had not been able to earn enough from selling his blood plasma to make sufficient payments).

<sup>220</sup> Nagrecha, *supra* note 46, at 85, 86; see also *id.* at 87–89 (giving more details).

<sup>221</sup> See, *e.g.*, 2017 AUSTRALIA L. REFORM COMM'N REPORT, *supra* note 70, at 389–92 (providing a thoughtful discussion of this issue, recognizing the differing views of different stakeholders, and ultimately “recommend[ing] that statutory provisions permitting imprisonment from unpaid fines should be repealed”).

These are undoubtedly not the only potential challenges. To the extent that domestic and international activists take up the issue of poverty penalties, more will arise. As always, there is need not only for good design of initial solutions, but also for ongoing and holistic monitoring.

## V. CONCLUSION

In 1991, Australian jurist Michael Kirby dissented from a case in which a \$60,000 AUS fine was imposed on an indigent prisoner with Parkinson's disease who earned \$12 AUS per week.<sup>222</sup> He considered international human rights law to prohibit the imposition of such a high fine under these circumstances.<sup>223</sup> In a later speech, he reiterated this position but did not expand on his analysis, instead saying: "Leave it to the law reviews."<sup>224</sup>

More than thirty years later, the problem of poverty penalties remains prevalent. As this Article has shown, criminal justice systems around the world are rife with economic sanctions that disproportionately punish poor people. Yet this issue has received relatively little attention at the international level, perhaps because of the absence of specific prohibitions against excessive fines in international human rights treaties. It is time—long past time—for more attention to this problem. International human rights advocates can encourage states to move toward eliminating poverty penalties, ending abusive collection practices, and considering individuals' ability to pay before imposing any fines. The world needs justice systems that treat individuals fairly, ensure public safety and community prosperity, and are funded equitably.

<sup>222</sup> *Smith v. The Queen*, 25 N.S.W. L.R. 1, 1991 WL 1121897 at \*9–10 (1991).

<sup>223</sup> *See id.* at \*12–13.

<sup>224</sup> Michael Kirby, *The Australian Use of International Human Rights Norms from Bangalore to Balliol—A View from the Antipodes*, 18 *COMMW. L. BULL.* 1306, 1319 (1992).