

## **FIGHTING FINES & FEES: BORROWING FROM CONSUMER LAW TO COMBAT CRIMINAL JUSTICE DEBT ABUSES**

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*Although media and academic sources often describe mass incarceration as the primary challenge facing the American criminal justice system, the imposition of criminal justice debt may be a more pervasive problem. On March 14, 2016, the Department of Justice (DOJ) requested that state chief justices forward a letter to all judges in their jurisdictions describing the constitutional violations associated with the illegal assessment and enforcement of fines and fees. The DOJ's concerns include the incarceration of indigent individuals without determining whether the failure to pay is willful and the use of bail practices that result in impoverished defendants remaining in jail merely because they are unable to afford bail.*

*Criminal justice debt, also known as legal financial obligations (LFOs), impacts not only those incarcerated but also millions of others who receive economic sanctions for low-level offenses, including misdemeanors and ordinance violations. LFOs, which include bail, fines, and fees, are*

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*imposed at every stage in the justice process, including pre-conviction, sentencing, incarceration, and post-release supervision.*

*For those who are unable to pay criminal justice debt, “poverty penalties” are often added in the form of charges for interest, payment plans, late payments, and collection. As incarceration rates and local budgetary concerns have increased, so too has the imposition of LFOs. Moreover, while authorities are trying to reduce incarceration, criminal justice debt may become an even greater concern, as one popular alternative is decriminalization and the imposition of monetary charges.*

*Often the financial charges are unrelated to the traditional notions of punishment or protection of public safety and instead, reflect a desire to maximize revenue collection. Many municipalities outsource services to private probation companies and collectors, which are often unsupervised and use collection procedures not authorized for private parties. Moreover, new technologies allow for additional collection abuses.*

*To date, states and municipalities have been ineffective in preventing abuses associated with criminal justice debt. Relying on the approach used for consumer debt collection, I propose a federal solution. The Fair Debt Collection Practices Act (FDCPA) and the Consumer Financial Protection Bureau (CFPB) provide the foundation for a federal framework for addressing problems with the collection of consumer debts. I contend that the justifications that supported the federal statutory and administrative solution for consumer debts are at least as significant, if not greater, for a similar framework to combat abusive criminal justice debt practices.*

*Not only do individuals with criminal justice debt encounter the same abuses and consequences that consumer debtors face—including harassment, negative credit reports, and the adverse impact on financing and employment prospects—but they also face denial of welfare benefits, suspension of driver’s licenses, arrest, and incarceration. In practice, the*

2017]

## FIGHTING FINES &amp; FEES

843

*imposition of criminal justice debt reflects actual discrimination and creates distrust in the system. Accordingly, I advocate the adoption of a federal act and the use of the DOJ to coordinate enforcement and outreach activities to attack abuses in the collection of criminal justice debt.*

INTRODUCTION .....	844
I. ABUSES IN CRIMINAL JUSTICE DEBT COLLECTION .....	851
A. <i>Components of Criminal Justice Debt</i> .....	852
B. <i>Growth of Criminal Justice Debt</i> .....	855
1. Mass Incarceration and the Growth of Criminal Justice Debt .....	856
2. Budgetary Concerns and Growth in Criminal Justice Debt .....	857
3. Decriminalization .....	858
C. <i>Abusive Acts in Collecting Criminal Justice Debt</i> ....	858
1. Focus on Revenue Collection Rather than Public Safety .....	859
a. <i>Abusive Use of Fines</i> .....	859
b. <i>Abusive Use of Fees</i> .....	863
2. Outsourcing to Private Companies .....	865
3. Failure to Take into Account Ability to Pay .....	869
a. <i>Incarceration for Inability to Pay Bail</i> .....	869
b. <i>Arrest and Incarceration for Inability to                 Pay Fees and Fines</i> .....	872
4. Disproportionate Impact on Low-Income Populations .....	873
5. Discriminatory Impact on Minorities .....	878
II. THE FEDERAL FRAMEWORK TO ADDRESS ABUSES IN CONSUMER DEBT COLLECTION .....	883
A. <i>The Rationale for the FDCPA Supports Adoption         of a Federal Act for Criminal Justice Debt</i> .....	884
1. Abusive Practices .....	886
2. Inadequacy of Laws .....	889
3. Alternative Non-Abusive Collection Methods ....	890
4. Interstate Commerce .....	891
5. Purposes .....	892
B. <i>The Justifications for the CFPB Support the Need         for a Federal Agency to Combat Abusive Criminal         Justice Debt Collection</i> .....	893
III. APPLYING THE FRAMEWORK TO CRIMINAL JUSTICE	

DEBT COLLECTION .....	896
A. <i>Prohibited Practices</i> .....	898
B. <i>Required Practices</i> .....	902
C. <i>Enforcement and Outreach Activities</i> .....	904
IV. FEDERALISM ISSUES .....	909
V. CONCLUSION .....	911

## INTRODUCTION

The last thirty years have seen dramatic growth in civil consumer debt and criminal justice debt, as well as abuses associated with the collection of such debts. Consumer debt includes amounts owed for personal, family, and household issues, including mortgages, medical bills, credit card balances, auto loan debt, and student loan debt.<sup>1</sup> Criminal justice debt includes charges for bail, fines, and fees.<sup>2</sup> Consumer debtors and individuals with criminal justice debt experience many of the same abuses and consequences, including harassment by collectors, adverse credit reports, restricted financing opportunities, embarrassment, and strain on family resources. Additionally, criminal justice debt can lead to denial of welfare benefits, suspension of driver's licenses, disenfranchisement, arrest, and incarceration.<sup>3</sup>

While federal legislative and regulatory efforts address problems associated with the abusive collection of civil debt, similar efforts have not been used to combat the abusive

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1. 15 U.S.C. § 1692a(5) (2012) (defining debt under the Fair Debt Collection Practices Act as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment”).

2. COUNCIL OF ECON. ADVISERS, ISSUE BRIEF: FINES, FEES, AND BAIL 1 (2015), [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) [<https://perma.cc/FLQ7-E7S5>].

3. ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADM'RS, 2015-2016 POLICY PAPER: THE END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS 4–9 (2016), <http://cosca.nsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx> [<https://perma.cc/W9JN-TB2N>]; ABBY SHAFROTH & LARRY SCHWARTZOL, CRIMINAL JUSTICE POLICY PROGRAM & NAT'L CONSUMER LAW CTR., CONFRONTING CRIMINAL JUSTICE DEBT: THE URGENT NEED FOR COMPREHENSIVE REFORM 6–7 (2016), <http://cjpp.law.harvard.edu/assets/Confronting-Criminal-Justice-Debt-The-Urgent-Need-for-Comprehensive-Reform.pdf> [<https://perma.cc/T9P5-WNA9>].

collection of criminal justice debt.<sup>4</sup> The failure to develop these efforts is especially disconcerting because of the additional collateral consequences associated with criminal justice debt.<sup>5</sup> The thesis of this Article is that just as abuses in civil debt collection created a need for a federal statutory and administrative solution, abuses in the assessment and collection of criminal justice debt demand a similar solution.

The following examples illustrate some of the differences in the treatment of abuses in the collection of consumer and criminal justice debt.

*Case 1: Vehicle Financing: Westlake Services, LLC and its wholly owned subsidiary, Wilshire Consumer Credit, LLC (collectively, “Westlake”)*

Westlake services subprime vehicle loans made to borrowers with low credit scores.<sup>6</sup> Using “Skip Tracy,” a web-based service that alters caller-ID information, Westlake allegedly called debtors and their families, friends, and employers with spoofed caller-ID information to reflect that calls were coming from flower shops or pizza delivery companies.<sup>7</sup> In its communications, Westlake pretended to be

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4. This Article builds on concepts developed in my prior articles and suggests applying the framework used to address consumer debt collection abuses to attack abuses involved in the collection of criminal justice debt. *See, e.g.*, Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327 (2014) (proposing methods of preventing abuses by debt buyers collecting on consumer debts which are often stale, previously paid or settled, or never incurred by the alleged debtor); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486 (2016) (describing how the same concerns that led to calls for abolition of debtors’ prisons for civil debt in the eighteenth and nineteenth centuries now exist with regard to the use of incarceration for criminal justice debt).

5. *See, e.g.*, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY 29 (2014), [http://www.hrw.org/sites/default/files/reports/us0214\\_ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf) [<https://perma.cc/UX63-QT39>] (describing how a probationer facing a two-year probation to pay a \$1200 fine and a \$35 monthly fee would be better off and would not face the threat of incarceration if she had had a civil consumer debt arising from a \$2400 two-year loan with a 50 percent interest rate).

6. Consent Order ¶¶ 4–5, Westlake Servs., LLC, CFPB No. 2015-CFPB-0026 (Sept. 30, 2005), [http://files.consumerfinance.gov/f/201509\\_cfpb\\_consent-order-westlake-services-llc.pdf](http://files.consumerfinance.gov/f/201509_cfpb_consent-order-westlake-services-llc.pdf) [<https://perma.cc/9WTT-NFMR>]. For more information about Westlake, see its website <http://www.westlakefinancial.com/Pages/default.aspx> (last visited Apr. 3, 2017) [<https://perma.cc/887Y-SW4Q>].

7. Consent Order, *supra* note 6, ¶¶ 7, 23. As defined in the Consent Order,

from those companies to obtain information about the location of debtors and their vehicles.<sup>8</sup> Additionally, Westlake allegedly changed caller-ID information and pretended to be from investigation, enforcement, and repossession entities. In so doing, Westlake implicitly and explicitly threatened to repossess vehicles and file criminal charges against borrowers.<sup>9</sup>

*Case 2: Private Probation Services: Sentinel Offenders Services, LLC (“Sentinel”)*

Sentinel is a private probation company, which offers “zero cost” solutions to municipalities that outsource probation and supervision of criminal defendants.<sup>10</sup> Sentinel’s revenue is based solely on fees collected from those under probation or supervision.<sup>11</sup> Private probation companies often act with little or no governmental oversight.<sup>12</sup>

Thomas Barrett of Georgia is one of Sentinel’s victims. His widely reported story reflects the difficult choices that indigent individuals face when dealing with criminal justice debt.<sup>13</sup> Barrett—a homeless, unemployed veteran—was arrested for shoplifting a can of beer worth less than \$2. Barrett refused his “free” public defender because he was told the representation would cost \$50, and he pleaded no contest.<sup>14</sup> He received a \$200 fine, was sentenced to twelve months of probation, and was ordered to wear an electronic monitoring bracelet under the supervision of Sentinel.<sup>15</sup> Sentinel charged Barrett a \$50 set-up

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“Skip Tracy’ means a web-based, multimedia, third-party paid service that allows users to place outgoing calls and choose (a) the phone number from which the calls will appear to have originated; and (b) particular text that may appear on call recipients’ phones as Caller ID.” *Id.* ¶ 3m.

8. *Id.* ¶¶ 24–26.

9. *Id.* ¶¶ 11–14, 48–52.

10. HUMAN RIGHTS WATCH, *supra* note 5, at 14.

11. *Id.* at 15–16.

12. *Id.* at 55–62.

13. *Id.* at 34; Note, *Policing and Profit*, 128 HARV. L. REV. 1723, 1726 (2015); Terry Carter, *Privatized Probation Becomes a Spiral of Added Fees and Jail Time*, A.B.A. J., Oct. 2014, at 61, [http://www.abajournal.com/magazine/article/probationers\\_prison\\_privatized\\_supervision\\_becomes\\_a\\_spiral\\_of\\_added\\_fees\\_j](http://www.abajournal.com/magazine/article/probationers_prison_privatized_supervision_becomes_a_spiral_of_added_fees_j) [<https://perma.cc/S7H4-MVHL>]; Joseph Shapiro, *Measures Aimed At Keeping People Out Of Jail Punish The Poor*, NPR (May 24, 2014, 4:58 PM), <http://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor> [<https://perma.cc/XQX5-E5A7>].

14. Shapiro, *supra* note 13.

15. HUMAN RIGHTS WATCH, *supra* note 5, at 34.

fee, a \$12 daily rental, and an additional \$39 in monthly fees.<sup>16</sup> Unfortunately, Barrett's income was only about \$300 a month, which he earned from donating plasma. When Barrett chose to skip meals to save money, he was limited in his ability to give plasma. Eventually, he fell behind on his payments, and he owed over \$1000 in fees, more than five times the original fine.<sup>17</sup>

Because Sentinel applied payments first to amounts owed to Sentinel, Barrett still owed the full amount of the original fine as well as outstanding amounts due on Sentinel's fees. When he was unable to pay Sentinel's fees, Sentinel petitioned the court to revoke Barrett's probation. Relying on testimony from Sentinel, the court revoked his probation and jailed Barrett.<sup>18</sup> Neither Sentinel nor the court considered his ability to pay.<sup>19</sup>

Although the civil and criminal scenarios both involve the abusive collection of debt, the protections available to the affected parties vary significantly. In the first case, federal statutory remedies under the Fair Debt Collection Practices Act (FDCPA) exist to help consumers faced with abusive debt collectors.<sup>20</sup> For example, the FDCPA prohibits collectors of consumer debt from engaging in harassing or abusive conduct, making false or misleading representations, or using unfair or unconscionable means.<sup>21</sup> It also places restrictions on communications with third parties and establishes affirmative disclosure requirements for collectors.<sup>22</sup> Additionally, in 2010, Congress established the Consumer Financial Protection Bureau (CFPB) to protect consumers "from unfair, deceptive, or abusive acts and practices."<sup>23</sup> The CFPB has investigative, regulatory, and enforcement powers.<sup>24</sup>

The CFPB investigated the complaints against Westlake and filed an administrative proceeding alleging violations of the FDCPA on over 137,000 loan accounts.<sup>25</sup> The CFPB found

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16. Shapiro, *supra* note 13.

17. HUMAN RIGHTS WATCH, *supra* note 5, at 34–35.

18. *Id.* at 2, 34–35.

19. *Id.* at 34–35.

20. 15 U.S.C. §§ 1692–1692o (2012).

21. *Id.* §§ 1692d–1692f.

22. *Id.* §§ 1692c, 1692g.

23. 12 U.S.C. § 5511(b)(2) (2012).

24. *Id.* § 5511(c).

25. Consent Order, *supra* note 6, ¶ 10.

that Westlake violated the FDCPA's prohibitions on debt collectors using false, deceptive, or misleading representations.<sup>26</sup> Specifically, the CFPB found that Westlake used false pretenses in contacting borrowers to determine location information and deceived consumers about who they were and what actions they intended to take, including falsely threatening imminent repossession and criminal charges.<sup>27</sup> Additionally, the CFPB found that the calls to third parties—including employers, families, and friends—illegally disclosed loan information.<sup>28</sup>

Westlake and the CFPB entered into a consent order providing that Westlake pay more than \$44 million in victim relief and \$4.25 million as a civil penalty.<sup>29</sup> Additionally, the order established specific conduct requirements and a compliance plan for Westlake that included recordkeeping and reporting obligations.<sup>30</sup> As a result, the CFPB and the FDCPA provided relief for victims of Westlake's abusive and deceptive actions and established a plan to prevent further abuses.

Mr. Barrett and other similarly situated defendants, on the other hand, do not have the same safeguards. Although United States Supreme Court case law dating back to 1983 requires a finding of ability to pay before revoking an individual's probation,<sup>31</sup> in practice, courts often fail to have such hearings.<sup>32</sup> Moreover, even if courts hold hearings, they often fail to adequately assess ability to pay, and indigent individuals are typically not represented by counsel.<sup>33</sup> A comprehensive federal framework to confront abuses in criminal justice debt collection does not exist. Instead, abuses

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26. *Id.* ¶ 17 (alleging violations under 15 U.S.C. § 1692e).

27. *Id.* ¶¶ 17–28, 48–54 (alleging violations under 15 U.S.C. § 1692e(5), (10), (14) as well as violations under 12 U.S.C. §§ 5531(a), 5536(a)(1)).

28. *Id.* ¶¶ 29–47 (alleging violations under 15 U.S.C. § 1692c(b) as well as violations under 12 U.S.C. §§ 5531(c)(1), 5536(a)(1)(B)).

29. *Id.* ¶¶ 98–100, 107–111; Press Release, Consumer Fin. Prot. Bureau, CFPB Orders Indirect Auto Finance Company to Provide Consumers \$44.1 Million in Relief for Illegal Debt Collection Tactics (Oct. 1, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-orders-indirect-auto-finance-company-to-provide-consumers-44-1-million-in-relief-for-illegal-debt-collection-tactics/> [<https://perma.cc/44TM-VDT6>]. Under the Consent Order, victim relief includes payments to affected consumers for nearly \$26 million and reductions in amounts owed of nearly \$17.5 million. Consent Order, *supra* note 6, ¶¶ 98–100.

30. Consent Order, *supra* note 6, ¶¶ 91–97, 116–17, 121–24.

31. *Bearden v. Georgia*, 461 U.S. 660, 671–73 (1983).

32. Sobol, *Charging the Poor*, *supra* note 4, at 512–14.

33. *Id.* at 514–15.

in criminal justice debt collection are often not addressed, and, even in situations where they are raised, it is typically by a non-profit group filing a lawsuit that is limited to a particular municipality.<sup>34</sup> A piecemeal municipality-by-municipality approach, however, is not an effective means of addressing the national problems of abuses in criminal justice debt.<sup>35</sup>

Abusive collection of criminal justice debt is a significant and growing problem in the United States. Estimates indicate that “tens of millions”<sup>36</sup> have been charged criminal justice debt aggregating more than \$50 billion.<sup>37</sup> Fueled by the development of mass incarceration and budgetary concerns at the state and local level, the debt burden on defendants has increased dramatically over the last thirty years.<sup>38</sup> Moreover, unintended consequences of current efforts to reduce incarceration may further increase criminal justice debt as municipalities replace incarceration with fines or charge fees for participation in alternative programs.<sup>39</sup> Unfortunately, those unable to pay these assessments face not only increased criminal justice debt but may also wind up incarcerated for their failure to pay.<sup>40</sup>

The abuses in criminal justice debt collection also include over-reliance on the criminal justice system to fund municipal operations. The Ferguson report revealed a system in which all local parties—the city, the police, and the court—focused on

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34. Equal Justice Under Law is a non-profit group that has filed several actions seeking to end abuses related to the collection of criminal justice debt including actions to end the use of cash bail systems, debtors’ prisons, and abusive probation practices. See *Litigation*, EQUAL JUSTICE UNDER LAW, <http://equaljusticeunderlaw.org/wp/current-cases/> (last visited Apr. 3, 2017) [<https://perma.cc/3PK9-M6RW>].

35. See Radley Balko, *A Debtors’ Prison in Mississippi*, WASH. POST (Oct. 21, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/10/21/a-debtors-prison-in-mississippi/> [<https://perma.cc/BD2P-GNPD>].

36. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 516 (2011).

37. LAUREN-BROOKE EISEN, BRENNAN CTR. FOR JUSTICE, CHARGING INMATES PERPETUATES MASS INCARCERATION 1 (2015), [https://www.brennancenter.org/sites/default/files/blog/Charging\\_Inmates\\_Mass\\_Incarceration.pdf](https://www.brennancenter.org/sites/default/files/blog/Charging_Inmates_Mass_Incarceration.pdf) [<https://perma.cc/SZJ8-UR9P>].

38. See *infra* Part I.B.

39. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1086–92 (2015).

40. For a more detailed discussion of the problems that arise when indigent individuals are incarcerated for failure to pay criminal justice debt, see Sobol, *Charging the Poor*, *supra* note 4.

revenue collection rather than public safety.<sup>41</sup> Similarly, the increasing reliance on outsourced services has created further abuses based on lack of supervision of private, for-profit companies who act with authority and powers delegated by municipalities.<sup>42</sup> Moreover, criminal justice debt is often imposed without regard to ability to pay.<sup>43</sup> As a result, indigent individuals and their families become trapped in a poverty cycle that they can never escape.<sup>44</sup>

The poor and minorities are most susceptible to abusive collection practices.<sup>45</sup> Ironically, the inability to pay often results in additional fees, known as poverty penalties that exist solely because of an individual's inability to pay. These penalties include late fees, installment charges, and supervision assessments until payment is made. Criminal justice debt and the corresponding criminal record can lead to a loss of welfare benefits and create difficulties in obtaining financing, housing, and employment, which, in turn, further reduce the ability to repay the debt.<sup>46</sup> Moreover, the fear of arrest or incarceration for failure to pay creates distrust in the system.<sup>47</sup> Additionally, the use of discretionary fines and fees is subject to abuse and discrimination in practice.<sup>48</sup> A more effective system is necessary for addressing abuses in the

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41. U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 10 (2015), [http://www.justice.gov/crt/about/spl/documents/ferguson\\_findings\\_3-4-15.pdf](http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf) [<https://perma.cc/2BK4-5AC2>] [hereinafter FPD REP.]. The report on the Ferguson Police Department was initiated after an officer's 2014 fatal shooting of Michael Brown, an unarmed black teenager. Eric Holder, U.S. Attorney Gen., U.S. Dep't of Justice, Attorney General Holder Delivers Update on Investigations in Ferguson, Missouri, JUSTICE.GOV (Mar. 4, 2015), <http://www.justice.gov/opa/speech/attorney-general-holder-delivers-update-investigations-ferguson-missouri> [<https://perma.cc/A4TC-HSXM>]. In the report, the DOJ investigated not only the police department but also municipal and court officials. FPD REP. *supra*, at 1. The examination included interviews of officials and city residents, courtroom observations, and review of police, city, and court records. *Id.* For a more detailed discussion of the background, methodology, findings, and conclusions of the report, see Neil L. Sobol, *Lessons Learned from Ferguson: Ending Abusive Collection of Criminal Justice Debt*, 15 U. MD. L.J. OF RACE RELIGION GENDER & CLASS 293, 295–303 (2015).

42. *See infra* Part I.C.2.

43. *See infra* Part I.C.3.

44. *See infra* Part I.C.4.

45. *See infra* Part I.C.4, 5.

46. *See infra* Part I.C.4.

47. *Id.*

48. *See infra* Part I.C.5.

collection of criminal justice debt.

A federal statutory and regulatory approach addresses abuse in the collection of consumer debt. The FDCPA sets forth prohibited practices (e.g., time and place restrictions on communications), and required practices (e.g., disclosure notices) for the collection of consumer debt.<sup>49</sup> The CFPB administers the FDCPA, collects consumer complaint data, and coordinates enforcement, outreach, and research activities with federal, state, and local governments and organizations.<sup>50</sup>

I advocate a similar system for confronting collection abuse in the criminal justice arena. I suggest the adoption of a federal statute, the Fair Justice Debt Practices Act (FJDPA), and use of the Department of Justice (DOJ) to help with the administration of the FJDPA and the coordination of enforcement, research, and outreach activities.

I begin by identifying the collection abuses that exist in the criminal justice system and how such abuses adversely impact the poor and minorities. Part II describes the history of FDCPA and CFPB and shows that the concerns that led to the creation of a federal framework for addressing civil debt are at least as great, if not greater, than the concerns that exist in the collection of criminal justice debt given the additional consequences, including the threat of loss of liberties.

Part III examines the principal remedies developed in the FDCPA and CFPB for civil debt collection and makes proposals for similar methods to address abuses in the collection of criminal justice debt. Finally, in Part IV, I briefly address some of the federalism concerns that will likely arise based on my call for a federal solution.

The consequences of abuses in the criminal justice system demand that a better system be developed. We should draw on our experience in combating abuses in consumer debt collection to help prevent the even more severe consequences that arise in collecting criminal justice debt.

## I. ABUSES IN CRIMINAL JUSTICE DEBT COLLECTION

While the issue of mass incarceration in the United States has generated substantial political debate and media coverage,

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49. See *infra* Part III.A, B.

50. See *infra* Part III.C.

criminal justice debt impacts more citizens than incarceration.<sup>51</sup> Criminal justice debt has grown along with the growth in incarceration.<sup>52</sup> Moreover, criminal justice debt is not limited to those incarcerated as it may also extend to anyone arrested or under supervision.<sup>53</sup> Approximately one-quarter to one-third of American adults have an arrest or criminal record.<sup>54</sup> In 2012, police made over 12 million arrests.<sup>55</sup> This Part identifies the components of criminal justice debt, explains the reasons for growth in criminal justice debt, and identifies major abuses associated with the collection of criminal justice debt, including the collateral consequences and disproportionate impact on the poor and minorities.

### A. *Components of Criminal Justice Debt*

Criminal justice debt is a broad concept encompassing all of the economic charges imposed in the justice process. Often labeled as legal financial obligations, these economic sanctions

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51. See JAMES JACOBS, *THE ETERNAL CRIMINAL RECORD* 93 (2015) (claiming that while scholars and media focus on America's disproportionate use of incarceration, the "vast majority of convicted misdemeanants are not incarcerated; even the majority of convicted felons are not sentenced to prison"); Natapoff, *supra* note 39, at 1057 (describing how misdemeanor charges represent approximately four-fifths of the cases in state courts and impact 10 million Americans annually); Jason Furman & Sandra Black, *Fines, Fees, and Bail: An Overlooked Part of the Criminal Justice System That Disproportionately Impacts the Poor*, HUFFINGTON POST: THE BLOG (Dec. 3, 2015, 12:15 PM), [http://www.huffingtonpost.com/jason-furman/fines-fees-and-bail-an-ov\\_b\\_8702912.html](http://www.huffingtonpost.com/jason-furman/fines-fees-and-bail-an-ov_b_8702912.html) [<https://perma.cc/NQB7-FKAB>] (stating that criminal justice reforms should not be limited to mass incarceration as reform is also necessary to address "regressive monetary punishments").

52. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 2–3.

53. RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'T JUSTICE CENT., *REPAYING DEBTS* 3 (2007), [http://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying\\_debts\\_full\\_report.pdf?sfvrsn=2](http://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying_debts_full_report.pdf?sfvrsn=2) [<https://perma.cc/R6QW-BED4>] (recognizing that "many individuals . . . pass through the court system and owe substantial financial obligations but have not been sentenced to prison or jail").

54. JACOBS, *supra* note 51, at 1 (claiming that "federal and state criminal repositories contain criminal records for approximately 25 percent of the U.S. adult population"); Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> [<https://perma.cc/6ZFF-WZ8T>] (claiming that "the FBI currently has 77.7 million individuals on file in its master criminal database—or nearly one out of every three American adults").

55. JACOBS, *supra* note 51, at 94.

can be assessed at any stage in the process from pre-conviction to sentencing to incarceration to probation or supervision.<sup>56</sup> The charges include fines, restitution, bail, and fees.<sup>57</sup> Additionally, the charges may be described as assessments, surcharges, or sanctions.<sup>58</sup> Purported justifications for the charges include punishment, deterrence, victim compensation, and reimbursement.<sup>59</sup> Child support obligations that accrue during incarceration are also a significant and growing concern for many indigent inmates, but they are beyond the scope of this Article.<sup>60</sup> Likewise, restitution, which has traditionally focused on the compensation of victims, is a significant financial burden faced by criminal defendants and is also beyond the reach of this Article.<sup>61</sup> Instead, this Article will primarily focus on abuses related to the collection of bail, fines, and fees.

On any given day, over 450,000 people in the United States are incarcerated without having been convicted of an offense.<sup>62</sup>

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56. Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 227 (2012), <http://tcr.sagepub.com/content/16/2/221> [<https://perma.cc/5SGR-HU49>].

57. Sobol, *Charging the Poor*, *supra* note 4, at 498–504 (providing a more detailed development of the components and history of criminal justice debt). For a state-by-state listing of examples of fines and fees, see ALEXES HARRIS, A POUND OF FLESH 28–41 tbl.2.4 (2016).

58. MCLEAN & THOMPSON, *supra* note 53, at 2.

59. Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 CLEARINGHOUSE REV. J. POV. L. & POL'Y 187, 188 (2007).

60. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 349 (2012). Professor Cammett discusses the impact of child support obligations incurred during incarceration on re-entry and the right to vote. *Id.* at 384–86. *See also* DOUGLAS N. EVANS, JOHN JAY COLL. OF CRIMINAL JUSTICE, THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION 5–6 (2014), <https://www.prisonfellowship.org/site/wp-content/uploads/2015/12/The-Debt-Penalty-John-Jay-August-2014.pdf> [<https://perma.cc/WBM4-UXVJ>] (describing survey results that inmates rank the need for child support assistance higher than employment or housing assistance); MITALI NAGRECHA, MARY FAINSOD KATZENSTEIN & ESTELLE DAVIS, CTR. FOR CMTY. ALTS., FIRST PERSON ACCOUNTS OF CRIMINAL JUSTICE DEBT: WHEN ALL ELSE FAILS, FINING THE FAMILY 28 (2015), <http://communityalternatives.org/pdf/Criminal-Justice-Debt.pdf> [<https://perma.cc/7AQ7-X3UZ>] (“Paying thousands of dollars in accumulated child support arrears from prison is not only unimaginable, but impossible.”).

61. Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 101–05 (2014) (discussing the evolution of criminal restitution from disgorgement of defendant’s unjust enrichment to compensation for victim’s losses).

62. PETER WAGNER & BERNADETTE RABUY, MASS INCARCERATION: THE

Instead, they are in jail because they have either been denied bail or, as in the vast majority of cases, they are unable to make a bail payment.<sup>63</sup> The imposition of bail impacts the release of an arrested individual before trial.<sup>64</sup> The purported purposes include preventing flight risk and reducing danger to society.<sup>65</sup> The goal is to set bail at a rate which is not punitive but will encourage defendants to appear at trial.<sup>66</sup> However, bail is often set based solely on the alleged offense without regard to the individual's ability to pay.<sup>67</sup>

Fines are assessed as a part of sentencing and are typically associated with a punitive or deterrent rationale.<sup>68</sup> The hope is that the amount of the fine will not only sufficiently punish current offenders but also deter potential future offenders from committing the offense. Fines are often used as a supplement to imprisonment.<sup>69</sup> Additionally, fines are increasingly becoming the sole sanction for many misdemeanors, including traffic violations.<sup>70</sup> While statutes or rules may set forth certain mandatory fines, judges also have considerable discretion in setting other fine amounts.<sup>71</sup>

Fees are generally thought of as a method of reimbursement.<sup>72</sup> For purposes of this Article, fees also include

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WHOLE PIE 2016 (2016), <https://www.prisonpolicy.org/reports/pie2016.html> [<https://perma.cc/AFD2-3PZT>] (chart reflecting that 451,000 of the 646,000 inmates in local jails are not convicted).

63. Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), [http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?\\_r=0](http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0) [<https://perma.cc/U8PB-JYBD>].

64. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 1.

65. *Id.* See also Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 503–13 (2012) (describing the development of the use of dangerousness standard for determining pretrial release).

66. Shaila Dewan, *When Bail is out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <http://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html> [<https://perma.cc/C8RK-6KAC>]; Furman & Black, *supra* note 51.

67. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 7; Furman & Black, *supra* note 51.

68. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 1.

69. Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 127 (1996).

70. Natapoff, *supra* note 39, at 1067–71 (discussing the move to fine-only and non-jailable misdemeanors as alternatives to incarceration).

71. Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1849–50 (2015) (describing mandatory fines in Florida, Pennsylvania, and Washington).

72. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 1 (recognizing that fees may also have compensatory, punitive, and deterrent purposes).

court costs and surcharges. Recipients of fees include the judicial system (courts, prosecutors, and defense counsel), the incarceration system (jails and prisons), the supervision system (probation and parole companies), and the collection system (debt collectors).<sup>73</sup> Fees can apply at any stage from pre-conviction to post-incarceration supervision. Fees may apply even when individuals are not convicted.<sup>74</sup> As with fines, mandatory fees are set by legislation or court rule; however, judges often impose additional discretionary fees.<sup>75</sup> Moreover, fees imposed often fund items that are not directly related to the offense or even to the criminal justice system.<sup>76</sup> For example, fees may go to general fund revenue or specific purposes, such as a library or training.<sup>77</sup>

### *B. Growth of Criminal Justice Debt*

While concerns about criminal justice debt date back to the 1980s, the amount of criminal justice debt has grown exponentially in the last thirty years.<sup>78</sup> Estimates reflect that over ten million individuals in the United States have criminal justice debt aggregating over \$50 billion and that the amount is growing.<sup>79</sup> One study of eleven states found a per-state average of \$178 million in uncollected criminal justice debt.<sup>80</sup> Approximately two-thirds of prisoners have criminal justice debt.<sup>81</sup> This section will examine mass incarceration and budgetary pressures as two likely explanations for the growth

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73. See, e.g., Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 322 (2014) (identifying that assessments of fees go beyond the courts and include prisons and jails).

74. See, e.g., SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, ELLA BAKER CENT., FORWARD TOGETHER, RESEARCH ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 14 (2015), <http://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> [<https://perma.cc/3JJD-EUDF>] (public defender fees in Florida and Ohio are assessed even when defendants are found not guilty).

75. Eaglin, *supra*, note 71, at 1849–50.

76. PEPIN, *supra* note 3, at 6–8.

77. MCLEAN & THOMPSON, *supra* note 53, at 2.

78. Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 67–68 (2013). See also Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555, 556–57 (2011).

79. EISEN, CHARGING INMATES, *supra* note 37, at 1.

80. MCLEAN & THOMPSON, *supra* note 53, at 7.

81. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 3.

in criminal justice debt. Additionally, it will identify how incarceration alternatives may increase the burdens of criminal justice debt.

### 1. Mass Incarceration and the Growth of Criminal Justice Debt

As incarceration has exploded, so too has the incidence of criminal justice debt.<sup>82</sup> In 1985, the number of adults incarcerated in the United States was approximately 750,000, with about 500,000 in prison and 250,000 in jail.<sup>83</sup> By 2008, incarceration had tripled and reached its peak at over 2.3 million with more than 1.6 million adults in prison and over 780,000 adults in jail.<sup>84</sup> While recent levels have dropped, more than 2.2 million adults are still currently incarcerated.<sup>85</sup>

As the United States leads the world in “mass incarceration,” it has also become the leader in “mass supervision.”<sup>86</sup> The over two million people currently subject to incarceration represent only about one-third of those under correctional control, as an additional 820,000 are subject to parole, and 3.8 million are subject to probation.<sup>87</sup> The total number of adults under correctional supervision (probation, parole, jail or prison) is over 6.8 million, reflecting 2.8 percent of the population or approximately one in thirty-six adults in the U.S.<sup>88</sup> In contrast, in 1980, only 1.1 percent of adults were subject to correctional supervision.<sup>89</sup>

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82. Katzenstein & Nagrecha, *supra* note 78, at 556–57.

83. TOM HESTER, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 103957, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1985, at 6 tbl.1.2 (1987), <http://www.bjs.gov/content/pub/pdf/cpus85.pdf> [<https://perma.cc/A2AT-DJ7Q>].

84. DANIELLE KAEBLE, LAUREN GLAZE, ANASTASIOS TSOUTIS & TODD MINTON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 249513, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 2 tbl.1 (2015), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf> [<https://perma.cc/Y27U-BB2N>].

85. *Id.* at 2.

86. Eaglin, *supra* note 71, at 1843. Although the United States has the most prisoners, Seychelles has recently overtaken the United States to become the country with the highest prison population rate. ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, WORLD PRISON POPULATION LIST 2 (2016), [http://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition.pdf) [<https://perma.cc/HTG9-PB5R>].

87. WAGNER & RABUY, *supra* note 62.

88. DANIELLE KAEBLE ET AL., *supra* note 84, at 1.

89. TRACY L. SNELL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS,

The growth in incarceration, probation, and parole has led to increased costs.<sup>90</sup> From 1983 to 2012, criminal justice costs grew by more than 650 percent.<sup>91</sup> One study found that the cost of the expansion in the criminal justice system during the thirty-year period was \$3.4 trillion.<sup>92</sup> By 2012, criminal justice costs were over \$270 billion with “local spending compris[ing] approximately half of total expenditures.”<sup>93</sup> The annual expenditures equate to more than \$870 per capita.<sup>94</sup>

## 2. Budgetary Concerns and Growth in Criminal Justice Debt

At the same time that mass incarceration, probation, and parole have burdened the criminal justice system with increased costs, governments have had to confront declining budgets. As mass incarceration reached its peak levels in 2007 and 2008, the recession hit states and localities resulting in reduced tax revenues and funding.<sup>95</sup> Rather than increasing tax rates, many municipalities sought to pass the costs of the criminal justice system on to defendants.<sup>96</sup> For example, in New Orleans, criminal justice debt “account[s] for almost two-

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NCJ 156675, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1993, at 1 (1995), <http://www.bjs.gov/content/pub/pdf/cpus93ex.pdf> [<https://perma.cc/H2UD-B4CC>].

90. COUNCIL OF ECON. ADVISERS, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 10 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf) [<https://perma.cc/J6GH-DWQA>].

91. EISEN, *supra* note 37, at 2.

92. COMMUNITIES UNITED ET AL., THE \$3.4 TRILLION MISTAKE: THE COST OF MASS INCARCERATION AND CRIMINALIZATION, AND HOW JUSTICE REINVESTMENT CAN BUILD A BETTER FUTURE FOR ALL 7 (2016), [http://www.maketheroad.org/pix\\_reports/Justice%20Reinvestment%20Final%20Report.pdf](http://www.maketheroad.org/pix_reports/Justice%20Reinvestment%20Final%20Report.pdf) [<https://perma.cc/ZJ53-DNVN>].

93. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 2.

94. COUNCIL OF ECON. ADVISERS, *supra* note 90, at 10.

95. SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., ECONOMIC IMPACTS OF PRISON GROWTH 2 (2010), <https://www.fas.org/sgp/crs/misc/R41177.pdf> [<https://perma.cc/7GB7-VUXR>]. See also ALEX BENDER ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 12 (2015), <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf> [<https://perma.cc/LX3X-V4NX>] (describing how the 2008 recession led to “unprecedented budget cuts” for the California court system); Eaglin, *supra* note 71, at 1843–44, 1866–67.

96. EISEN, *supra* note 37, at 2.

thirds of the criminal court's general operating budget."<sup>97</sup> Additionally, many municipalities impose criminal justice debt to help overcome general budget deficits unrelated to criminal justice services.<sup>98</sup>

### 3. Decriminalization

Although mass incarceration and budget concerns have contributed to the growth in criminal justice debt, efforts to reduce incarceration may create unintended consequences by increasing the debt burden on indigent defendants.<sup>99</sup> Some states have increased fees to "offset diminishing funding for alternatives to incarceration."<sup>100</sup> In an attempt to reduce incarceration, many states are now decriminalizing certain misdemeanors by making them fine-only or non-jailable offenses.<sup>101</sup> With a more streamlined process and providing fewer procedural protections than jailable offenses, decriminalization has led to a net-widening effect as municipalities have expanded coverage and imposed criminal justice debt on more individuals.<sup>102</sup>

#### *C. Abusive Acts in Collecting Criminal Justice Debt*

Abuses in collection have accompanied the growth of criminal justice debt and are expected to increase as debt escalates.<sup>103</sup> The abuses include the misplaced reliance on monetary sanctions as a tool for revenue collection; the failure to adequately supervise private parties who perform traditional governmental functions in collecting criminal justice debt; the failure to take into account ability to pay in imposing criminal justice debt and incarcerating defendants; and the disproportionate and discriminatory impact on poor and minorities.

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97. AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 8 (2010), [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf](https://www.aclu.org/files/assets/InForAPenny_web.pdf) [<https://perma.cc/7JS8-VLD3>].

98. Eaglin, *supra* note 71, at 1867–68.

99. Natapoff, *supra* note 39, at 1102–04.

100. Eaglin, *supra* note 71, at 1848–49.

101. *Id.* at 1845; Natapoff, *supra* note 39, at 1067.

102. Natapoff, *supra* note 39, at 1059.

103. Furman & Black, *supra* note 51.

### 1. Focus on Revenue Collection Rather than Public Safety

The March 2015 report on Ferguson described in shocking detail a criminal justice system focused more on revenue maximization than the protection of public safety.<sup>104</sup> Unfortunately, the experience in Ferguson is neither new nor unique.<sup>105</sup> The misplaced reliance on profit generation rather than public safety creates public mistrust of the government.<sup>106</sup> The over-reliance on revenue collection is most evident in the growing and pervasive use of fines and fees by municipalities.

#### *a. Abusive Use of Fines*

A major criticism of some municipalities is their unfettered use of fines to generate revenue.<sup>107</sup> Fines have seen a dramatic increase in the last few decades. For example, from 1986 to 2004, the percentage of incarcerated individuals who had also received a fine more than tripled.<sup>108</sup> Misdemeanor offenses have also grown at significant rates, currently representing about 80 percent of state court dockets and including over ten million non-traffic cases each year.<sup>109</sup> As misdemeanors have

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104. FPD REP., *supra* note 41, at 10. For a more detailed discussion of the Ferguson Report and how its conclusions are not limited to Ferguson, Missouri, see Sobol, *supra* note 41.

105. Vanita Gupta, Head, Civ. Rights Div., Remarks at the Symposium on the Criminalization of Poverty at the University of Michigan Law School (Feb. 19, 2016), <http://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-symposium-criminalization> [https://perma.cc/3P6R-B26C] (declaring that the “problem of excessive fines and fees extends well beyond Ferguson . . . [and] exists in many of the country’s 6,500 municipal courts”); DEUONO-POWELL ET AL., *supra* note 74, at 16; Sobol, *supra* note 41, at 294 n.6.

106. Loretta E. Lynch, U.S. Attorney Gen., Remarks at White House Convening on Incarceration and Poverty (Dec. 3, 2015), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and> [https://perma.cc/YV36-84G3].

107. Emily Shaw, *Where Local Governments Are Paying the Bills with Police Fines*, SUNLIGHT FOUND. (Sept. 26, 2012, 12:02 PM), <https://sunlightfoundation.com/2016/09/26/where-local-governments-are-paying-the-bills-with-police-fines/> [https://perma.cc/C9GA-9HCH].

108. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 3 (explaining that 12 percent of inmates received fines in 1986 and 37 percent of inmates received fines in 2004) (citing Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1770 (2010)).

109. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320–21

increased, economic sanctions accompanying these offenses have “ballooned.”<sup>110</sup> Fines for these lower-level offenses have led to concerns about whether courts are just acting as collection agents and whether the economic charges are merely a form of taxes.<sup>111</sup>

The move towards decriminalization of misdemeanors to fine-only offenses also creates the potential for abuse by municipalities using criminal justice debt as funding sources.<sup>112</sup> Under such circumstances, due to net-widening effects and lack of procedural protections, more individuals become vulnerable to the imposition of fines and fees.<sup>113</sup> The alternatives to incarceration create opportunities, or “revenue traps,” for local governments to generate revenue through new fines and fees imposed on defendants.<sup>114</sup>

The Ferguson report reflects an emphasis on using fines to generate revenue at all stages of the criminal justice process.<sup>115</sup> Police officers were under “pressure . . . to write citations, independent of any public safety need”<sup>116</sup> and to “fill the revenue pipeline.”<sup>117</sup> Promotion of police officers was based on the number of tickets issued.<sup>118</sup> Additionally, daily postings at the police station highlighted the top ticket producers.<sup>119</sup> In response to the city establishing revenue generation as a primary goal, the municipal court set fines at levels that were either at or near the highest rates in the state, created new fines, and worked with city officials to meet revenue targets.<sup>120</sup> For example, the court established a failure to appear fine which led to the collection of more than \$440,000 in 2013.<sup>121</sup> The DOJ alleges that the court routinely used arrest warrants as a collection tool rather than to promote public safety.<sup>122</sup> In

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(2012).

110. *Id.* at 1326.

111. Natapoff, *supra* note 39, at 1099 (quoting a 2011–12 policy paper from the Conference of State Court Administrators).

112. *Id.* at 1100–01.

113. *Id.* at 1059.

114. *Id.* at 1098–1103.

115. FPD REP., *supra* note 41, at 10.

116. *Id.*

117. *Id.* at 13.

118. *Id.* at 2.

119. *Id.* at 11.

120. *Id.* at 14.

121. *Id.* at 43.

122. *Id.* at 55.

2013, the court issued 33,000 warrants, and “[m]any residents were jailed because they could not afford the hundreds of dollars in court fines for offenses such as traffic violations.”<sup>123</sup>

Excessive use of fines is not limited to Ferguson. Some municipalities faced with severe budget issues “ticket everything in sight to keep the town functioning.”<sup>124</sup> These cities encourage law enforcement to issue citations, and the “courts are the mechanism for collection.”<sup>125</sup>

For example, a study of traffic ticket revenue in Colorado found forty towns collecting more than the state’s four percent average with the top offender—Campo, Colorado—collecting 93 percent of its revenue from traffic tickets.<sup>126</sup> Similarly, a study of North Carolina counties during 1990 to 2003 demonstrated that when county revenue decreased in any given year, the following year led to a statistically significant increase in traffic tickets issued.<sup>127</sup>

The use of fines to generate revenue is not limited to traffic violations. Cities also fined individuals for staying at a boyfriend’s house, having tall grass, wearing saggy pants, or failing to sign up for a designated trash collection service.<sup>128</sup> Reports show that as states have begun to put restrictions on revenue attributable to traffic fines, municipalities have apparently adopted more aggressive use of non-traffic fines.<sup>129</sup>

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123. DEVUONO-POWELL ET AL., *supra* note 74, at 16.

124. Jack Hitt, *Police Shootings Won’t Stop Unless We Also Stop Shaking Down Black People*, MOTHERJONES.COM (Sept.–Oct. 2015), <http://www.motherjones.com/politics/2015/07/police-shootings-traffic-stops-excessive-fines> [https://perma.cc/TX9A-29FZ] (quoting William Maurer, an attorney with the Institute for Justice).

125. Whitney Bennis & Blake Strode, *Debtors’ Prison in 21st-Century America*, ATLANTIC (Feb. 23, 2016), <http://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/> [https://perma.cc/4BYF-ZKT2].

126. Alexa Corcoran, *A Handful of Colorado Towns Rely Heavily on Money from Traffic Tickets*, ROCKY MOUNTAIN PBS NEWS (Oct. 12, 2016, 10:04 PM), <http://www.rmpbs.org/blogs/news/a-handful-of-colorado-towns-rely-heavily-on-money-from-traffic-tickets/> [https://perma.cc/EEM7-D89L].

127. Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 72 (2009) (discussed in COUNCIL OF ECON. ADVISERS, *supra* note 2, at 2).

128. Ryan J. Reilly & Mariah Stewart, *Fleece Force: How Police and Courts Around Ferguson Bully Residents and Collect Millions*, HUFFINGTON POST (Mar. 26, 2015, 7:33 AM), [http://www.huffingtonpost.com/2015/03/26/st-louis-county-municipal-courts\\_n\\_6896550.html](http://www.huffingtonpost.com/2015/03/26/st-louis-county-municipal-courts_n_6896550.html) [https://perma.cc/DFX3-DY5P] (staying at a boyfriend’s house is viewed as violation of an occupancy permit).

129. Monica Davey, *Lawsuit Accuses Missouri City of Fining Homeowners to Raise Revenue*, N.Y. TIMES (Nov. 4, 2015), <http://www.nytimes.com/2015/11/05/us/lawsuit-accuses-missouri-city-of-fining-homeowners-to-raise->

For example, Pagedale and Frontenac, Missouri, saw increases in non-traffic arrests of 495 percent and 364 percent, respectively, following state-imposed caps on traffic-ticket revenues.<sup>130</sup> In November 2015, a civil rights class action complaint was filed against the City of Pagedale claiming that it used its “code enforcement and municipal court[s]” as “revenue-generating machines” that “violate[] the Due Process and Excessive Fines Clauses of the U.S. Constitution.”<sup>131</sup>

Additionally, municipalities are increasingly using new technologies to become more aggressive in collecting fines. For example, in 2011, 70 percent of agencies reported that they had access to electronic license plate readers.<sup>132</sup> Port Arthur, Texas, is one of many municipalities using the readers to stop and arrest motorists with unpaid traffic fines.<sup>133</sup> Before the readers, officers would apprehend drivers with outstanding fines only if the drivers were stopped for other offenses.<sup>134</sup> The readers now allow police to stop drivers based solely on outstanding fines.<sup>135</sup> Drivers are often told to “pay up or go to jail.”<sup>136</sup> With the adoption of the readers, annual ticket revenue in Port Arthur surged from \$1.2 million to \$2.1 million.<sup>137</sup> Additionally, Texas has enacted legislation permitting the use of credit and debit card machines in police cars so that police

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revenue.html?ref=us&\_r=1 [https://perma.cc/Q6PC-9XVB]; Jennifer S. Mann, *Municipalities Ticket for Trees and Toys, As Traffic Revenue Declines*, ST. LOUIS POST-DISPATCH (May 24, 2015), [http://www.stltoday.com/news/local/crime-and-courts/municipalities-ticket-for-trees-and-toys-as-traffic-revenue-declines/article\\_42739be7-afd1-5f66-b325-e1f654ba9625.html](http://www.stltoday.com/news/local/crime-and-courts/municipalities-ticket-for-trees-and-toys-as-traffic-revenue-declines/article_42739be7-afd1-5f66-b325-e1f654ba9625.html) [https://perma.cc/5WNG-2ZR3].

130. Hitt, *supra* note 124.

131. Civil Rights Class Action Complaint ¶ I, *Whitner v. City of Pagedale*, No. 14:15-cv-01655, 2016 WL 915303 (E.D. Mo. Nov. 4, 2015), <http://ij.org/wp-content/uploads/2015/11/ECF-1-Complaint-FILE-STAMPED-11.04.15.pdf> [https://perma.cc/DP4Q-YJCX].

132. Alex Campbell & Kendall Taggart, *The Ticket Machine*, BUZZFEED (Jan. 26, 2016, 8:19 PM), <http://www.buzzfeed.com/alexcampbell/the-ticket-machine#.kiN209Eaxq> [https://perma.cc/74NM-SGXU] (citing POLICE EXEC. RESEARCH FORUM, HOW ARE INNOVATIONS IN TECHNOLOGY TRANSFORMING POLICING? 1 (2012), [http://www.policeforum.org/assets/docs/Critical\\_Issues\\_Series/how%20are%20innovations%20in%20technology%20transforming%20policing%202012.pdf](http://www.policeforum.org/assets/docs/Critical_Issues_Series/how%20are%20innovations%20in%20technology%20transforming%20policing%202012.pdf) [https://perma.cc/DD44-6UG7]).

133. Campbell & Taggart, *supra* note 132.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

can collect fines.<sup>138</sup> This has led to criticism that police are becoming “mobile debt collectors.”<sup>139</sup>

*b. Abusive Use of Fees*

Fines are often just the tip of the monetary obligation iceberg. The fees assessed to defendants, especially for misdemeanors, often exceed the penalties for the underlying offense.<sup>140</sup> For example, California adds \$390 in statutory fees and assessments to the \$100 fine for a minor traffic violation.<sup>141</sup> Moreover, if the defendant fails to appear in court or pay the charge, an additional \$325 is added, turning the initial charge of \$100 into an \$815 obligation.<sup>142</sup> Florida’s system of using fees to fund its courts has been described as “cash register justice.”<sup>143</sup> From 1996 to 2007, Florida added more than twenty categories of fees.<sup>144</sup>

Over the last several years, fees have escalated even more than fines.<sup>145</sup> While fees for criminal defendants date back to 1846, they have now grown significantly both in number (new fees) and in dollar amount.<sup>146</sup> Since 2010, all but two states and the District of Columbia have increased their criminal

138. TEX. CODE CRIM. PROC. ANN. ART. 103.0025 (b)(2) (West Supp. 2016).

139. Dave Maass, “No Cost” License Plate Readers Are Turning Texas Police into Mobile Debt Collectors and Data Miners, ELECTRONIC FRONTIER FOUND.: DEEPLINKS (Jan. 26, 2016), <https://www.eff.org/deeplinks/2016/01/no-cost-license-plate-readers-are-turning-texas-police-mobile-debt-collectors-and> [<https://perma.cc/H2VB-Z85R>]; Debra Cassens Weiss, *Texas Police Turn into ‘Mobile Debt Collectors’ with License-Reader Program*, A.B.A. J. (Feb. 01, 2016, 06:15 AM), [http://www.abajournal.com/news/article/texas\\_police\\_turn\\_into\\_mobile\\_debt\\_collectors\\_with\\_license\\_reader\\_program](http://www.abajournal.com/news/article/texas_police_turn_into_mobile_debt_collectors_with_license_reader_program) [<https://perma.cc/H9YW-VGKK>].

140. HUMAN RIGHTS WATCH, *supra* note 5, at 14.

141. BENDER ET AL., *supra* note 95, at 9.

142. *Id.* at 10. See also Hitt, *supra* note 124 (describing how government agencies can add fees to fines, converting a \$35 fine to a monetary charge of \$235).

143. REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES 1 (2010), <https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf?nocdn=1> [<https://perma.cc/25D9-WUK7>].

144. *Id.* at 1. For more examples of the imposition of multiple fees in jurisdictions, see PEPIN, *supra* note 3, at 6–8.

145. Harris et al., *supra* note 108, at 1769–71; Pat O’Malley, *Politicizing the Case for Fines*, 10 CRIMINOLOGY & PUB. POL’Y 547, 548 (2011).

146. Eisen, *supra* note 73, at 319, 322; Tanzina Vega, *Costly Prison Fees are Putting Inmates Deep in Debt*, CNN: MONEY (Sept. 18, 2015), <http://money.cnn.com/2015/09/18/news/economy/prison-fees-inmates-debt/index.html> [<https://perma.cc/85HS-NQAW>] (quoting Lauren-Brooke Eisen).

justice fees.<sup>147</sup> Although policies have been developed to reduce discretion in sentencing, policies setting forth restrictions on legislatures and judges in setting and applying fees are rare.<sup>148</sup> Unfortunately, “the decision to raise or create new user fees is rarely made with much deliberation or thought about the consequences.”<sup>149</sup>

Fees are now imposed in many jurisdictions at every stage in the process.<sup>150</sup> For example, at the pre-conviction stage, defendants may be billed for the issuance of a warrant, lab testing, and monitoring devices.<sup>151</sup> At least forty-three states assess application fees for public defender services.<sup>152</sup> At sentencing, charges may include court costs, and mandatory fees imposed by the state, as well as discretionary fees.<sup>153</sup> Additionally, for those incarcerated, at least forty-three states charge for room and board, and thirty-five states charge for medical care.<sup>154</sup> Inmates may be charged for services provided including toilet paper, uniforms, and telephone calls.<sup>155</sup> Fees for prisoners have increased dramatically, as, in 1991, about one-quarter had fees at the end of their term while currently

147. *State-by-State Court Fees*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees> [https://perma.cc/9JDR-FX8T].

148. Eaglin, *supra* note 71, at 1856.

149. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 4 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [https://perma.cc/QF87-28LA].

150. Lauren-Brooke Eisen & Jessica Eaglin, *Poverty, Incarceration, and Criminal Justice Debt*, TALK POVERTY: JUSTICE (Dec. 2, 2014, 8:00 AM), <http://talkpoverty.org/2014/12/02/criminal-justice-debt/> [https://perma.cc/BLC4-Q3BE].

151. RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, *INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA* 50 n.50 (2015), <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf> [https://perma.cc/F4XY-APN2].

152. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [https://perma.cc/U9NT-B6EJ]; *State-by-State Court Fees*, *supra* note 147.

153. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1190–91.

154. EISEN, *supra* note 37, at 4. The Brennan Center has compiled an interactive map that reflects state-by-state charges for room and board or medical fees. See BRENNAN CTR. FOR JUSTICE, *IS CHARGING INMATES TO STAY IN PRISON SMART POLICY*, <https://www.brennancenter.org/states-pay-stay-charges> (last visited Feb. 4, 2017) [https://perma.cc/5ME8-KBSH].

155. Eisen & Eaglin, *supra* note 150.

more than three-quarters have fees when leaving prison.<sup>156</sup>

Additionally, at least forty-four states impose charges for probation and parole services, and forty-nine states impose fees for monitoring devices.<sup>157</sup> From 1999 to 2009, the number of individuals under electronic monitoring increased from approximately 75,000 to over 200,000.<sup>158</sup> Often, municipalities use fees as a method of funding non-criminal justice programs.<sup>159</sup>

Decriminalization of misdemeanors can also result in increased fees, as alternatives to incarceration include “supervisory, educational, or treatment” requirements and, in turn, defendants are charged fees for these services.<sup>160</sup> Defendants in alternative programs are often charged participation fees. For example, probationers in Rutherford County are charged a fee of \$132 to participate in trash pickup as community service.<sup>161</sup> Similarly, Pennsylvania law requires defendants pay at least \$60 to be eligible for parole or probation.<sup>162</sup>

## 2. Outsourcing to Private Companies

Unfortunately, collection abuses are not limited to governmental entities involved in the criminal justice system. The outsourcing of traditional governmental functions to private for-profit companies has created heightened concerns regarding the abusive collection of criminal justice debt. Outsourcing is apparent in the growing use of private firms for

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156. Eaglin, *supra* note 71, at 1852.

157. Shapiro, *supra* note 152; *State-by-State Court Fees*, *supra* note 147.

158. Greg Beato, *The Lighter Side of Electronic Monitoring*, REASON (May 24, 2012), <https://reason.com/archives/2012/05/24/the-lighter-side-of-electronic-monitorin> [<https://perma.cc/EAN2-3J8Z>].

159. PEPIN, *supra* note 3, at 6–8.

160. Natapoff, *supra* note 39, at 1086–87.

161. Kim Bellware, *Judge Says You Can't Lock Up People on Probation for Being Poor*, HUFFINGTON POST (Dec. 21, 2015, 7:59 PM), [http://www.huffingtonpost.com/entry/poverty-jailingMe-probation-rutherford-county\\_56785da5e4b06fa6887e31e1](http://www.huffingtonpost.com/entry/poverty-jailingMe-probation-rutherford-county_56785da5e4b06fa6887e31e1) [<https://perma.cc/525L-NL39>].

162. 18 PA. STAT. AND CONS. STAT. ANN. § 11.1101 (West 2015). *See also* BANNON ET AL., *supra* note 149, at 20 (discussing the statute); Daniel Craig, *WATCH: Pennsylvania Parole Fee Scrutinized by John Oliver*, PHILLY VOICE (Nov. 10, 2015), <http://www.phillyvoice.com/watch-pa-parole-fee-scrutinized-john-oliver/> [<https://perma.cc/S9BX-6ZYN>] (discussing how John Oliver highlighted the provision in an episode of HBO's *Last Week Tonight*).

prisons, probation, and collection.<sup>163</sup> Additionally, private businesses are often used to provide services such as medical care and telephone to incarcerated individuals.<sup>164</sup> Moreover, the vast majority of states allow private bail companies.<sup>165</sup>

More than 1,000 courts in at least twelve states use private probation companies to monitor misdemeanor defendants.<sup>166</sup> The probation companies are attractive to cash-strapped municipalities, as they often provide cities an “offender-funded” business model.<sup>167</sup> Under this zero-cost solution for municipalities, probation companies receive all of their income from fees recovered from probationers.<sup>168</sup>

Often the fees charged by the companies are not regulated, leading to abuses.<sup>169</sup> Concerns about private probation companies have been the subject of litigation throughout the country.<sup>170</sup> Additionally, proposed federal legislation threatens

163. Beckett & Harris, *supra* note 36, at 513.

164. HARRIS, *supra* note 57, at 10. \$2.9 billion is the estimated annual payment to private companies for food and telephone services for the incarcerated. PETER WAGNER & BERNADETTE RABUY, PRISON POLICY INITIATIVE, FOLLOWING THE MONEY OF MASS INCARCERATION (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/3RMP-D25H>].

165. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 4 (2007), <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/FP45-JDYE>] (describing use of commercial bail agents in forty-six states). Private bail companies typically charge defendants a fee equal to 10 percent of the bail amount and may require collateral from defendants. *Id.* In return for the fee, the bail company will post a surety/appearance bond. *Id.* Annually, bail companies receive \$1.4 billion in nonrefundable fees. WAGNER & RABUY, *supra* note 164.

166. HUMAN RIGHTS WATCH, *supra* note 5, at 1, 12 n.3 (listing Alabama, Colorado, Florida, Georgia, Idaho, Michigan, Mississippi, Missouri, Montana, Tennessee, Utah, and Washington, and stating that these states are not “necessarily an exhaustive list of all states where the industry exists”).

167. *Id.* at 15.

168. *Id.*

169. DEVUONO-POWELL ET AL., *supra* note 74, at 15.

170. See, e.g., Class Action Complaint, Rodriguez v. Providence Cmty. Corr., Inc., No. 3:15-cv-01048 (M.D. Tenn. Oct. 1, 2015), [http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/10/complaint\\_file\\_stamped.pdf](http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/10/complaint_file_stamped.pdf) [<https://perma.cc/A2QR-7Z48>] [hereinafter PCC Complaint]; Complaint, Reynolds v. Judicial Corr. Servs., Inc., No. 2:15-cv-00161-MHT-CSC (M.D. Ala. Mar. 12, 2015), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/case/1\\_-\\_complaint.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/1_-_complaint.pdf) [<https://perma.cc/M6AR-6GWV>]; Complaint, Thompson v. Dekalb Cty., No. 1:15-mi-99999-UNA (N.D. Ga. Jan. 29, 2015), [https://www.aclu.org/sites/default/files/assets/2015.01.29\\_filed\\_thompson\\_complaint.pdf](https://www.aclu.org/sites/default/files/assets/2015.01.29_filed_thompson_complaint.pdf) [<https://perma.cc/JZY7-PEST>]; First Amended Class Action Complaint, Mitchell v. City of Montgomery, No. 2:14-cv-00186-MEF-CSC (M.D. Ala. May 23, 2014), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Complaint.pdf>

to reduce federal funding for states and municipalities that rely on private probation companies.<sup>171</sup>

Probationers' experiences in Kentucky reflect some of the concerns over the use of private probation companies, where they are subject to monitoring fees only if they live in counties serviced by private companies.<sup>172</sup> The firms operate without any written agreements or any supervision by the state.<sup>173</sup> Although counties do not keep records of people under private probation, Kentucky Alternative Programs is suspected to be the state's largest private probation company, monitoring about 8,000 defendants in thirty-eight counties.<sup>174</sup> Concerns have surfaced over contributions by its officers and directors to judicial campaigns as well as the failure to verify whether the companies are complying with court rules requiring that fees be adjusted based on ability to pay.<sup>175</sup>

Sentinel Offender Services, a private probation company, involved in the Barrett case described in the Introduction, has been accused of requiring probationers to take drug tests even when the courts have not ordered the tests.<sup>176</sup> A recent lawsuit suggests that Sentinel required the non-court ordered tests as a way of collecting additional fees.<sup>177</sup>

Similar concerns exist in Tennessee, where a federal corruption lawsuit has been filed against Rutherford County and Providence Community Corrections (PCC), a private probation company.<sup>178</sup> The complaint alleges that the county

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[<https://perma.cc/D92P-VSAA>]; *Sentinel Offender Servs., LLC v. Glover*, 766 S.E.2d 456, 460 (Ga. 2014).

171. End of Debtor's Prison Act of 2017, H.R. 1724, 115th Cong. (2017).

172. James McNair, *Inside Kentucky's Unregulated Private Probation Industry*, KY. CTR. FOR INVESTIGATIVE REPORTING (Jan. 20, 2016), <http://kycir.org/2016/01/20/inside-kentuckys-unregulated-private-probation-industry/#> [<https://perma.cc/3UBK-XB7H>].

173. *Id.* (stating that "[n]o state agency monitors the monitors").

174. *Id.*

175. *Id.*

176. Kate Brumback, *Lawsuit: Private Probation Company Forced Illegal Drug Tests*, WASH. TIMES (Feb. 17, 2016), <http://www.washingtontimes.com/news/2016/feb/17/lawsuit-private-probation-company-forced-illegal-d/> [<https://perma.cc/9R7D-MAF9>].

177. Complaint ¶ 1, *Luse v. Sentinel Offender Servs., LLC*, No. 2:16-mi-99999-UNA (N.D. Ga. Feb. 17, 2016), <https://www.schr.org/files/post/files/LUSE%20v%20%20SENTINEL%20OFFENDER%20SERVICES.pdf> [<https://perma.cc/8U6G-JRG8>].

178. PCC Complaint, *supra* note 170. See Alysia Santo, *How to Fight Modern-Day Debtors' Prisons? Sue the Courts.*, MARSHALL PROJECT (Oct. 1, 2015, 2:45 PM), <https://www.themarshallproject.org/2015/10/01/how-to-fight-modern-day->

and PCC have operated a racketeering enterprise to extort money from indigent individuals by threatening incarceration for failure to pay criminal justice debt.<sup>179</sup> PCC's revenues are based solely on fees collected from individuals on probation.<sup>180</sup> PCC allegedly added monthly charges, fees for drug tests administered at PCC's discretion (even if the underlying offense was not drug-related), pictures, and classes.<sup>181</sup> Probationers were allegedly required to sign a document that required them, among other things, to allow warrantless searches of their homes, vehicles, and persons by PCC, to obey orders of PCC officers, and to pay all PCC fees.<sup>182</sup> PCC allegedly told probationers that failure to comply with any of these requirements could result in revocation of probation, arrest, or incarceration for months.<sup>183</sup> PCC failed to inform probationers that they had rights to have payments modified and could not be incarcerated without an ability-to-pay determination.<sup>184</sup> PCC allegedly even discouraged indigency waivers and purportedly told probationers that they would have to pay \$25 to seek indigency relief.<sup>185</sup> Additionally, PCC reportedly applied payments to its fees first rather than court debts, so that typically the court debt was only minimally reduced and probationers would remain under probation due to outstanding court debt.<sup>186</sup>

Another area where private companies offer free services in exchange for the right to collect fees from the public is the use of high-speed cameras for reading license plates. Vigilant Solutions, Inc. provides "no cost" license plate readers to Texas law enforcement and receives its revenues from a 25 percent fee added to defendants' fines.<sup>187</sup> Police use the readers to identify drivers with outstanding criminal justice debt. Officers give drivers the option to pay the outstanding debt and Vigilant Solution's fee by credit or debit card, or face arrest.<sup>188</sup>

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debtors-prisons-sue-the-courts [https://perma.cc/BQN5-QZSG].

179. PCC Complaint, *supra* note 170, at 1–3.

180. *Id.* ¶¶ 1, 16, 18.

181. *Id.* ¶ 20.

182. *Id.* ¶ 21.

183. *Id.* ¶¶ 21, 24.

184. *Id.* ¶¶ 29, 36.

185. *Id.* ¶ 36.

186. *Id.* ¶¶ 26–27.

187. Weiss, *supra* note 139.

188. *Id.* (describing Vigilant Solutions's role in Kyle, Texas).

Failure to pay can also result in towing and impound fees.<sup>189</sup>

### 3. Failure to Take into Account Ability to Pay

A significant problem shared by bail, fines, and fees is that they are often imposed without taking into account a defendant's ability to pay, leaving those unable to pay with the threat of incarceration.<sup>190</sup> As a result, while mass incarceration has been associated with an increase in criminal justice debt, an increase in criminal justice debt has also led to more incarceration as individuals are incarcerated not for their underlying offenses, but for their inability to pay criminal justice debt.<sup>191</sup>

#### *a. Incarceration for Inability to Pay Bail*

Although monetary bail was initially set up as a way of allowing individuals to be released before trial, in modern times, it has become a way of locking up indigent individuals and coercing them to accept plea bargains.<sup>192</sup> According to one report “[m]oney, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial.”<sup>193</sup> Since 1990, the use of monetary bail has increased dramatically.<sup>194</sup> For example, a Bureau of Justice Statistics report found that the use of bail for felony defendants in large urban counties increased from approximately 50 percent in 1990 to over 70 percent in 2009.<sup>195</sup> Additionally, between 1992

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189. *Id.*

190. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 1; Furman & Black, *supra* note 51.

191. EISEN, CHARGING INMATES, *supra* note 37, at 2 (describing “how current practices of charging inmates perpetuates mass incarceration”).

192. ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 8, 19–20 (2009); Pinto, *supra* note 63. A complete history of the development of the bail system is beyond the scope of this Article. For more detailed information, see TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, FUNDAMENTALS OF BAIL 21–44 (2014), [http://static.nicic.gov/UserShared/2014-11-05\\_final\\_bail\\_fundamentals\\_september\\_8\\_2014.pdf](http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8_2014.pdf) [<https://perma.cc/8QT6-JAJ3>].

193. SUBRAMANIAN ET AL., *supra* note 151, at 32.

194. COUNCIL OF ECON. ADVISERS, *supra* note 90, at 49 (asserting that “the use of bail bonds has also increased by more than 130 percent over the past two decades”).

195. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 6.

and 2009, judges increased bail in felony cases by more than 40 percent.<sup>196</sup> The growth in pretrial detention has surpassed the growth of imprisonment as the 59 percent growth rate in “unconvicted” individuals in jail from 1996 to 2014 nearly doubled the 32 percent growth rate for prison inmates.<sup>197</sup> The jailing of unconvicted defendants accounts for 99 percent of the increase in jail inmates over the last fifteen years.<sup>198</sup> More than 50 percent of unconvicted inmates remain in jail for at least thirty days.<sup>199</sup> Many plead guilty to a petty offense simply to get out of jail and take advantage of time served.<sup>200</sup> As a result, they wind up with criminal records.<sup>201</sup> Additionally, many spend more time in jail awaiting trial than the maximum sentence they could receive for their offenses.<sup>202</sup> As a report by the VERA Institute suggests, “[t]hese cases, in particular, turn our ideals about justice upside down. . . . [T]he system punishes these individuals while they are presumed to be innocent, and then releases them once they are found guilty.”<sup>203</sup>

Moreover, studies have also found that pretrial detention adversely impacts both plea bargaining and sentencing. Defendants in jail are less likely to help with their defense by securing witnesses or evidence.<sup>204</sup> They are also more likely to accept a plea bargain with a longer sentence. Additionally, they are more likely to be ultimately sentenced to incarceration and more likely to receive a longer prison term than those who can pay bail.<sup>205</sup> A study of over 153,000 defendants jailed in Kentucky between July 2009 and June 2010 found that “[d]etained defendants are over four times more likely to be sentenced to jail and over three times more likely to be

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196. SUBRAMANIAN ET AL., *supra* note 151, at 29.

197. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 7 & n.11.

198. Peter Wagner, *Jails Matter. But Who is Listening?*, PRISON POLICY INITIATIVE (Aug. 14, 2015), <http://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/> [<https://perma.cc/JD33-5F7Q>].

199. Natapoff, *supra* note 109, at 1322.

200. *Id.* at 1322; Dewan, *supra* note 66.

201. Dewan, *supra* note 66.

202. SUBRAMANIAN ET AL., *supra* note 151, at 34; Dewan, *supra* note 66.

203. SUBRAMANIAN ET AL., *supra* note 151, at 34.

204. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 8.

205. *Id.* (citing CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_state-sentencing\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf) [<https://perma.cc/L45K-4KLN>]).

sentenced to prison than defendants who are released at some point pending trial.”<sup>206</sup> Additionally, jail terms are almost three times greater, and prison terms are more than two times longer for defendants not released pretrial.<sup>207</sup> A New York study had similar results reporting that “pretrial detention was the single greatest predictor of conviction.”<sup>208</sup> The disparities are even more significant for low-risk defendants.<sup>209</sup>

Bail is typically set without a determination of ability to pay.<sup>210</sup> The system of cash bail has been the subject of criticism for almost one hundred years.<sup>211</sup> Calls for reform seek abolition of cash bail programs.<sup>212</sup> New Jersey, for example, following a constitutional amendment, enacted legislation, effective January 1, 2017, to determine pretrial release using risk assessment rather than money bail.<sup>213</sup> Additionally, lawsuits have been filed questioning the constitutionality of certain cash bail systems, including those that rely on fixed schedules that fail to take into account ability to pay.<sup>214</sup> Bail should be based

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206. LOWENKAMP ET AL., *supra* note 205, at 3.

207. *Id.*

208. Pinto, *supra* note 63.

209. LOWENKAMP ET AL., *supra* note 205, at 4.

210. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 7; Furman & Black, *supra* note 51.

211. Alexander Shalom, *Bail Reform as a Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921, 923–24 (2014).

212. See, e.g., Press Release, Pretrial Justice Inst., New Ferguson-Inspired Campaign Launches to End Cash Bail, Reduce Arrests, and Cut Pretrial Detentions in 20 States by 2020 (Oct. 26, 2015), <http://www.pretrial.org/new-ferguson-inspired-campaign-launches-to-end-cash-bail-reduce-arrests-and-cut-pretrial-detentions-in-20-states-by-2020/> [<https://perma.cc/LVZ4-V535>].

213. See Robert Ramsey, *New Bail Procedures—Criminal Justice Reform*, 51 N.J. PRAC. SERIES, MUN. CT. PRAC. MANUAL § 9:3 (2016–2017 ed. 2016). The New Jersey constitutional amendment was adopted in 2014. N.J. CONST. art. I, ¶11. For a description of reforms in other jurisdictions, see Sara Dorn, *New Jersey Begins Overhaul of Bail System: Justice for All*, CLEVELAND.COM (Jan. 18, 2017, 11:05 AM), [http://www.cleveland.com/metro/index.ssf/2017/01/new\\_jersey\\_begins\\_overhaul\\_of.html](http://www.cleveland.com/metro/index.ssf/2017/01/new_jersey_begins_overhaul_of.html) [<https://perma.cc/2FP3-GTBQ>].

214. See, e.g., Class Action Complaint at 1–2, *Varden v. City of Clanton*, No. 2:15-cv-00034- MHT-WC (M.D. Ala. Jan. 15, 2015). The DOJ filed a statement of interest in *Varden* asserting that a fixed bail system that did not take into account ability to pay was unconstitutional. Statement of Interest at 1, *Varden v. City of Clanton*, No. 2:15-cv-00034-MHT-WC (M.D. Ala. Feb. 13, 2015), <http://www.justice.gov/file/340461/download> [<https://perma.cc/HY3F-U386>]. Subsequently, the City changed its bail policies and a settlement was reached in the lawsuit. *Jones v. City of Clanton*, No. 2:15-cv34-MHT, 2015 WL 5387219, at \*1 (M.D. Ala. Sept. 14, 2015). For a description of the lawsuits filed by Equal Justice Under Law seeking to end cash bail systems, see *Ending the American Money Bail System*, EQUAL JUSTICE UNDER LAW, <http://equaljusticeunderlaw.org/>

on risk to the public and the probability of appearing at court, rather than as a method of punishing or raising revenue.<sup>215</sup>

*b. Arrest and Incarceration for Inability to Pay  
Fees and Fines*

Just as the inability to pay bail results in incarceration, inability to pay fees and fines can also lead to incarceration. The failure to take into account ability to pay is especially troublesome when the failure to pay results in arrest or loss of liberty.<sup>216</sup> Incarceration under these circumstances often violates constitutional, statutory, and rule provisions that require an assessment of ability to pay.<sup>217</sup> For example, in 1983, the United States Supreme Court held that revoking probation and incarcerating an individual without taking into account ability to pay and alternative sentencing “would be contrary to the fundamental fairness required by the Fourteenth Amendment.”<sup>218</sup>

While courts are generally required to take into account ability to pay before incarcerating, many do not.<sup>219</sup> Even when ability-to-pay hearings are held, courts often lack guidance on the standards to apply and when to apply them, leading to conflicting results.<sup>220</sup> Additionally, individuals are typically not represented by counsel at such hearings.<sup>221</sup> In these situations,

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wp/current-cases/ending-the-american-money-bail-system (last visited Apr. 3, 2017) [<https://perma.cc/4VUM-7YLF>]. See also Santo, *supra* note 178 (describing how the lawsuits have led to municipalities in Alabama, Missouri, Mississippi, and Louisiana ending cash bail for misdemeanors and traffic violations).

215. SCHNACKE, *supra* note 192, at 64–65.

216. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 1; Furman & Black, *supra* note 51.

217. Sobol, *Charging the Poor*, *supra* note 4, at 504–07.

218. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983). For a more detailed discussion of *Bearden* and related cases, see Sobol, *Charging the Poor*, *supra* note 4, at 504–07.

219. Sobol, *Charging the Poor*, *supra* note 4, at 513.

220. Eaglin, *supra*, note 71, at 1854–55 (describing how states fail to “provide meaningful standards or methodologies for ability-to-pay determinations”).

221. Sobol, *Charging the Poor*, *supra* note 4, at 514; See, e.g., AM. CIVIL LIBERTIES UNION OF N.H., DEBTORS’ PRISONS IN NEW HAMPSHIRE 1–2 (2015), <http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf> [<https://perma.cc/3JCW-L6US>] (finding that in 2013 New Hampshire judges failed to conduct meaningful ability-to-pay hearings or provide defendants with counsel when incarcerating nearly 150 defendants who were unable to pay fines); AM. CIVIL LIBERTIES UNION OF TEX., NO EXIT, TEXAS: MODERN-DAY DEBTORS’ PRISONS AND THE POVERTY TRAP 6–7 (2016),

indigent defendants become trapped in modern-day debtors' prisons.<sup>222</sup> Investigations and reports have described the growing incidence and problems of modern-day debtors' prisons.<sup>223</sup> Additionally, class-action lawsuits have been filed alleging debtors' prisons in municipalities throughout the United States.<sup>224</sup>

As a practical matter, efforts to incarcerate individuals for failure to pay are often counterproductive, creating greater expenses for municipalities than they ever recover in collection.<sup>225</sup>

#### 4. Disproportionate Impact on Low-Income Populations

It should come as no surprise that the imposition of monetary charges without consideration of ability to pay disproportionately impacts the poor. By their very nature, fixed financial charges have a regressive effect on those with lower

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[https://www.aclutx.org/sites/default/files/no\\_exit\\_texas\\_-\\_modern-day\\_debtors\\_prisons\\_and\\_the\\_poverty\\_trap\\_11-2016.pdf](https://www.aclutx.org/sites/default/files/no_exit_texas_-_modern-day_debtors_prisons_and_the_poverty_trap_11-2016.pdf) [<https://perma.cc/66JZ-M6JE>] (finding courts generally fail to conduct proper ability-to-pay hearings, to appoint counsel, and to consider payment alternatives).

222. See Sobol, *Charging the Poor*, *supra* note 4 (describing the use of modern-day debtors' prisons to collect criminal justice debt and comparing them to traditional debtor's prisons in the eighteenth and nineteenth centuries).

223. See, e.g., AM. CIVIL LIBERTIES UNION OF NEB., *Unequal Justice: Bail and Modern Day Debtors' Prisons in Nebraska* (2016), [https://www.aclunbraska.org/sites/default/files/field\\_documents/unequal\\_justice\\_2016\\_12\\_13.pdf](https://www.aclunbraska.org/sites/default/files/field_documents/unequal_justice_2016_12_13.pdf)

[<https://perma.cc/PVK7-ZCL6>]; AM. CIVIL LIBERTIES UNION OF N.H., *supra* note 221; AM. CIVIL LIBERTIES UNION OF TEX., *supra* note 221; AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., *Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor* (2014), <https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf> [<https://perma.cc/7FDN-ECC8>].

224. See Joseph Shapiro, *Lawsuits Target 'Debtors' Prisons' Across the Country*, NPR (Oct. 21, 2015, 4:36 PM), <http://www.npr.org/2015/10/21/450546542/lawsuits-target-debtors-prisons-across-the-country> [<https://perma.cc/SNF2-EFLD>]. For a description of the lawsuits filed by Equal Justice Under Law alleging debtors' prisons in Louisiana, Mississippi, Missouri, and Alabama, see EQUAL JUSTICE UNDER LAW, *Shutting Down Debtors' Prison*, <http://equaljusticeunderlaw.org/wp/current-cases/ending-debtors-prisons/> (last visited Apr. 3, 2017) [<https://perma.cc/4LMV-WVWH>].

225. Eaglin, *supra*, note 71, at 1852. See, e.g., AM. CIVIL LIBERTIES UNION OF N.H., *supra* note 221, at 7 (finding that in 2013 the costs of incarcerating defendants who were unable to pay fines was approximately \$167,000 and the state failed to collect nearly \$76,000 in unpaid fines).

income levels.<sup>226</sup> Revenue generation through fines and fees also tends to be greater in poorer municipalities, as they generally have fewer available income resources than wealthier cities.<sup>227</sup> Analysis of reports from Oakland, California reflects that the police disproportionately use automatic license plate readers in lower-income neighborhoods.<sup>228</sup> Additionally, an alarming trend is the criminalization of poverty, as certain offenses, such as homelessness, apply only to those who lack financial resources.<sup>229</sup>

Those unable to pay initial monetary amounts often face additional financial charges, referred to by critics as poverty penalties as the additional charges would not exist if payment was made up front. These penalties can take the form of interest, late payments, installment plan charges, and collection fees.<sup>230</sup> A study of fifteen states with the highest prison populations found that fourteen of the states used poverty penalties.<sup>231</sup> At least nine of these states had municipalities that assessed fees for installment plans.<sup>232</sup> Washington State imposes a statutory interest fee of 12 percent and annual collection charges of \$100 per year.<sup>233</sup> In some jurisdictions, unpaid criminal debt obligations are referred to

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226. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 1.

227. Bennis & Strode, *supra* note 125.

228. Jeremy Gillula & David Maass, *What You Can Learn from Oakland's Raw ALPR Data*, ELECTRONIC FRONTIER FOUND.: DEEPLINKS (Jan. 21, 2015), <https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alpr-data> [<https://perma.cc/622J-S8NG>].

229. *See, e.g.*, TONY ROBINSON & ALLISON SICKLES, NO RIGHT TO REST: CRIMINALIZING HOMELESSNESS IN COLORADO (2015), <http://www.cpr.org/sites/default/files/homelessness-study.pdf> [<https://perma.cc/E3KD-4R7Q>]. A detailed analysis of the criminalization of poverty is beyond the scope of this Article. For more information, see KAREN DOLAN & JODI L. CARR, INST. FOR POLICY STUDIES, THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY (2015), <http://www.ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf> [<https://perma.cc/9PKY-MFRJ>]; Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (discussing criminalization of welfare recipients).

230. BANNON ET AL., *supra* note 149, at 1.

231. *Id.*

232. DILLER, *supra* note 143, at 15.

233. AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., *supra* note 223, at 4; WASH. REV. CODE § 10.82.090 (2015) (tying the interest rate to the rate used for civil judgments). A procedure for seeking waiver of this interest does exist. *See Legal Financial Obligation (LFO)*, WASHINGTONLAWHELP.ORG, <http://www.washingtonlawhelp.org/issues/consumer-debt/legal-financial-obligations-restitution-reduc-1> (last visited Apr. 3, 2017) [<https://perma.cc/L2L3-749A>].

private collection companies that impose additional fees of up to 40 percent of the original debt.<sup>234</sup>

Cash bail also has a disparate impact on indigent defendants. While wealthier defendants have the ability to post bail and in return receive a full refund when they appear in court, poorer defendants are often unable to pay bail or wind up using a bonding company and having to pay a non-refundable charge of 10 to 15 percent of the bail.<sup>235</sup>

Imposing monetary charges on inmates is especially severe on the poor as more than 80 percent of jailed inmates are indigent.<sup>236</sup> One study found that the average amount of fines and fees incurred by those incarcerated exceeds \$13,600.<sup>237</sup> This amount exceeds the annual income of more than two-thirds of those in jail.<sup>238</sup> Unable to pay charges for medical services, inmates often refuse medical treatment, resulting in the spread of diseases to other prisoners, correctional employees, and visitors.<sup>239</sup>

The poor are also subject to “pay-only probations” in which the only reason for the probation is the inability to pay the criminal justice debt upfront.<sup>240</sup> Those who can pay are not subject to supervision.<sup>241</sup> Most of the cases handled by private probation companies are pay-only probation matters.<sup>242</sup>

Lower income individuals often wind up in an endless cycle of criminal justice debt facing the threat of arrest and incarceration for failure to pay.<sup>243</sup> The fear of detention or incarceration for failure to pay can cause people to avoid going

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234. DILLER, *supra* note 143, at 21. *See* AM. CIVIL LIBERTIES UNION OF TEX., *supra* note 221, at 2 (describing how collection agencies in Texas can charge a fee of 30 percent for collecting unpaid criminal justice debt).

235. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 7.

236. EISEN, CHARGING INMATES, *supra* note 37, at 4. *See* Eisen, *supra* note 73, at 340 (arguing that “it is unreasonable to require population whose debt to society is already being paid by the sentences imposed, 80 percent of whom are indigent, to chip in to foot the bill”).

237. DEVUONO-POWELL ET AL., *supra* note 74, at 9.

238. *Id.* at 11 (stating that “over two-thirds of those in jail reported incomes of less than \$12,000 per year”).

239. EISEN, CHARGING INMATES, *supra* note 37, at 4 (describing how the release and detention of inmates who often are “double and triple bunked in a cell” contribute to the transmission of illness).

240. Natapoff, *supra* note 39, at 1100.

241. *Id.*

242. *Id.*

243. HARRIS, *supra* note 57, at 3.

to public places or seeking medical care or police help.<sup>244</sup> Some defendants have admitted that, faced with the threat of arrest or incarceration for criminal justice debt, they have even committed crimes to obtain funds to repay criminal justice debt.<sup>245</sup>

Additionally, the collateral consequences on the poor arising from criminal justice debt are severe.<sup>246</sup> Such consequences include the inability to obtain financing, secure employment, and pay for necessities.<sup>247</sup> Many states suspend driver's licenses for failure to pay criminal justice debt, impacting the ability of individuals to obtain and maintain employment.<sup>248</sup> One study found that over 40 percent of individuals lost their jobs due to a suspension of their driver's licenses.<sup>249</sup>

Texas's Driver Responsibility Program, established in 2003, imposes annual fees on the driver's license of those convicted of certain traffic offenses and suspends licenses until such fees are paid.<sup>250</sup> A report found that the program not only negatively impacted families but also safety.<sup>251</sup> The program

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244. Natapoff, *supra* note 39, at 1093–94.

245. See Jasmine Burnett, *This New Documentary Features President Obama and Real Conversations about our Justice System*, BLAVITY (Oct. 3, 2015), <http://blavity.com/vices-new-documentary-fixing-the-system-featuring-president-obama/> [<https://perma.cc/T4WN-9AAN>] (describing an interview where defendant admitted to selling drugs to raise money to pay criminal justice debt due in Pennsylvania). To view the entire documentary, see VICE NEWS, *Fixing the System: VICE on HBO Special Report (Full Episode)*, YOUTUBE (Dec. 12, 2016), <https://www.youtube.com/watch?v=QgJPYJ0Jn04> [<https://perma.cc/F5YN-AXFT>]. A survey in Alabama found that 17 percent of defendants admitted to committing crimes to repay criminal justice debt. FOSTER COOK, JEFFERSON CTY.'S CMTY. CORR. PROGRAM TREATMENT ALTERNATIVES FOR SAFER CMTYS., *THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 11* (2014), <http://media.al.com/opinion/other/The%20Burden%20of%20Criminal%20Justice%20Debt%20in%20Alabama-%20Full%20Report.pdf> [<https://perma.cc/6JFT-XUF2>].

246. HARRIS, *supra* note 57, at 3; Natapoff, *supra* note 39, at 1060, 1081.

247. HARRIS, *supra* note 57, at 3; Natapoff, *supra* note 39, at 1059, 1093.

248. ALEX BENDER ET AL., *supra* note 95, at 4 (describing how California has over four million people, representing 17 percent of adults, with suspended driver's licenses); DILLER, *supra* note 143, at 20–21. (describing suspension of driver's licenses in Florida); Eisen & Eaglin, *supra* note 150.

249. ALEX BENDER ET AL., *supra* note 95, at 7.

250. CRAIG ADAIR, TEX. CRIMINAL JUSTICE COALITION, *THE DRIVER RESPONSIBILITY PROGRAM: A TEXAS-SIZED FAILURE* 1–3 (2013), [www.texascjc.org/system/files/publications/Driver%20Responsibility%20Program.pdf](http://www.texascjc.org/system/files/publications/Driver%20Responsibility%20Program.pdf) [<https://perma.cc/LQ3H-9AEL>].

251. *Id.* at 1.

left 1.3 million drivers with invalid licenses affecting their ability to acquire insurance and “likely increas[ing] the number of uninsured motorists on Texas roads.”<sup>252</sup> Moreover, the program collected less than 50 percent of the anticipated revenue.<sup>253</sup> Even the program’s author has now called for its modification or repeal.<sup>254</sup>

The impact of criminal justice debt falls not only on defendants but also on their families and dependents. Often, families face difficult choices between paying for criminal justice debt and basic necessities.<sup>255</sup> One study found that “[w]hile 63% of respondents reported that family members were primarily responsible for covering conviction-related costs, nearly half also reported that their families could not afford to pay these fees and fines.”<sup>256</sup> Families that pay the criminal justice debt of incarcerated family members suffer “a double penalty,” as they no longer have the income of the inmates and have to pay the fees related to incarceration.<sup>257</sup> Additionally, failure to timely pay criminal justice debt can be classified as failure to comply with a probation or parole order resulting in loss of federal benefits, including “food stamps, housing assistance, and Supplemental Security Income for seniors and people with disabilities.”<sup>258</sup>

While decriminalization efforts to change misdemeanors into fine-only or non-jailable offenses allow individuals who can afford the fines or fees to attend incarceration-alternative treatment programs the ability to escape the system, it often leaves indigent defendants trapped in the system.<sup>259</sup> Unfortunately, these fine-only misdemeanors have many of the same collateral consequences associated with jailable offenses, including the impact on employment and housing.<sup>260</sup> Moreover, decriminalization efforts often result in fewer procedural safeguards than jailable offenses. For example, fine-only or

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252. *Id.*

253. *Id.*

254. *Id.*

255. DEVUONO-POWELL ET AL., *supra* note 74, at 30.

256. *Id.* at 13.

257. Lauren-Brooke Eisen, *Prisons Shouldn't Create Debtors: Column*, USA TODAY (June 5, 2015), <http://www.usatoday.com/story/opinion/2015/06/05/johnnie-melton-incarceration-fees-column/28407981> [<https://perma.cc/9YQ6-V6YS>].

258. DEVUONO-POWELL ET AL., *supra* note 74, at 25.

259. Natapoff, *supra* note 39, at 1097.

260. *Id.* at 1091–93.

non-jailable misdemeanors eliminate the constitutional requirement to provide counsel for defendants.<sup>261</sup> Indigent defendants without the benefit of a lawyer may receive fines that they do not have the ability to pay, and failure to pay may, in turn, lead to incarceration.<sup>262</sup>

## 5. Discriminatory Impact on Minorities

The criminal justice debt problem is especially severe for minorities, given the relative lack of wealth and savings available to many minorities.<sup>263</sup> For example, a 2013 report found that the median net worth of white households (\$141,900) was nearly thirteen times the median number for black households (\$11,000) and more than ten times the median number for Hispanic households (\$13,700).<sup>264</sup> Additionally, nearly 25 percent of black households have less than \$5 in savings.<sup>265</sup> As a result, minorities are especially vulnerable to debt issues. The inability to pay consumer debts such as electricity bills or car loans can result in higher interest rates and penalties as well as disconnection of utilities or repossession of cars.<sup>266</sup> The inability to pay criminal justice debt can lead to suspension of a driver's license, arrest, and incarceration.<sup>267</sup>

Monetary sanctions not only have a regressive effect on the

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261. *Id.* at 1058–59.

262. *Id.* at 1059, 1081.

263. Paul Kiel, *Debt and the Racial Wealth Gap*, N.Y. TIMES (Dec. 31, 2015), [http://www.nytimes.com/2016/01/03/opinion/debt-and-the-racial-wealth-gap.html?\\_r=0](http://www.nytimes.com/2016/01/03/opinion/debt-and-the-racial-wealth-gap.html?_r=0) [<https://perma.cc/D7XK-BF4S>].

264. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End Of Great Recession*, PEW RESEARCH CENTER (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> [<https://perma.cc/GKK6-KMAE>].

265. Kiel, *supra* note 263. A discussion of the differences in savings rates between racial groups is beyond the scope of this Article. For more information about savings rates, see PEW CHARITABLE TRUSTS, THE ROLE OF EMERGENCY SAVINGS IN FAMILY FINANCIAL SECURITY: WHAT RESOURCES DO FAMILIES HAVE FOR FINANCIAL EMERGENCIES (Nov. 2015), [http://www.pewtrusts.org/~media/assets/2015/11/emergency-savings-report-2\\_artfinal.pdf](http://www.pewtrusts.org/~media/assets/2015/11/emergency-savings-report-2_artfinal.pdf) [<https://perma.cc/Q8TT-CGFG>].

266. Kiel, *supra* note 263.

267. *Id.* Similarly, data reflects that debt collection lawsuits are more likely in African-American neighborhoods than white neighborhoods. Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods> [<https://perma.cc/R26V-ZJ4K>].

poor, but their imposition often reflects discrimination against minorities. Discretion afforded to law enforcement officers and judicial authorities provides opportunities for discrimination.<sup>268</sup> Even controlling for income levels, evidence exists that racial discrimination occurs in the detention, arrest, and incarceration of minorities. As such, minorities face discrimination when criminal justice debt arising from arrest and incarceration is imposed.<sup>269</sup>

Racial discrimination is a concern in the imposition of bail as reports indicate that African-Americans “and Latinos generally suffer worse bail outcomes due to the broad discretion and implicit bias in bail decisions.”<sup>270</sup> For example, a study found that judges in two Texas counties set higher bail levels for African-Americans than whites, “even when controlling for offense type and defendant characteristics.”<sup>271</sup> The study “suggest[s] that judges value freedom significantly less for blacks than whites in Harris county, and . . . [in] Dallas county.”<sup>272</sup> Similarly, a report from Nebraska found that the average bond amount for “Black[s], Hispanic[s], or Native American[s] . . . [was] \$14,572 more than the average bond for a nonviolent offense and \$13,109 more for a violent offense.”<sup>273</sup>

Similarly, racial disparities are well-documented for traffic stops, arrests, and incarceration. “Nationally, African-Americans comprise 13 percent of the population but 28 percent of those arrested and 40 percent of those incarcerated.”<sup>274</sup> Moreover, “African-American men are now

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268. FPD REP., *supra* note 41, at 63. For a more detailed discussion of the discriminatory use of discretionary offenses in Baltimore and Ferguson, see *infra* notes 298–300 and accompanying text.

269. FPD REP., *supra* note 41, at 69.

270. Cynthia Jones & Nancy Gist, *Decision Points: Disproportionate Pretrial Detention of Blacks and Latinos Drives Mass Incarceration*, HUFFINGTON POST: THE BLOG (Nov. 11, 2015, 3:34 PM), [http://www.huffingtonpost.com/cynthia-jones/pretrial-detention-blacks-and-latinos\\_b\\_8537602.html](http://www.huffingtonpost.com/cynthia-jones/pretrial-detention-blacks-and-latinos_b_8537602.html)

[<https://perma.cc/PA89-35HJ>]. For a more detailed discussion of racial disparities in bail decisions, see Cynthia E. Jones, “Give Us Free”: *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEG. & PUB. POL’Y 919 (2013).

271. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 7 (citing Shawn D. Bushway & Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* (Aug. 20, 2011) (unpublished paper), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1990324](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324) [<https://perma.cc/MVA6-CAKF>]).

272. Bushway & Gelbach, *supra* note 271, at 37.

273. AM. CIVIL LIBERTIES UNION OF NEB., *supra* note 223, at 20.

274. BANNON ET AL., *supra* note 149, at 4.

incarcerated at a rate over six times their white male counterparts.”<sup>275</sup> African-Americans are “2.7 times more likely than whites to be stopped in investigatory stops.”<sup>276</sup> Additionally, African-Americans are also more likely to be killed in traffic stops.<sup>277</sup> The deaths in 2015 of Walter Scott in South Carolina, Samuel Dubose in Ohio, and Sandra Bland in Texas all involved minor traffic stops—“a broken brake light, a missing front license plate[,] and failure to signal a lane change,” respectively.<sup>278</sup>

Data from three cities and a dozen state police districts in Connecticut also reflected clear racial disparities in traffic stops during the day, “when a driver’s race is easier to detect.”<sup>279</sup> Disturbing data from LaDue, Missouri, indicates that while African-Americans account for less than one percent of the population, they were 18.5 times more likely to be subject to a traffic stop than white drivers.<sup>280</sup> Similarly, data from Oakland, California, reflect a disproportionate use of automatic license plate readers in African-American and Latino neighborhoods.<sup>281</sup>

The Ferguson report also reflects racial disparities and bias. It alleges intentional racial discrimination against African-Americans.<sup>282</sup> The DOJ found that “African Americans are disproportionately represented at nearly every stage of Ferguson law enforcement, from initial police contact to final disposition of a case in municipal court.”<sup>283</sup> The investigation

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275. INIMAI CHETTIAR, LAUREN-BROOKE EISEN, & NICOLE FORTIER, BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION 9 (2013).

276. CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 64 (2014) (providing a detailed analysis of racial disparities in police stops).

277. Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, WASH. POST (Dec. 24, 2015), [https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb\\_story.html](https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html) [https://perma.cc/KK5H-TA2A].

278. Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [https://perma.cc/5JGK-SXF3].

279. *Id.*

280. Bennis & Strode, *supra* note 125.

281. Gillula & Maass, *supra* note 228.

282. FPD REP., *supra* note 41, at 4.

283. *Id.* at 63.

found that even after controlling for “non-race based variables” “African Americans remained 2.07 times more likely to be searched; 2.00 times more likely to receive a citation; and 2.37 times more likely to be arrested than other stopped individuals.”<sup>284</sup> Moreover, the report alleges that each of the results were “statistically significant and would occur by chance less than one time in 1,000.”<sup>285</sup> The chances of the differences occurring at the same time were even lower.<sup>286</sup> Additionally, African-Americans were more likely to receive multiple citations than whites while stopped.<sup>287</sup>

Similarly, the DOJ’s investigation of the Baltimore Police Department in 2016 found that the police “[d]epartment intrudes disproportionately upon the lives of African Americans at every stage of its enforcement activities.”<sup>288</sup> The report alleges discrimination based on the “overwhelming statistical evidence of racial disparities in . . . stops, searches, and arrests.”<sup>289</sup> For example, the report found that while African-Americans represent less than 60 percent of drivers, they were involved in over 80 percent of traffic stops.<sup>290</sup>

While African-Americans in Baltimore and Ferguson were more likely to be searched, police were less likely to find contraband with African-American drivers than with white drivers.<sup>291</sup> Similarly, a study in Greensboro, North Carolina revealed that while the police were over two times more likely to search African-Americans and their vehicles in traffic stops than white drivers, police were more likely to find drugs and weapons with white drivers.<sup>292</sup>

Similarly, the arrest and incarceration rates related to traffic tickets in Port Arthur, Texas, show that while African-Americans are ticketed at about the same proportional rate as their make-up of the population, they represent more than 70

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284. *Id.* at 65.

285. *Id.* at 66.

286. *Id.*

287. *Id.*

288. U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 47 (2016), <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/NE6P-MPNF>] [hereinafter BPD REP.].

289. *Id.* at 48.

290. *Id.* at 52.

291. *Id.* at 53; FPD REP., *supra* note 41, at 65.

292. LaFraniere & Lehren, *supra* note 278.

percent of the arrests for such citations.<sup>293</sup> Additionally, African-Americans in Port Arthur represented approximately three-quarters of the individuals who spent more than two days in jail for traffic tickets.<sup>294</sup>

The discrimination is not limited to traffic violations as studies also show discrimination in low-level, non-traffic offenses. For example, an examination of data from four cities in New Jersey of the low-level offenses of disorderly conduct, defiant trespass, loitering, and marijuana possession found “extreme racial disparities between black and white arrests.”<sup>295</sup> The study found that African-Americans were “3.2 to 5.7 times more likely to be arrested than Whites.”<sup>296</sup> Similarly, although African-Americans and whites reportedly use marijuana at the same rate, in Greensboro, North Carolina, African-Americans are five times as likely to be charged with possession of minor amounts.<sup>297</sup>

Data from Ferguson and Baltimore also reflect racial disparity in discretionary charges. African-Americans represent about two-thirds of the residents in Ferguson; however, they had “95% of Manner of Walking in Roadway charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges.”<sup>298</sup> These statistics and the claim that officer Darren Wilson stopped Michael Brown for walking in the street led commentators to claim that “walking while black” was a crime in Ferguson.<sup>299</sup>

Similarly, in Baltimore, while African-Americans account for less than two-thirds of the of the city’s residents, they had “87[%] of . . . charges for resisting arrest; 89[%] of . . . charges for making a false statement to an officer; 84[%] of . . . charges for failing to obey an order; 86[%] of . . . charges for hindering

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293. Campbell & Taggart, *supra* note 132.

294. *Id.*

295. AM. CIVIL LIBERTIES UNION OF N.J., SELECTIVE POLICING: RACIALLY DISPARATE ENFORCEMENT OF LOW-LEVEL OFFENSES IN NEW JERSEY 12 (2015), [https://www.aclu-nj.org/files/7214/5070/6701/2015\\_12\\_21\\_aclunj\\_select\\_enf.pdf](https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf) [<https://perma.cc/BNJ9-JN2F>].

296. *Id.*

297. LaFraniere & Lehren, *supra* note 278.

298. FPD REP., *supra* note 41, at 62.

299. Molly Hennessy-Fiske, *Walking in Ferguson: If You’re Black, It’s Often Against the Law*, L.A. TIMES (Mar. 5, 2015, 5:58 PM), <http://www.latimes.com/nation/la-na-walking-black-ferguson-police-justice-report-20150305-story.html#page=1> [<https://perma.cc/QXJ6-UKGS>]; Hitt, *supra* note 124.

or obstruction . . . 83[%] of . . . arrests for disorderly conduct; and 88[%] of . . . arrests for trespassing.”<sup>300</sup>

Additionally, the DOJ has alleged that racial disparities in Ferguson extend to the judicial system, as African-Americans in Ferguson were more likely to have cases that lasted longer, have warrants issued, and have disproportionate fines and fees.<sup>301</sup>

The “racialization of crime” is a growing concern with non-jailable offenses where procedural and evidentiary safeguards are typically not available.<sup>302</sup> As a result, the trend toward decriminalization of misdemeanors into non-jailable offenses “risks further racializing the selection process as police are empowered to stop and cite young black men more freely without the constraints of criminal adjudication or the threat of defense counsel.”<sup>303</sup> The “net-widening . . . can further intensify racial disparities, creating new safety valves for white, wealthy, well-educated, and other favored offender classes to exit the enlarged criminal process while poor, minority, addicted, and otherwise disadvantaged offenders remain behind, unable to extricate themselves.”<sup>304</sup>

Corrective action is necessary. The next section of this Article will address the abuses in the collection of civil debts and the response to curbing those abuses to illustrate a potential structure for resolving abuses in the collection of criminal justice debt.

## II. THE FEDERAL FRAMEWORK TO ADDRESS ABUSES IN CONSUMER DEBT COLLECTION

Debt collection abuses are not unique to the criminal justice arena; America has also witnessed a history of abuses in civil debt collection.<sup>305</sup> In many ways, consumer debt collection

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300. BPD REP., *supra* note 288, at 55.

301. FPD REP., *supra* note 41, at 68–69.

302. Natapoff, *supra* note 109, at 1368 (stating that misdemeanors “represent the concrete mechanism by which the system is able to generate ‘criminals’ based on race, class, and social vulnerability, unconstrained by standard evidentiary requirements”).

303. Natapoff, *supra* note 39, at 1059.

304. *Id.* at 1095.

305. Michael M. Greenfield, *Coercive Collection Tactics—An Analysis of the Interests and the Remedies*, 1972 WASH. U. L.Q. 1, 15 (asserting that excessive debt collection “tactics have been around for decades, if not centuries”).

abuses mirror the abuses arising in the collection of criminal justice debt; however, the concerns are even greater in the criminal justice context, given the more severe consequences arising from arrest, incarceration, and the creation of a criminal record.<sup>306</sup>

Recognizing that state and local governments had been ineffective in stopping abuses by collectors of civil debt, Congress created a federal solution.<sup>307</sup> The backbone of the system is the Fair Debt Collection Practices Act (FDCPA) enacted in 1977<sup>308</sup> and the Consumer Financial Protection Bureau (CFPB) which began operations in July 2011.<sup>309</sup>

While Congress has addressed abuses in the collection of civil debt, a federal approach to combat abuses in the collection and assessment of criminal justice debt does not currently exist. This section will identify the reasons for the development of the FDCPA and CFPB and illustrate how they parallel the need for a similar system to address abuses in the collection of criminal justice debt.

A. *The Rationale for the FDCPA Supports Adoption of a Federal Act for Criminal Justice Debt*

Just as abuses increased with the explosion of criminal justice debt, increases in complaints about collection accompanied the exponential growth in consumer debt. The

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306. SHAFROTH & SCHWARTZOL, *supra* note 3, at 6–7. Acknowledging that “[t]he problems of criminal justice debt lie at the intersection of criminal and consumer law,” the Criminal Justice Policy Program (CJPP) at Harvard Law School and the National Consumer Law Center (NCLC) have entered into a collaborative project to help address the litigation and policy issues arising from criminal justice debt. *Id.* at 4. More information about the project is available on the CJPP and NCLC websites. See <http://cjpp.law.harvard.edu/publications/confrontingcjdebt> [<https://perma.cc/M4UK-CNNU>]; <http://www.nclc.org/issues/confronting-criminal-justice-debt.html> [<https://perma.cc/HP5B-ZA54>].

307. S. REP. NO. 95–382, at 2–3 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695, 1696–97 [hereinafter 1977 SENATE REPORT].

308. 15 U.S.C. §§ 1692–1692p (2012). While the FDCPA is the primary federal statutory source addressing abuses in debt collection, other federal remedies for addressing collection abuses exist. See, e.g., The Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012); The Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012); The Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991).

309. CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2 (2013), [http://files.consumerfinance.gov/f/201303\\_cfpb\\_March\\_FDCPA\\_Report1.pdf](http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf) [<https://perma.cc/2XW8-JPHA>] [hereinafter CFPB 2013 ANNUAL REPORT].

first major growth spurt in consumer debt occurred from 1950 to 1971. During this period, consumer debt “increased fivefold.”<sup>310</sup> By 1971, outstanding consumer credit had ballooned to more than \$130 billion, representing more than \$600 for every American.<sup>311</sup> Similar to how the dramatic growth in correctional supervision led to the proliferation of prison, jail, and probation services, the dramatic increase in consumer credit resulted in the development of an industry to service and collect on consumer accounts.<sup>312</sup> In 1976, the industry had more than 40,000 collectors in over 5,000 agencies that collected more than \$5 billion.<sup>313</sup> A trade group representing about 50 percent of these collectors reported that its members contacted eight million people in 1976.<sup>314</sup> In the 1970s, demands for regulation of the debt collectors developed at both the state and federal level.<sup>315</sup>

On March 20, 1978, the FDCPA became effective and was heralded as the “first comprehensive federal debt collection statute.”<sup>316</sup> In response, many states enacted similar legislation.<sup>317</sup> The purported goal of the FDCPA—which had the support of consumer groups, national debt collection organizations, and state and federal law enforcement groups—was to “protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors.”<sup>318</sup>

In support of the FDCPA, Congress provided findings indicating abusive practices, inadequacy of laws, availability of non-abusive collection methods, the impact on interstate

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310. Robert L. Geltzer & Lois Woocher, *Debt Collection Regulation: Its Development and Direction for the 1980s*, 37 BUS. LAW. 1401, 1402 (1982).

311. Greenfield, *supra* note 305, at 1.

312. Geltzer & Woocher, *supra* note 310, at 1402; David C. Frazier & Edward Tonore, *Consumer Credit Protection, Fair Debt Collection Practices Act 15 U. S. C. § 1692 (Cum. Supp. 1978)*, 1 MISS. C. L. REV. 157, 157 (1978) (finding “[t]he rise in consumer credit outstanding has greatly contributed to the growth of third party debt collectors in America”).

313. 1977 SENATE REPORT, *supra* note 307, at 1696.

314. *Id.*

315. Geltzer & Woocher, *supra* note 310, at 1402.

316. *Id.* The FDCPA was not the first federal regulation addressing debt collection. Frazier & Tonore, *supra* note 312, at 177–80 (discussing FTC’s pre-FDCPA enforcement actions as well as pre-FDCPA legislation including the Truth-in-Lending Act, the Extortionate Credit Transactions Act, and the Fair Credit Reporting Act).

317. Geltzer & Woocher, *supra* note 310, at 1402–06.

318. 1977 SENATE REPORT, *supra* note 307, at 1696.

commerce, and the purposes of the Act.<sup>319</sup> This section will provide detail on the findings and purposes of the FDCPA to show how similar and often stronger motivations exist in the criminal justice debt context. These concerns support the creation of a federal act to confront abuses in the collection of criminal justice debt.

### 1. Abusive Practices

“There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”<sup>320</sup>

The abusive practices identified in the Senate report for the FDCPA included “obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer’s legal rights, disclosing a consumer’s personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.”<sup>321</sup>

A former debt collector testifying at the House hearings in 1976 on the FDCPA provided examples of some of the abuses, including seeking recovery of debts that were not owed.<sup>322</sup> He stated that “beating,” the practice of repeatedly calling individuals at home and work, was the typical method of collecting debts.<sup>323</sup> Other techniques he used to collect included pretending to be from a law firm or law enforcement and threatening arrest and imprisonment.<sup>324</sup> He also threatened to have children sent to orphanages if alleged debtors did not agree to pay.<sup>325</sup> He even called parents of alleged debtors and

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319. 15 U.S.C. § 1692 (2012).

320. *Id.* § 1692(a).

321. 1977 SENATE REPORT, *supra* note 307, at 1696.

322. *The Debt Collection Practices Act: Hearings on H.R. 11969 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking, Currency & Hous.*, 94th Cong. 30 (1976) [hereinafter *1976 Hearings*] (estimating that at least half of the record and book account debts were “illegitimate”).

323. *Id.* at 31.

324. *Id.* at 31–32.

325. *Id.* at 31.

told them that their children would be incarcerated unless the parents paid their debt.<sup>326</sup> For debts in which the limitations period had expired, a common practice was to seek token payments to restart the limitations period.<sup>327</sup>

Other testimony at the House hearings included information from reporters who worked undercover at debt collection agencies.<sup>328</sup> One reporter testified that the manager taught collectors to be abusive and harassing.<sup>329</sup> Testimony further revealed that it did not matter whether the consumer's debt was legitimate, as illustrated by a collector who proudly displayed a letter from an alleged debtor stating, "I don't owe this bill, but I am sending you the money just to be rid of you."<sup>330</sup> To make matters worse, collectors would also add additional charges to amounts owed.<sup>331</sup>

Similarly, a former debt collector testified in 1977 about the collection abuses he witnessed.<sup>332</sup> He stated that the "debt collection business . . . not only ruins the lives of people who must deal with debt collection agencies, but in many cases it can even ruin the lives of those who work as debt collectors."<sup>333</sup> He confirmed that he, too, was aware of the abuses discussed by the former debt collector who testified at the 1976 hearings.<sup>334</sup> He provided details on different techniques or "gags" that debt collectors used.<sup>335</sup> The gags were intended to acquire the debtor's employment and location information.<sup>336</sup> Typically, they involved pretending to be from sales, insurance, or survey companies.<sup>337</sup> He testified that collectors would also call debtors' family members, pretending to be from law enforcement and reporting that the debtor was allegedly

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326. *Id.* at 31–32.

327. *Id.* at 30–31. The resurrection of an unenforceable debt creates a zombie-debt. For a more detailed discussion of this issue and how zombie debts have increased due to the growth in debt buyers, see Sobol, *Protecting Consumers*, *supra* note 4.

328. *1976 Hearings*, *supra* note 322, at 45–60.

329. *Id.* at 45.

330. *Id.* at 46.

331. *Id.*

332. *The Debt Collection Practices Act: Hearings on H.R. 29 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking, Fin. & Urban Affairs*, 95th Cong. 22–27 (1977).

333. *Id.* at 22.

334. *Id.* at 23.

335. *Id.* at 24–26.

336. *Id.*

337. *Id.*

involved in an accident and requesting employment information to confirm the debtor's whereabouts.<sup>338</sup>

As described in Part I, the abusive practices associated with the collection of criminal justice debt are at least as, if not more, severe than the abuses that occur in the collection of consumer debt. The concerns about the collateral consequences of abusive civil debt collection leading to bankruptcy, family disharmony, and unemployment that motivated Congress to enact the FDCPA also exist with abusive criminal justice debt collection.<sup>339</sup> Moreover, the imposition of criminal justice debt can result in arrest, incarceration, a criminal justice record, loss of federal benefits, and suspension of driver's licenses.<sup>340</sup> These consequences can cause people to distrust government officials. As a result, individuals with criminal justice debt may avoid going to public places, seeking medical aid, or requesting police assistance.<sup>341</sup>

The Senate report refuted the contention that the FDCPA would benefit "deadbeats" by describing the "universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay debts is miniscule."<sup>342</sup> The report found that the "vast majority" of debtors "fully intend to repay their debts," and default is typically the result of "an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce."<sup>343</sup> Likewise, many of the abuses that arise from criminal justice debt impact individuals because of their inability, rather than refusal, to pay.<sup>344</sup>

Accordingly, to the extent the abuses and consequences of civil debt collection supported the creation of the FDCPA, the even more severe abuses and consequences in the collection of criminal justice debt support the adoption of a federal act.

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338. *Id.* at 25.

339. 15 U.S.C. § 1692(a) (2012).

340. *See supra* Part I.C.4, 5.

341. *See supra* Part I.C.4.

342. 1977 SENATE REPORT, *supra* note 307, at 1697; John Tavormina, Comment, *The Fair Debt Collection Practices Act – The Consumer's Answer to Abusive Collection Practices*, 52 TUL. L. REV. 584, 588 (1977–1978).

343. 1977 SENATE REPORT, *supra* note 307, at 1697; Tavormina, *supra* note 342, at 588.

344. *See supra* Part I.C.3.

## 2. Inadequacy of Laws

“Existing laws and procedures for redressing these injuries are inadequate to protect consumers.”<sup>345</sup>

Just as current efforts to curb abuses in the collection of criminal justice debt abuse have failed, pre-FDCPA efforts to prevent abuses by civil debt collectors had failed at both the federal and state level. Before the 1970s, state and federal governments provided little or no regulation of debt collection activities.<sup>346</sup>

The Consumer Credit Protection Act of 1968<sup>347</sup> marked the beginning of federal efforts to regulate consumer credit; however, such efforts provided only indirect means of regulation.<sup>348</sup> The regulation included potential actions by the Federal Trade Commission, the Federal Communications Commission, and the United States Postal Service that allowed for ad hoc administrative decisions but failed to statutorily describe the rights of consumers and the duties of collectors.<sup>349</sup>

Additionally, the Senate report on the FDCPA emphasized that the collection abuses were widespread, national problems and the states had failed to provide sufficient laws to curb debt abuse.<sup>350</sup> The report revealed that about eighty million people, or 40 percent of Americans, had “no meaningful protection from debt collection abuse,” finding that thirteen states had no debt collection laws, and another eleven states had ineffective safeguards.<sup>351</sup> The report concluded that the states’ failure to provide “meaningful legislation” was the “primary reason” for “widespread” abusive debt collection.<sup>352</sup>

Moreover, common-law remedies were ineffective piecemeal approaches to help consumers.<sup>353</sup> For example,

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345. 15 U.S.C. § 1692(b) (2012).

346. Geltzer & Woocher, *supra* note 310, at 1402.

347. 15 U.S.C. §§ 1601–1691.

348. Tavormina, *supra* note 342, at 584. For example, the powers of the Federal Trade Commission were based only on guidelines without “the force of law” and the Federal Communications Commission’s authority was limited to telephone communications. *1976 Hearings*, *supra* note 322, at 23.

349. Tavormina, *supra* note 342, at 584–85.

350. 1977 SENATE REPORT, *supra* note 307, at 1696–97.

351. *Id.* at 1697.

352. *Id.* at 1696; Frazier & Tonore, *supra* note 312, at 159.

353. Frazier & Tonore, *supra* note 312, at 180; Tavormina, *supra* note 342, at 586.

causes of action for libel and slander, invasion of privacy, emotional distress, abuse of process, and malicious prosecution were not effective against debt collection abuses.<sup>354</sup> One problem with the common-law approach is its focus on compensating for, rather than preventing, abuses.<sup>355</sup>

Similarly, the approach to abuses in criminal justice debt collection has been a compensatory approach rather than a preventive approach. The current approach relies on lawsuits filed by the DOJ, the ACLU, and other private non-profit groups that seek to establish constitutional violations by individual municipalities. This case-by-case method is only a piecemeal approach for past abuses and does not provide a comprehensive method for preventing abuses that are occurring throughout the country.<sup>356</sup>

### 3. Alternative Non-Abusive Collection Methods

“Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.”<sup>357</sup>

Just as Congress recognized that non-abusive methods exist for collection of civil debt, alternative non-offensive methods for collecting criminal justice debt exist. The non-abusive alternatives in the criminal justice context include taking into account ability to pay at the time of sentencing as well as at the time of collection.<sup>358</sup> Eliminating incarceration when failure to pay is based on inability to pay can also result in savings to municipalities based on the expense of incarceration and the unlikelihood of financial recovery from those unable to pay.<sup>359</sup> Studies have shown that such punitive systems can be fiscally counterproductive.<sup>360</sup> Additionally,

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354. Frazier & Tonore, *supra* note 312, at 161–66; Tavormina, *supra* note 342, at 586.

355. Frazier & Tonore, *supra* note 312, at 180.

356. See Balko, *supra* note 35 (claiming that while lawsuits may end debtors' prisons “[b]asic humanity ought to compel . . . [public officials] to address the problem way before these lawsuits ever get in front of jury”).

357. 15 U.S.C. § 1692(c) (2012).

358. See, e.g., Sobol, *Charging the Poor*, *supra* note 4, at 524–32 (discussing alternative systems, including the use of day fines).

359. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 4–5.

360. See *supra* note 225 and accompanying text.

reducing or eliminating poverty penalties can help prevent citizens from entering the endless cycle of debt based on the piling-on of charges when they lack the ability to pay. Another alternative to abusive criminal justice debt charges is the use of non-monetary sanctions such as community service. Similarly, instead of relying on cash bail systems that unfairly discriminate against the indigent and lead to expenses for jailing those who are unable to pay bail, alternatives should focus on whether there is a public safety or flight risk.<sup>361</sup>

#### 4. Interstate Commerce

“Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.”<sup>362</sup>

A justification for the use of federal FDCPA was the impact on interstate commerce as the development of wide area telephone service lines allowed for a “dramatic increase in interstate collections.”<sup>363</sup> While such concerns may not at first be as apparent in the criminal debt arena, where most of the collections are intrastate, the imposition of criminal justice debt is not limited to state residents. Instead, it also extends to non-residents visiting the state. Additionally, interstate commerce may be impacted where out-of-state private companies are used. For example, Sentinel Offender Services, a private probation company headquartered in California, advertises on its website that it is operating “across the United States” with “more than 40 field locations.”<sup>364</sup>

Moreover, as illustrated by the Ferguson report, the abusive collection of criminal justice debt implicates equal protection and due process concerns as well as civil rights

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361. See *supra* note 215 and accompanying text.

362. 15 U.S.C. § 1692(d) (2012).

363. 1977 SENATE REPORT, *supra* note 307, at 1697.

364. *About Sentinel Offender Services*, <https://www.sentineladvantage.com/about-sentinel-offender-services/> (last visited Mar. 14, 2016) [<https://perma.cc/5ULU-U7JM>].

violations and discrimination.<sup>365</sup> Additional constitutional concerns may arise under the Sixth Amendment's right to counsel and the Eighth Amendment's restriction on excessive bail and fines.<sup>366</sup> These federal questions further support the adoption of a federal statute.<sup>367</sup>

## 5. Purposes

“[T]he purpose of this subchapter [is] to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”<sup>368</sup>

Just as the FDCPA seeks to promote consistent action and prevent non-abusive collectors from suffering a competitive disadvantage, reforms of criminal justice debt collection should be established to provide consistent treatment of defendants and to not unfairly punish municipalities who comply with the reforms. Moreover, municipalities who comply and achieve results could receive federal funding.<sup>369</sup>

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365. FPD REP., *supra* note 41, at 1–6. *Bearden* involved equal protection and due process concerns. *Bearden v. Georgia*, 461 U.S. 660, 665–67 (1983).

366. U.S. CONST. amends. VI, VIII. For a more detailed discussion of the impact of the Eighth Amendment on criminal justice debt, see Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014); Eisen, *supra* note 73.

367. See, e.g., Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 508–16 (2010) (advocating the adoption of a federal act to provide right to counsel for indigent criminal defendants).

368. 15 U.S.C. § 1692(e) (2012).

369. See LAUREN-BROOKE EISEN & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, *THE REVERSE MASS INCARCERATION ACT* 7–11 (2015), [https://www.brennancenter.org/sites/default/files/publications/The\\_Reverse\\_Mass\\_Incarceration\\_Act%20.pdf](https://www.brennancenter.org/sites/default/files/publications/The_Reverse_Mass_Incarceration_Act%20.pdf) [<https://perma.cc/XDL9-ZKY8>] (advocating federal funds for states that reduce imprisonment and crime).

*B. The Justifications for the CFPB Support the Need for a Federal Agency to Combat Abusive Criminal Justice Debt Collection*

After the enactment of the FDCPA and until the early 1990s, debt collection complaints declined.<sup>370</sup> Thereafter, abuses and complaints grew as both consumer debt and debt collection again expanded at exponential rates until 2010.<sup>371</sup> By 2010, the Federal Trade Commission classified the system of addressing consumer debt disputes as “broken.”<sup>372</sup> Beginning operations in July 2011, the CFPB would become the new “cop on the beat” to help combat abuses in debt collection.<sup>373</sup>

The reasons why the CFPB was necessary to aid in the battle against abusive civil debt collection parallel similar concerns that exist regarding why a federal agency should be involved with criminal justice debt issues.

Although President Carter had recognized the need for a consumer protection agency to regulate debt collection issues when he signed the FDCPA,<sup>374</sup> it would take more than thirty years before the CFPB was created.<sup>375</sup> The CFPB was one part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 enacted in response to the economic recession of 2008.<sup>376</sup> A primary concern of the CFPB was to

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370. Lynn A.S. Araki, Comment, *RX for Abusive Debt Collection Practices: Amend the FDCPA*, 17 U. HAW. L. REV. 69, 77–78 (1995).

371. Sobol, *Protecting Consumers*, *supra* note 4, at 333–36.

372. FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION i (2010), <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf> [<https://perma.cc/Q27U-H3F3>].

373. Richard Cordray, Prepared Remarks of CFPB Director Richard Cordray at University of Michigan Law School (Oct. 24, 2014), <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-university-of-michigan-law-school/> [<http://perma.cc/K4K9-EHLN>]; *see also* Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency & Stronger Laws*, 13 WYO. L. REV. 405, 405–06 (2013) (categorizing the creation of the CFPB as a “sea change” in consumer protection law). For an empirical analysis of the effectiveness of CFPB’s enforcement actions through 2015, *see* Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057 (2016).

374. Presidential Statement on Signing the Consumer Protection Act Amendments 1977, 2 PUB. PAPERS 1628 (Sept. 20, 1977).

375. CFPB 2013 ANNUAL REPORT, *supra* note 309, at 2.

376. A detailed discussion of Dodd-Frank Act and the creation of the CFPB is beyond the scope of this Article. For more detailed information, *see* Leonard J. Kennedy, Patricia A. McCoy & Ethan Bernstein, *The Consumer Financial*

address issues created by the mortgage crisis.<sup>377</sup> However, the CFPB was not limited to only mortgage debt or mortgage-granting entities. It also was given authority to address general debt collection abuses, including the extension of credit to a borrower without adequate regard to a borrower's reasonable ability to repay.<sup>378</sup> Moreover, while the FTC was limited to review of unfair and deceptive practices by non-bank entities, the CFPB was granted additional authority to review abusive practices and non-financial institutions.<sup>379</sup>

The CFPB was needed as the debt-collection industry had radically changed from the industry that existed when Congress passed the FDCPA.<sup>380</sup> The primary changes in the industry were the addition of debt-buyers and the use of new technologies.<sup>381</sup>

Between 1980 and 2010, consumer credit once again grew at record rates with revolving debt (primarily credit card debt)

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*Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1142–49 (2012).

377. Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 27 (2012).

378. Tiffany S. Lee, *No More Abuse: The Dodd Frank and Consumer Financial Protection Act's "Abusive" Standard*, 14 J. CONS. & COM. L. 118, 122 (2011).

379. Jean Braucher, *Form & Substance in Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 107, 117–18 (2012).

380. CFPB 2013 ANNUAL REPORT, *supra* note 309, at 9 (stating “[t]oday’s collection industry is markedly different from the industry contemplated when Congress enacted the FDCPA”). The CFPB has also been subject to criticism. *See, e.g.*, Michael Hiltzik, *Consumer Protection: Why Do Republicans Hate the CFPB so Much?*, L.A. TIMES (July 23, 2015, 12:46 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-cfpb-republicans-20150723-column.html> [<http://perma.cc/G4FB-6NY3>]; Ian Salisbury, *The CFPB Turns 5 Today. Here's What It's Done (and What It Hasn't)*, TIME (July 21, 2016), <http://time.com/money/4412754/cfpb-5-year-anniversary-accomplishments/> [<https://perma.cc/25ML-25TR>]. Lawsuits have focused on, among other things, the role of the director who can only be removed for cause. *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 37–39 (D.C. Cir. 2016) (declaring that the “CFPB is unconstitutionally structured because it is an independent agency headed by a single Director,” but remedying the constitutional violation by “severing the for-cause removal position” and allowing the CFPB to “operate as an executive agency”). While Richard Cordray was the acting director when this Article was submitted for publication, concerns exist about the future of the CFPB under a Trump administration. Lisa Lambert, *Consumer Financial Protection Bureau Could Be Defanged Under Donald Trump*, HUFFINGTON POST (Nov. 11, 2016, 1:41 AM), [http://www.huffingtonpost.com/entry/cfpb-donald-trump\\_us\\_58256519e4b02d21bbc839ea](http://www.huffingtonpost.com/entry/cfpb-donald-trump_us_58256519e4b02d21bbc839ea) [<http://perma.cc/3PBZ-L9Z4>]. Even if there are changes in CFPB's leadership or in its regulatory role, the conclusions of this Article still support the use of the DOJ and a federal act to address criminal justice debt abuses.

381. CFPB 2013 ANNUAL REPORT, *supra* note 309, at 9.

reaching a peak in 2008 at over \$1 trillion.<sup>382</sup> While consumer credit was escalating, the debt collection industry experienced a marked change as creditors began selling their debts. By 2005, the debt-buying industry was a \$100 billion industry.<sup>383</sup> The FTC characterized the massive influx of debt buyers as the “most significant change in the debt collection business” since 2000.<sup>384</sup> Buyers paid cents on the dollar for debts and received little information or documentation regarding the debts. Moreover, the information received was often unwarranted, contained inaccurate or incomplete information, and the debts sold included debts that had been sold, paid, settled, or were stale.<sup>385</sup> Additionally, new technologies “fundamentally altered” the collection industry.<sup>386</sup> Innovations were especially apparent in electronic payment systems and new communication methods, including automatic dialers, e-mails, cell phones, and text messaging.<sup>387</sup>

An agency with the flexibility to provide regulations to address these new types of collectors and these new technologies was necessary. While the FDCPA had established statutory restrictions and requirements for debt collectors, the FDCPA had also explicitly precluded the development of regulations.<sup>388</sup> Additionally, before the CFPB, a central agency

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382. BD. OF GOVERNORS OF THE FED. RESERVE SYS., HISTORICAL DATA FOR CONSUMER CREDIT OUTSTANDING (LEVELS), [http://www.federalreserve.gov/releases/g19/HIST/cc\\_hist\\_sa\\_levels.html](http://www.federalreserve.gov/releases/g19/HIST/cc_hist_sa_levels.html) (last updated Feb. 7, 2017) [<http://perma.cc/KCX4-AEMB>]; Sobol, *Protecting Consumers*, *supra* note 4, at 333–34.

383. Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 265 (2011).

384. FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT iv (2009), <https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf> [<http://perma.cc/ZVN9-HR6Z>] [hereinafter FTC Workshop].

385. Sobol, *Protecting Consumers*, *supra* note 4, at 352–59. See Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41 (2015) (providing an analysis of the life-cycle of a sold debt by examining over eighty debt purchase and sale agreements).

386. FTC Workshop, *supra* note 384, at iv.

387. *Id.* at 35–51; William P. Hoffman, Comment, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 562–68 (2010).

388. FTC Workshop, *supra* note 384, at 69–70. Prior to the adoption of Dodd-Frank Act, the FDCPA explicitly prohibited the FTC from issuing regulations concerning debt collection. *Id.*; 15 U.S.C. § 1692l(d) (1995). Although the FTC was

to address abuses and coordinate responses was not available, often leading to conflicting results.<sup>389</sup> The Dodd-Frank Act addressed these concerns by giving the CFPB primary responsibility for administering the FDCPA and exclusive jurisdiction to create regulations for consumer financial protection.<sup>390</sup>

Just as civil debt collection has witnessed an expansion in new actors (debt buyers) and new technologies (payment and communication systems), criminal justice debt collection has seen new types of collectors and technologies. The new collectors of criminal justice debt arise from outsourcing to private prisons, probation companies, and collection services.<sup>391</sup> New technologies include license plate readers and credit/debit card readers in police cars that allow for new methods of collecting criminal justice debt.<sup>392</sup> The justifications for a federal agency with rulemaking and enforcement authority to address and coordinate actions against the ever-changing landscape of civil debt collection exist to address the evolving issues in the collection of criminal justice debt.

### III. APPLYING THE FRAMEWORK TO CRIMINAL JUSTICE DEBT COLLECTION

Just as the FDCPA and CFPB provide a framework to confront abuses in the collection of consumer debts, a federal act and regulatory authority should apply to criminal justice debt. The remedies under the FDCPA and CFPB fall into three general categories: prohibited practices, required actions, and

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limited in its ability to create regulations under the FDCPA, the FTC did have authority to address unfair or deceptive acts by non-bank entities under the provisions of the Federal Trade Commission Act. 15 U.S.C. § 45 (2012). A detailed discussion of the role of the FTC is beyond the scope of this Article. For more information, see *THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION* (James Campbell Cooper ed. 2013).

389. Pridgen, *supra* note 373, at 405–09.

390. CFPB 2013 ANNUAL REPORT, *supra* note 309, at 6; Matthew R. Bremner, Note, *The Fair Debt Collection Practices Act: The Need for Reform in the Age of Financial Chaos*, 76 BROOK. L. REV. 1553, 1593 (2011); Block-Lieb, *supra* note 377, at 29; 12 U.S.C. § 5512 (2012).

391. See, e.g., Lynch, *supra* note 106 (discussing how private probation companies create new issues as they assess additional charges to people who are unable to pay fines and fees).

392. See *supra* notes 132–138 and accompanying text.

enforcement and outreach activities. This section identifies the key remedies in these categories and outlines how similar provisions should be adopted to combat abusive criminal justice debt practices. In doing so, I advocate the adoption of the federal Fair Justice Debt Practices Act (FJDPA) to serve as the statutory basis similar to the FDCPA and propose that the DOJ serve as the regulatory authority for the FJDPA, just as the CFPB plays that role for the FDCPA. Recognizing the need for further collection of data, study, and debate about the methods for addressing abuses in the collection of criminal justice debt, this Article sets forth the concepts and a framework for the FJDPA but leaves the formulation of the specific provisions to a subsequent article.

Moreover, acknowledging that the significant differences between criminal and consumer debts create a need for differences in specific remedies, this Article does not propose that the FDCPA and CFPB simply be extended to criminal justice debt, but instead that the statutory and regulatory framework used for consumer protection be applied to protect the victims of abusive criminal justice debt practices.

The primary differences between civil and criminal debts are the parties involved and the manner in which the debts are incurred. For consumer debt issues, amounts are frequently owed to private parties and private collection agents are involved, whereas for criminal debt matters, the amounts are generally owed to public parties and public collection agents are involved.<sup>393</sup> Nonetheless, public parties are often holders of the two largest sources of consumer debt: mortgage debt and student loan debt.<sup>394</sup> Furthermore, due to outsourcing, private parties are also involved in the collection of criminal justice debt.<sup>395</sup>

Additionally, consumer debts are incurred on a voluntary basis in exchange for services, whereas criminal justice

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393. The FDCPA does not apply to government officials. 15 U.S.C. § 1692a(6)(C) (2012); 1977 SENATE REPORT, *supra* note 307, at 1698 (describing that debt collector under the FDCPA does not apply to “[g]overnment officials, such as marshals and sheriffs, while in the conduct of their official duties”).

394. See, e.g., Courtney Miller, *How Uncle Sam Became the Biggest Student Lender*, NERDWALLET (Jan. 5, 2016), <https://www.nerdwallet.com/blog/studies/uncle-sam-biggest-student-lender/> [http://perma.cc/EXN7-VFC4] (stating that the federal government is the “largest holder of nonrevolving American consumer debt,” owning more than 70 percent of student loan debt).

395. See *supra* Part I.C.2.

obligations are imposed.<sup>396</sup> As such, criminal fines and fees are generally not considered debts under the FDCPA.<sup>397</sup> Interestingly, the Seventh Circuit has ruled that unpaid parking fees and nonpayment sanctions were debts for purposes of the FDCPA.<sup>398</sup> The district court ruled that the fee was “properly characterized as a fine” rather than as a debt subject to the FDCPA.<sup>399</sup> The fee consisted of a daily parking charge of \$1.50 and a non-payment sanction of \$45.00.<sup>400</sup> A public railroad owned the parking lot but used private entities to manage the lot and collect on outstanding amounts.<sup>401</sup> The FTC and CFPB filed an amicus brief asserting that the charges were within the FDCPA’s broad definition of a debt.<sup>402</sup> The Seventh Circuit agreed. The court found the parties had entered into a contractual obligation when the plaintiffs, by parking, accepted the offer contained in the signs on the lot.<sup>403</sup>

These differences are important and help explain why the specific remedies for consumer and criminal justice debts will vary. However, the framework established by the FDCPA and CFPB can be a model for confronting abusive criminal justice debt practices.

#### A. *Prohibited Practices*

The FDCPA prohibits general categories of behavior by debt collectors and establishes specific restrictions on collector activities. Similarly, the FJDPA should contain general and specific restrictions for the collection of criminal justice debt.

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396. See *Bell v. Providence Cmty. Corr.*, No. 3:11–00203, 2011 WL 2218600, at \*4–5 (M.D. Tenn. June 7, 2011) (holding that probation fees were not a debt under the FDCPA as they did not arise from a consumer transaction, “business deal or consensual understanding”).

397. *Id.*; see also *Pierre v. Retrieval-Masters Creditors Bureau, Inc.*, No. 15-2596, 2017 WL 1102635 at \*10 (D.N.J. Mar. 24, 2017) (holding that neither tolls nor related penalties for non-payment were debts under the FDCPA).

398. *Franklin v. Parking Revenue Recovery Servs., Inc.*, 832 F.3d 741, 743 (7th Cir. 2016).

399. *Franklin v. Parking Revenue Recovery Servs., Inc.*, No. 13 C 02578, 2014 WL 6685472, at \*6 (N.D. Ill. Nov. 25, 2014).

400. *Id.* at \*2.

401. *Id.* at \*1.

402. Brief of Amici Curiae Fed. Trade Comm’n & Consumer Fin. Prot. Bureau at 16–17, *Franklin v. Parking Revenue Recovery Servs., Inc.*, No. 14-3774 (7th Cir. Dec. 11, 2015), [http://files.consumerfinance.gov/f/201512\\_cfpb\\_amicus-brief-franklin.pdf](http://files.consumerfinance.gov/f/201512_cfpb_amicus-brief-franklin.pdf) [<https://perma.cc/P29A-KLVX>].

403. *Franklin*, 832 F.3d at 745.

A primary objective of the FDCPA is to prevent harassment or abuse.<sup>404</sup> Violations of the prohibition on harassment or abuse under the FDCPA include using or threatening violence to harm a person, her reputation, or her property.<sup>405</sup> Additionally, the FDCPA prohibits abusive, profane, or obscene language as well as calling individuals “repeatedly or continuously with intent to annoy, abuse, or harass.”<sup>406</sup>

Similarly, the FJDPA should contain provisions to restrict discriminatory, abusive, and harassing actions by the actors involved in the collection of criminal justice debt. The FJDPA should prohibit using or threatening incarceration to collect criminal justice debt unless a judge determines that a defendant has the ability to pay the debt. Officers should be held accountable for discriminatory actions in stopping, detaining, searching, and arresting individuals.<sup>407</sup> Similarly, courts should avoid the discriminatory application of bail and sentencing. Probation and collection officers, whether public or private officials, should be prohibited from using abusive techniques to collect revenue.

The FDCPA also prohibits false or misleading representations.<sup>408</sup> The general provisions prohibit false statements regarding the “character, amount, or legal status of any debt.”<sup>409</sup> This prohibition covers collectors falsely asserting that they have a judgment on a debt.<sup>410</sup> Moreover, the FDCPA prohibits misrepresentations as to the consequences of failure to pay a debt as well as the actions that collectors are authorized to take.<sup>411</sup> In general, the FDCPA prohibits collectors from threatening “any action that cannot legally be taken or that is not intended to be taken.”<sup>412</sup> For example, collectors are not permitted to represent or imply that failure to pay will result in “arrest or imprisonment . . . or the seizure,

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404. 15 U.S.C. § 1692d (2012).

405. *Id.* § 1692d(1).

406. *Id.* § 1692d(2), (5).

407. *See e.g.*, AM. CIVIL LIBERTIES UNION OF N.J., *supra* note 295, at 6.

408. 15 U.S.C. § 1692e (2012).

409. *Id.* § 1692e(2).

410. David B. Goldston, *Federal Regulation of Debt Collection Practices—The Fair Debt Collection Practices Act and Section Five of the Federal Trade Commission Act*, 13 U.S.F. L. REV. 575, 589 (1979).

411. 15 U.S.C. § 1692e(4), (5).

412. *Id.* § 1692e(5).

garnishment, attachment, or sale of any property or wages . . . unless such action is lawful and the debt collector or creditor intends to take such action.”<sup>413</sup>

Similarly, the FJDPA should contain provisions prohibiting false or misleading representations in the collection of criminal justice debt. For example, the FJDPA should prohibit collectors of criminal justice debt from misrepresenting the consequences of failure to pay the debt. Collectors should not be permitted to threaten incarceration without affording defendants the right to a meaningful ability to pay hearing and court-appointed counsel, if indigent. Similarly, probation officers should not be permitted to require conditions, tests, classes, or fees that are not court-mandated.

Additionally, the FDCPA confronts unfair practices by stating that a “debt collector may not use unfair or unconscionable means to collect or attempt to collect a debt.”<sup>414</sup> Unfair conduct under the statute includes seeking to collect amounts, including interest or fees, not authorized by the underlying debt agreement or permitted by law.<sup>415</sup>

Similarly, the FJDPA should address unfair or unconscionable methods of collecting criminal justice debt. For example, the FJDPA should restrict or eliminate the use of poverty penalties that arise solely because an individual lacks the ability to pay a monetary charge. Moreover, the FJDPA should include provisions restricting the use of cash bail and private probation companies.

Similar provisions have been proposed at the federal level. For example, California Representative Ted Lieu has introduced the “No Money Bail Act of 2016,” which bans cash bail for federal crimes and restricts funding to states that use cash bail.<sup>416</sup> Additionally, the proposed “End of Debtor’s Prison Act” prohibits certain federal grants to states and municipalities that rely on private probation companies that charge for “pay-only” probation.<sup>417</sup> Some cities have already

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413. *Id.* § 1692e(4).

414. *Id.* § 1692f.

415. *Id.* § 1692f(1).

416. No Money Bail Act of 2016, H.R. 4611, 114th Cong. (2016); Press Release, Ted W. Lieu, Congressman Ted W. Lieu Introduces the “No Money Bail Act of 2016” (Feb. 24, 2016), <https://lieu.house.gov/media-center/press-releases/congressman-ted-w-lieu-introduces-no-money-bail-act-2016-0> [http://perma.cc/PY8E-V3EU].

417. End of Debtor’s Prison Act of 2017, H.R. 1724, 115th Cong. (2017).

banned private probation companies.<sup>418</sup> The initial reports from municipalities that have stopped using private probation companies are favorable.<sup>419</sup>

The FJDPA could expressly prohibit incarceration based on fines or fees.<sup>420</sup> Professor Natapoff has suggested statutory language aimed at preventing the incarceration of individuals who are unable to pay criminal justice debt created by decriminalization laws.<sup>421</sup> If the FJDPA does not ban incarceration as a prohibited practice, then it should establish required practices, as described in the following section, to determine when incarceration for failure to pay criminal justice debt is appropriate.

The FDCPA also establishes specific restrictions on communications with the debtor and third parties.<sup>422</sup> For example, it creates time and place restrictions on contacting the debtor, prohibiting communications at inconvenient times (presumed to be after nine p.m. and before eight a.m.) and at the debtor's place of employment.<sup>423</sup> Furthermore, the FDCPA seeks to prevent debt collectors from revealing information to third parties about the status of an individual as a debtor by generally restricting calls to third parties to requests for

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418. John Archibald, *Alabama's For-Profit Courts Turn American Dream into Nightmare*, AL.COM (Nov. 21, 2014, 1:42 PM), [http://www.al.com/opinion/index.ssf/2014/11/alabamas\\_for-profit\\_courts\\_tur.html](http://www.al.com/opinion/index.ssf/2014/11/alabamas_for-profit_courts_tur.html) [http://perma.cc/MZ2X-2JST]. See, e.g., Agreement to Settle Injunctive and Declaratory Relief Claims ¶ 8, *Mitchell v. City of Montgomery*, No. 2:14-cv-00186-MHT-CSC (M.D. Ala. Nov. 17, 2014), <http://media.al.com/opinion/other/montgomeryDoc%2051-1%20-%20Settlement%20of%20Injunctive%20and%20Declaratory%20Claims%2011-17-2014.pdf> [http://perma.cc/JH23-SBM7] (providing a three-year ban on use of private probation companies in Montgomery, Alabama).

419. See, e.g., Patrick McCreless, *Smooth Transition Since Cities Took Over Municipal Court Probation Services*, ANNISTON STAR (Feb. 20, 2016), [http://www.annistonstar.com/news/anniston/smooth-transition-since-cities-took-over-municipal-court-probation-services/article\\_2d461526-d823-11e5-af0e-8bc64a886b0e.html](http://www.annistonstar.com/news/anniston/smooth-transition-since-cities-took-over-municipal-court-probation-services/article_2d461526-d823-11e5-af0e-8bc64a886b0e.html) [http://perma.cc/ANY6-3B8E] (describing the results in Anniston and Jacksonville, Alabama after ceasing the use of private probation companies).

420. Some commentators would expressly ban incarceration for fees or fines. See, e.g., Beckett & Harris, *supra* note 36, at 519. Others argue that the ban should be restricted to fees. See, e.g., R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1820 (2015).

421. Natapoff, *supra* note 39, at 1112–13.

422. 15 U.S.C. § 1692c (2012).

423. *Id.* § 1692c(a)(1), (3). The restriction on contacting a debtor at his job exists when “the debt collector knows or has reason to know that the consumer’s employer prohibits the consumer from receiving such communication.” 15 U.S.C. § 1692c(a)(3).

location information.<sup>424</sup> Additionally, the FDCPA prohibits communications by postcard or use of language or symbols on envelopes that indicate that the communications are for debt collection.<sup>425</sup>

Similarly, given the collateral consequences that can arise when third parties are aware of criminal justice debt—including the impact on employment and housing—the FJDPA should also prohibit communications at an individual's place of employment and restrict communications with third parties.

### B. *Required Practices*

In addition to prohibiting certain types of behavior, the FDCPA also sets forth required practices for debt collectors. Similarly, the FJDPA should establish requirements and standards for the actors involved in the collection of criminal justice debt.

The FDCPA sets up a system for validating and verifying debts.<sup>426</sup> Although the process has been subject to criticism and should be amended to reflect the growth in debt buyers,<sup>427</sup> the concept of providing notice of rights is an important notion that should apply to the collection of criminal justice debt. The basic idea of the validation and verification requirements is to provide notice and information to consumers to prevent the collection from the wrong people or for the wrong amount.<sup>428</sup>

The FDCPA requires that, within five days of her initial communication, a collector provide the consumer with written notice which includes the amount of the debt and the name of the creditor as well as statements about the debtor's ability to dispute the debt.<sup>429</sup> The collector must notify the debtor that

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424. *Id.* § 1692b, 1692c(b).

425. *Id.* § 1692b(4), (5).

426. *Id.* § 1692g.

427. See Sobol, *Protecting Consumers*, *supra* note 4, at 364–66. For an empirical examination of whether consumers understand validation notices, see Jeff Sovern & Kate K. Walton, *Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices*, SMU L. REV. (forthcoming 2017).

428. As stated in the Senate Report, the purpose of the validation provision was to “eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.” 1977 SENATE REPORT, *supra* note 307, at 1699.

429. 15 U.S.C. § 1692g(a).

she has thirty days to dispute the debt.<sup>430</sup> Additionally, the collector must inform the debtor that if she requests information about the original creditor within the thirty days, the collector will provide the name and address of the original creditor.<sup>431</sup> If the debtor timely disputes the debt or requests information about the original creditor, the collector must cease collection actions and communications until verification or the original creditor information is provided.<sup>432</sup>

Interestingly, the validation notices provided under the FDCPA are often referred to as “mini-Miranda” warnings.<sup>433</sup> Similarly, disclosure requirements should be set up for the collection of criminal justice debt. The FJDPA should require that defendants be afforded ability to pay hearings and defendants be provided with information about the process for contesting criminal justice debt and asserting inability to pay. For example, the FJDPA could provide that notice of rights be described on citations, at the courthouse, and on the court’s website. Moreover, the FJDPA could provide counsel for indigent defendants at such hearings.<sup>434</sup>

The FJDPA should also establish procedures and guidelines for determining the dollar amounts for bail, fines, and fees. A process should be set up for review of existing monetary charges as well as for the creation of new charges. Those guidelines should leave open the possibility of eliminating charges and denying new charges that may not be appropriate.<sup>435</sup> For example, elimination of cash bail or fees for public defenders could be considered.

To address the abusive use of fines and fees to generate revenue for municipalities, the FJDPA should also require

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430. *Id.*

431. *Id.* § 1692g(a)(5).

432. *Id.* § 1692g(b).

433. Araki, *supra* note 370, at 95–97; Melissa Travis, Comment, *The Three Cs Versus the Dinosaur: Updating the Technologically Archaic FDCPA to Provide Consumers, Collectors, and Courts Clarity*, 44 J. MARSHALL L. REV. 1033, 1039–40 (2011).

434. State Representative Adrienne Wooten has introduced a bill in Mississippi to address the rights of indigent defendants in the collection of fines and fees. The proposal requires appointment of counsel for indigent defendants facing incarceration for failure to pay fines and fees and establishes scenarios where defendants are presumed unable to pay fines and fees. H.B. 672, 132d Leg., Reg. Sess. (Miss. 2017).

435. For a more detailed discussion analyzing whether monetary charges should be eliminated, see Sobol, *Charging the Poor*, *supra* note 4, at 532–34.

revenue caps. Such caps should be inclusive to avoid the issue of cities increasing fines and fees on areas not covered.<sup>436</sup> A larger fine does not necessarily mean greater compliance. For example, data reflects that traffic fines need not be high to help traffic safety, as “[g]etting the ticket correlates to driver safety, not the amount it costs.”<sup>437</sup>

Requiring use of cameras may also help discourage offensive and discriminatory collection efforts.<sup>438</sup> For example, California now requires that officers record all traffic and pedestrian stops.<sup>439</sup> Additionally, a police chief relied on dashboard recordings to dismiss officers accused of discriminating against African-American drivers.<sup>440</sup>

The FDCPA also has a provision regarding the application of payments when a debtor has multiple debts. Under such circumstances, collectors must apply payment based on the debtor’s request rather than to a disputed debt.<sup>441</sup> Similarly, the FJDPA should establish a system for prioritization of the application of payments received. For example, payments should be applied to fines and restitution before fees.

### C. *Enforcement and Outreach Activities*

Merely establishing a federal law will not be effective unless parties are aware of their rights and obligations, and its provisions are enforced. The primary functions of the CFPB include rulemaking, supervision, enforcement, responding to consumer complaints, and education.<sup>442</sup>

Just as the CFPB has become the “cop on the beat” to help with the coordination of enforcement of the FDCPA, the DOJ should help enforce the FJDPA. The DOJ is already performing many activities similar to the activities undertaken by the CFPB. What allows the CFPB to succeed is the ability to rely

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436. For example, when Missouri placed caps on traffic fines, a dramatic increase in non-traffic fines occurred. *See supra* notes 128–131 and accompanying text.

437. Campbell & Taggart, *supra* note 132 (relying on a Canadian study on traffic fines).

438. AM. CIVIL LIBERTIES UNION OF N.J., *supra* note 295, at 6 (recommending use of “dashboard and/or body cameras”).

439. LaFraniere & Lehren, *supra* note 278.

440. *Id.*

441. 15 U.S.C. § 1692h (2012).

442. 12 U.S.C. § 5511(c) (2012); Kennedy et al., *supra* note 376, at 1146.

on the FDCPA, whereas the DOJ in its enforcement actions often has to rely on more general safeguards and greater burdens in establishing violations of constitutional and civil rights. Adopting a federal act setting forth the prohibited and required practices of actors involved in the collection of criminal justice debt will allow the DOJ to more effectively combat abusive practices. Moreover, the DOJ should create or designate a division to address compliance and help with education and outreach.

The CFPB's rulemaking authority allows it to establish guidelines to help collectors understand their requirements under the FDCPA. Similarly, the DOJ should develop guidelines to help courts understand their obligations under the FJDPA. For example, the DOJ could create procedures and directives for ability to pay hearings, including notice process, right to counsel, standards for indigency, and alternatives to incarceration.<sup>443</sup> Additionally, guidelines could be established providing for "independent oversight of police departments" and restricting the use of citations as a measure of effective performance.<sup>444</sup> The DOJ is currently seeking information about best practices for assessment of fines and fees.<sup>445</sup> These best practices could establish guidelines for courts and municipalities.

As outlined in the *Westlake* case in the Introduction, the CFPB also has supervisory, investigative, and enforcement powers. The CFPB and FTC share enforcement under the FDCPA,<sup>446</sup> and they also coordinate activities with other

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443. For more detail about potential guidelines for ability-to-pay hearings, see Sobol, *Charging the Poor*, *supra* note 4, at 535–37. Potential sources for establishing indigency standards include standards used for determining right to public defender and federal housing assistance. See ACCESS TO JUSTICE PROGRAM, BRENNAN CTR. FOR JUSTICE, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL (2008), <https://www.nacd.org/WorkArea/DownloadAsset.aspx?id=22023&libID=21993> [<https://perma.cc/G4RV-H4KQ>]; CONG. BUDGET OFFICE, FEDERAL HOUSING ASSISTANCE FOR LOW-INCOME HOUSEHOLDS (Sept. 2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50782-lowincomehousing-onecolumn.pdf> [<https://perma.cc/KH9N-PZB4>].

444. AM. CIVIL LIBERTIES UNION OF N.J., *supra* note 295, at 6.

445. Press Release, U.S. Dep't of Justice, Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices (Mar. 14, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices> [<https://perma.cc/9ZGN-6TH4>].

446. See Memorandum of Understanding Between the CFPB and the FTC (Jan. 20, 2012), <https://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf>

agencies and state representatives.<sup>447</sup> For example, Operation Collection Protection was “the first coordinated federal-state enforcement initiative targeting deceptive and abusive debt collection practices.”<sup>448</sup> In 2015, at least 115 actions were filed “by . . . more than 70 law enforcement partners.”<sup>449</sup> Additionally, as part of its supervisory powers, the CFPB “conduct[s] internal examinations, visit[s] institutions, require[s] reports from them, and open[s] up their books and operations to scrutiny.”<sup>450</sup>

The DOJ already exercises supervisory, investigatory, and enforcement powers as evidenced by its investigation of the Ferguson and Baltimore Police Departments.<sup>451</sup> Additionally, the DOJ should require states and municipalities to provide data to evaluate their progress in addressing abuses related to criminal justice debt. Data accumulation and analysis is fundamental to deciding the appropriate courses of action.<sup>452</sup> The current system does not have an adequate process for collecting national statistics on the imposition of criminal

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[<https://perma.cc/F6JJ-995C>].

447. See, e.g., Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 128 (2013) (discussing coordination with state attorneys general).

448. Press Release, Fed. Trade Comm’n, FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown Against Abusive Debt Collectors (Nov. 4, 2015), <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement-partners-announce> [<https://perma.cc/P6L7-Z6R9>].

449. *Id.*

450. Cordray, *supra* note 373.

451. FPD REP., *supra* note 41; BPD REP., *supra* note 288. See also Simone Weichselbaum, *Policing the Police*, MARSHALL PROJECT (May 26, 2015, 6:12 PM), [https://www.themarshallproject.org/2015/04/23/policing-the-police?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20160211-382#.UncKbIPQS](https://www.themarshallproject.org/2015/04/23/policing-the-police?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20160211-382#.UncKbIPQS) [<https://perma.cc/CTQ4-NUTU>] (discussing the effectiveness of investigations).

452. See, e.g., JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 35 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/4ABD-BT5T>] (identifying the need for national data to help develop bail reform); Edmund L. Andrews, *Stanford Engineers’ Law, Order & Algorithms’ Data Project Aims to Identify Bias in the Criminal Justice System* (Feb. 10, 2016), <http://news.stanford.edu/2016/02/10/law-order-algorithm-021016/> [<https://perma.cc/N7J5-NLNG>] (describing Stanford University’s School of Engineering development of a database of 100 million traffic stops throughout the United States to help identify discrimination and “design practices that are more equitable and effective at reducing crime”). The DOJ investigation of the Baltimore Police Department emphasized the importance of data collection and analysis. BPD REP., *supra* note 288, at 45.

justice debt.<sup>453</sup> Establishing fact-gathering procedures and requiring reporting and collection of data will allow for continual study, assessment, and modification of appropriate actions. Additionally, such processes would help create greater transparency in the collection of criminal justice debt.

Third-party companies that provide outsourcing services should be subject to oversight by municipalities and be required to provide reporting information about their operations. Employment of private companies could be conditioned upon compliance with established standards, reporting requirements, and approved fee schedules. Additionally, just as the CFPB produces annual reports of its activities under the FDCPA,<sup>454</sup> the DOJ should provide similar reports reflecting its operations in addressing abuses in the collection of criminal justice debt.

Dodd-Frank also requires the CFPB to collect and respond to consumer complaints.<sup>455</sup> Accordingly, the CFPB has established an online complaint database that allows consumers to file complaints about collectors and sets up a process for resolving the claims.<sup>456</sup> The DOJ should set up a similar system to help track and resolve complaints about criminal justice debt collection.<sup>457</sup>

Just as the CFPB works with state and local groups, the DOJ offers resources and advice to states and municipalities. For example, in March 2016, the DOJ sent a letter to all state chief justices and court administrators containing information about their responsibilities associated with the collection of criminal justice debt.<sup>458</sup> The letter set forth certain principles based on constitutional protections that courts should follow in imposing and enforcing fines and fees.<sup>459</sup> The principles covered include the requirements that courts conduct indigency hearings before incarcerating an individual for failure to pay

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453. HARRIS, *supra* note 57, at 6–8.

454. 15 U.S.C. § 1692m (2012).

455. 12 U.S.C. § 5511(c)(2) (2012).

456. *See Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/complaintdatabase/> (last visited Apr. 3, 2017). [<https://perma.cc/68ZR-SWZN>].

457. Sobol, *Charging the Poor*, *supra* note 4, at 538.

458. U.S. Dep't of Justice, *supra* note 445.

459. Letter from Vanita Gupta & Lisa Foster, Office for Access to Justice, Civil Rights Div., U.S. Dep't of Justice 2 (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download> [<https://perma.cc/ZJ3J-FT63>].

finer or fees; evaluate non-incarceration alternatives for those unable to pay; avoid using arrest warrants and license suspensions as collection methods rather than as a means of protecting public safety; and avoid using cash bail on indigent defendants who lack the ability to pay but are neither a flight risk nor a threat to public safety.<sup>460</sup> Additionally, the letter cautions courts to have oversight and control over the potential unconstitutional actions of its staff and private companies who are delegated authority from the court.<sup>461</sup> The letter explicitly identifies the possible conflicts of interest that arise when using private probation companies.<sup>462</sup> The chief justices were encouraged to send the letters to all of their local judges and provide training and resources to help judges.<sup>463</sup> The DOJ also sent information about a resource guide and grant program to help aid state and local authorities in the collection of fines and fees.<sup>464</sup>

Finally, providing education and outreach is a primary function of the CFPB.<sup>465</sup> The CFPB targets education for specific groups and has created form letters for use by debtors.<sup>466</sup> Additionally, the DOJ should work with state and local groups, including non-profit organizations, to provide outreach and training to educate not only the actors involved in the collection of criminal justice debt but also the general public. Such programs are necessary to help mend the severe trust issues that currently exist in many communities arising from abusive criminal justice debt practices.

The DOJ is already performing many of the functions that the CFPB is providing, including outreach and enforcement. Armed with a federal statute specifying prohibited and required practices for those involved in collecting criminal justice debt, the DOJ would be more effective in the battle against abuses in criminal justice debt collection.

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460. *Id.*

461. *Id.* at 8.

462. *Id.*

463. *Id.* at 3.

464. U.S. Dep't of Justice, *supra* note 445.

465. 12 U.S.C. § 5511(c)(1) (2012).

466. CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2015, at 42–45 (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb-fair-debt-collection-practices-act.pdf](http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf) [<https://perma.cc/WL9F-FUUA>].

## IV. FEDERALISM ISSUES

A legitimate concern about the proposal for a federal act and use of a federal agency for enforcement is the impact that it would have on states' rights.<sup>467</sup> Similar concerns were raised with the adoption of the FDCPA and the use of the CFPB.<sup>468</sup> To address some of these concerns the FDCPA explicitly describes its relationship to state law and sets forth a procedure for states to obtain exemptions.<sup>469</sup> The FDCPA provides that state laws are preempted only to the extent that they are inconsistent with the FDCPA.<sup>470</sup> Following the enactment of FDCPA, states enacted legislation similar to the FDCPA.<sup>471</sup> Some states provide even greater coverage.<sup>472</sup> Moreover, states can receive an exemption under the FDCPA if they demonstrate substantially similar laws and adequate enforcement.<sup>473</sup> Additionally, the CFPB operates with state and local authorities to coordinate enforcement and outreach.<sup>474</sup> Similarly, as described in Part III, the DOJ is already involved in the enforcement and outreach activities similar to what the CFPB is doing.<sup>475</sup>

My proposal is not meant to restrict state enforcement but, instead, to provide a floor for enforcement. Moreover, I hope that, as the experience with the FDCPA shows, states would adopt legislation similar to the FJDP. Just as with the FDCPA, states would be encouraged to provide additional provisions to safeguard their citizens. Similarly, as with the FDCPA, the FJDP could provide exemptions for states that enact laws that provide greater protections.

To incentivize cooperation from states and municipalities,

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467. A detailed analysis of the federalism concerns is beyond the scope of this Article. For an example of an article that addresses these concerns, see Professor Drinan's advocacy of a federal act to provide counsel to indigent defendants. Drinan, *supra* note 367.

468. *See, e.g.*, 1977 SENATE REPORT, *supra* note 307, at 1703 (describing the views of Senators Schmitt, Garn, and Tower that the legislation and regulation should be left to the states).

469. 15 U.S.C. §§ 1692n, 1692o (2012).

470. *Id.* § 1692n.

471. *See* Geltzer & Woocher, *supra* note 310, at 1402.

472. *See, e.g.*, TEX. FIN. CODE ANN. § 392.001(6) (West 2016) (debt collector includes creditors collecting on debts).

473. 15 U.S.C. § 1692o.

474. *See supra* notes 447–449 and accompanying text.

475. *See supra* Part III.C.

the FJDPAs could condition federal grants on adoption of and compliance with its requirements.<sup>476</sup> The DOJ currently uses the threat of deprivation of federal funds for failure to comply with its mandates.<sup>477</sup> Similarly, commentators have advocated the withholding of federal funds to help enforce national standards for constitutional policing.<sup>478</sup> Alternatively, instead of mandating federal standards, the federal government could “promulgat[e] guidelines and best practices” and use “grants and other funding incentives” to encourage adoption by state and local governments.<sup>479</sup>

Finally, as discussed earlier, criminal justice debt abuses may impact interstate commerce and, more importantly, often involve deprivation of constitutional rights that justify the use of a federal statute.<sup>480</sup> Under 42 U.S.C. § 14141, the DOJ can seek relief against governmental authorities when its law enforcement officers engage in a “pattern or practice” of conduct that deprives individuals of their constitutional rights.<sup>481</sup> The DOJ has used its authority under § 14141 to investigate police departments, file lawsuits, and seek consent decrees.<sup>482</sup> Accordingly, to the extent abusive collection

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476. Current proposals for reform of bail practices and the use of private probation companies rely on conditioning federal funds on state compliance. *See supra* notes 416–417 and accompanying text. For a discussion regarding factors that justify the conditioning of federal grants, see Drinan, *supra* note 367, at 509–10.

477. *See, e.g.*, Ryan J. Reilly, *DOJ Threatens to Withhold Grants from States That Aren't Protecting Prisoners from Rape*, HUFFINGTON POST (Feb. 12, 2014, 2:16 PM), [http://www.huffingtonpost.com/2014/02/12/doj-prison-rape\\_n\\_4775411.html](http://www.huffingtonpost.com/2014/02/12/doj-prison-rape_n_4775411.html) [<https://perma.cc/5QZ3-S58W>].

478. Nat Hentoff & Mike Hentoff, *Real Police Reform Requires National Policing Standards*, CATO INST. (Aug. 12, 2016), <https://www.cato.org/publications/commentary/real-police-reform-requires-national-policing-standards> [<https://perma.cc/YSV9-DDWN>].

479. Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 838–39 (2017).

480. *See supra* Part II.A.4 (discussing constitutional concerns regarding equal protection, due process, right to counsel, and potential violations of the Eighth Amendment's restriction on excessive bail and fines). For a more detailed refutation of federalism concerns, see Drinan, *supra* note 367, at 508–10 (advocating for a national right to counsel act based on Sixth Amendment concerns).

481. 42 U.S.C. § 14141 (2012).

482. *See, e.g.*, BPD REP., *supra* note 288; FPD REP., *supra* note 41. A detailed discussion of the use of § 14141 is beyond the scope of this Article. For more information, see Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014) (providing an empirical review of the DOJ's use of § 14141).

methods form a pattern or practice of conduct depriving individuals of constitutional rights, the DOJ already has the authority to seek compliance of local government officials.

The current municipality-by-municipality approach of federal lawsuits and federal investigations presents only a piecemeal approach to stemming violations.<sup>483</sup> A federal statutory and regulatory approach offers a more efficient method of addressing these abuses and preventing abuses before they arise.<sup>484</sup>

## V. CONCLUSION

Millions of Americans are subject to an abusive criminal justice debt system that often focuses more on revenue collection than public safety. They become trapped in the system because they are unable to pay the fines and fees assessed. Once in the system, their criminal justice debt escalates. Their poverty prevents them from ever escaping. Moreover, the system fosters discrimination and creates distrust in communities.

A new approach is necessary to prevent abusive criminal justice debt practices. When faced with similar issues in the collection of civil debts, we turned to a federal framework. The holders of criminal justice debt share the financial consequences that consumer debtors have but also experience denial of benefits, loss of driver's licenses, criminal records, arrest, and even incarceration. Given these greater consequences, we should provide even greater protection for individuals with criminal justice debt. A federal approach should be examined. The exact contours of a federal act need more detailed study and development. In March 2016, the DOJ established a National Task Force on Fines, Fees, and Bail Practices to develop model statutes, rules and procedures, and best practices. The task force includes state judges, legislatures, advocacy groups, and professors.<sup>485</sup> That task

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483. See Hentoff & Hentoff, *supra* note 478 (recognizing the need for national standards to address constitutional policing and stating that “[i]t is long past time for the U.S. government to acknowledge that police misconduct is not a series of isolated problems that can be solved by a series of individual civil rights enforcement actions”).

484. See Balko, *supra* note 35.

485. U.S. Dep't of Justice, *supra* note 445.

force should examine the need for a federal statutory and regulatory solution to confront abuses in the collection of criminal justice debt.<sup>486</sup>

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486. *Id.* Similarly, the Laura and John Arnold Foundation commissioned a five-year, nearly \$4 million project, to study the imposition of criminal justice fines and fees at state and local levels by examining the practices in eight states. See Deborah Bach, *UW Project Focuses on Fines and Fees That Create 'Prisoners of Debt'* (Dec. 4, 2015), <http://www.washington.edu/news/2015/12/04/uw-project-focuses-on-fines-and-fees-that-create-prisoners-of-debt/> [https://perma.cc/YD3F-3FNR]. The study was subsequently expanded to cover nine states and the first-year report to the Foundation was released in April, 2017. See ALEXES HARRIS ET AL., *MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM* 3–4 (2017), <http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf> [https://perma.cc/7EUS-3WBC].