CONFRONTING CRIMINAL JUSTICE DEBT

A GUIDE FOR LITIGATION

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ABOUT THE AUTHORS

Abby Shafroth is a staff attorney at the National Consumer Law Center and focuses on the intersection of criminal justice and consumer law, and student loans and for-profit school issues. Previously, Abby litigated employment and civil rights class and collective actions at Cohen Milstein Sellers & Toll PLLC in Washington, D.C., and worked as an attorney at the Lawyers' Committee for Civil Rights Under Law.

David Seligman is a contributing author at the National Consumer Law Center, where he specializes in forced arbitration, and a staff attorney at Towards Justice in Denver, Colorado, where he primarily litigates class and collective actions on behalf of low-wage workers. Previously, he was a staff attorney at NCLC focusing on forced arbitration, court fines and fees, and subprime auto lending.

Alex Kornya is the Assistant Litigation Director at Iowa Legal Aid. Previously, he was a staff attorney for Iowa Legal Aid, advocating primarily in the areas of consumer protection, tax, and housing. Since 2009, he has advocated for the rights of low-income people facing the burden of criminal justice debt, developing and raising various constitutional and consumer protection theories and achieving systemic change.

Rhona Taylor is a staff attorney in the Institutions Project at Columbia Legal Services and currently heads the Reentry Taskforce. Throughout her legal career, she has worked to increase access to justice for all, whether as a member of the Institutions Project, a staff attorney at the King County Department of Public Defense, or in her prior role as an Assistant Federal Public Defender in Michigan.

Nick Allen is a staff attorney in the Institutions Project at Columbia Legal Services. He works on addressing the legal barriers of legal financial obligations—the fees, fines and restitution imposed by the court as part of a criminal judgment and sentence.

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ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

ABOUT THIS PROJECT

This report is part of *Confronting Criminal Justice Debt: A Comprehensive Project for Reform*, a collaborative project by Criminal Justice Policy Program (CJPP) at Harvard Law School and the National Consumer Law Center (NCLC).

This project includes three parts designed to assist attorneys and advocates working on reform of criminal justice debt:

- *Confronting Criminal Justice Debt: The Urgent Need for Comprehensive Reform* (CJPP and NCLC),
- *Confronting Criminal Justice Debt: A Guide for Litigation* (NCLC), and
- *Confronting Criminal Justice Debt: A Guide for Policy Reform* (CJPP).

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1. INTRODUCTION

1.1. The Growing Need for Skilled Representation of Individuals in Criminal Justice Debt Matters

In August 2014, *The New York Times* reported on events unfolding in Ferguson, Missouri, a "working-class suburb of about 20,000 residents." Twenty-four hours earlier, a police officer had shot and killed an 18-year-old black youth named Michael Brown. The next day, hundreds of people gathered to protest and light candles. Michael Brown's stepfather stood at the gathering holding a cardboard sign that read "Ferguson police just executed my unarmed son."[1]

News of Michael Brown's shooting and the tensions that followed were the first that most people had heard about Ferguson, Missouri. But as we learned more, we saw that Michael Brown's death was the explosive culmination of many years of systematic injustice. For the five years prior to the shooting, a small legal services and advocacy organization based in the St. Louis region called ArchCity Defenders had been representing clients in municipal courts and chronicled their clients' experiences in a white paper focused on the region's municipal courts.[2] Those courts had been the focal point of an aggressive revenue-through-law enforcement scheme that targeted primarily the African-American community in which Michael Brown had grown up. In 2015, when the Department of Justice investigated Ferguson's municipal court system and police department, it observed that the municipal courts handled "most charges brought by FPD, and d[id] so not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue."[3] In its white paper discussing the phenomenon, ArchCity Defenders explained the relationship between the police and the municipal courts: "Many residents feel that the police target black residents and try to find something wrong in order to issue tickets. The courts, in turn, issue arrest warrants for failure to pay and send them to jail if they fail to pay thereafter."[4] This scheme imposed jarring costs on the city's residents:

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[1] Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. Times, Aug. 11, 2014, *available at* http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html.

[2] Thomas Harvey, et al., Archcity Defenders: Municipal Courts White Paper (2014) ("ArchCity White Paper"), *available at* http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf.

[3] U.S. Dep't of Justice, Investigation of the Ferguson Police Department 42 (Mar. 4, 2015) , *available at* https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf..

[4] ArchCity White Paper, *supra* n.2, at 16.

> *Clients reported being jailed because they were unable to pay fines. Some who have been incarcerated for delinquent fine payments have lost jobs and housing as a result. Indigent mothers "failed to appear" in court and had warrants issued for their arrest after arriving early or on-time to court and being turned away because that particular municipality prohibits children in court. Family members were forced to wait outside courtrooms while loved-ones represent themselves in front of a judge and a prosecutor. Many recounted being mistreated by the bailiffs, city prosecutors, court clerks, and even some judges.*[5]

Unfortunately, what was happening in Ferguson happens all across the country every day. The costs of this injustice are tremendous—both for the debtors and families like those whom ArchCity described and for society more broadly. Systematic injustice of this scope must be addressed not just through litigation but also through policy reform, public education, and activism. Yet litigation approaches remain critical, and lawyers and advocates across the country must be armed with as many tools as possible to protect the clients and communities they serve.

Before understanding how we might attack the problem, we must identify it. Those ensnared in the criminal and civil justice systems frequently must pay a heavy price in the form of costs related to arrest, prosecution, defense, imprisonment and supervision, as well as more generic surcharges and punitive fines.[6] Today, criminal justice debt amounts owed by individuals often total in the thousands, and sometimes significantly more.[7] Individuals do not need to be convicted of a crime to owe criminal justice debt. Even those who are acquitted, have charges dismissed, or are never charged may be stuck with the bill for their arrest, detention, and defense in many jurisdictions.

As states and municipalities have struggled with budget shortages, they have increased not only the amount of criminal justice debt imposed but also the vigor with which it is collected. For example, in 2010, Philadelphia launched its first major effort to collect an estimated $1.5 billion in outstanding criminal justice debts, dating back to the 1970s. Although the city later decided to halt collection of the largest category of the

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[5] *Id.* at 1-2.

[6] *See* Alexes Harris, A Pound of Flesh: Monetary Sanctions As Punishment for the Poor 5–11, 23–41 (2016).

[7] *See id.* at 56–57 (average criminal justice debt imposed in Washington State is $1,347, not including restitution—with restitution average debt totaled $9,204); *id.* at 57–58 figs. 3.1–3.2 (illustrating rapid accumulation at 12% interest accrued for those with limited ability to pay); *id.* at 55 (interviewee was assessed $33,000 in debts and spent eight years in prison; though she was currently making minimum payments, accruing interest had brought her total debt to $72,000 by thirteen years post-conviction); *see also* Saneta deVuono-powell, Chris Schweidler, Alicia Walters, & Azadeh Zohrabi, Ella Baker Foundation, Who Pays? The True Cost of Incarceration on Families 13 (2015), *available at* http://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf (survey finding average amount spent by formerly incarcerated people and their families in 14 states on criminal justice costs, including attorney's fees and restitution, was $13,607).

debts after a significant public education and media campaign led by Community Legal Services and other advocates,[8] this recent aggressive collection effort appears to be in step with a broader trend. As part of this wave, states and local governments are also increasingly contracting with private debt collection agencies—which are often authorized to charge significant collection costs—to try to collect from those with criminal justice debt.[9]

The methods available to collect criminal justice debts can be draconian. In at least 44 states and the District of Columbia, individuals may be incarcerated for "willful" nonpayment of criminal justice debts.[10] In many jurisdictions, nonpayment of criminal justice debt may also result in governmental infringements on other vital rights and interests that could be essential to a person's self-sufficiency or successful reentry following incarceration, including suspension of driver's or professional licenses, restrictions on expungement of criminal records, and denial of the right to vote.[11] Debtors may also face garnishment of their wages or benefits and seizure of their tax refunds or other assets.

As discussed in the companion *Guide for Policy Reform*, significant reform of the laws governing these practices is needed. Even under current law, however, there are a number of important legal protections available to defend against or challenge criminal justice debt practices. For example, in some jurisdictions, imposition of both mandatory and discretionary costs is not permitted if the defendant lacks the ability to pay. Skilled representation by counsel can often limit the imposition of excessive and unaffordable criminal justice fines and fees, substantially improving the lives of the individuals directly affected. Moreover, there are constitutional limits on imprisonment of debtors because of their inability to pay criminal justice debt, and on unduly harsh collection methods that deprive those who owe criminal justice debt of the defenses and exemptions that apply to other debtors. Representation will often enable the debtor to obtain a payment plan, or even modification or remission of the debt itself. Bankruptcy

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[8] *See* Suzanne Young, *A Successful Campaign in Philadelphia to Eliminate Unsubstantiated Criminal Debt*, Talk Poverty (Sept. 11, 2015), *available at* https://talkpoverty.org/2015/09/11/successful-campaign-philadelphia-eliminate-huge-unsubstantiated-criminal-debt/.

[9] *See, e.g.*, Blake Ellis & Melanie Hicken, CNN Money Investigation, *The Secret World of Government Debt Collection* (Feb. 17, 2015), *available at* http://money.cnn.com/interactive/pf/debt-collector/government-agencies/.

[10] *See* Alexes Harris, A Pound of Flesh: Monetary Sanctions As Punishment for the Poor 50 (2016). For a summary of all states, see *id.* at tbl. 4.2, and for a chart of the state law authority relied upon, see *id.* at tbl. A2.2.

[11] *See generally Confronting Criminal Justice Debt: A Guide for Policy Reform* at 15-17, 22-23 (2016). *See also* Ark. Code. Ann. § 16-90-1404 (driver's license suspensions); Iowa Code §§ 901C.1, 907.9 (expungement); Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry 2, 25, 29 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf; Allyson Fredericksen and Linnea Lassiter, Alliance for a Just Society, Disenfranchised by Debt (2016).

KEY TERMS

- **Criminal justice debt:** The various financial obligations that may be imposed on someone who is accused of an infraction, misdemeanor, or felony, including the costs that may accrue after sentencing, are referred to generically or collectively by a variety of names, including *criminal justice debt*, *court debt*, *criminal debt*, *legal financial obligations* (or "*LFOs*"), *monetary sanctions*, and *fines and fees*. For consistency, the term *criminal justice debt* is primarily used in this report, though the types of debts addressed herein may also result from infractions such as jaywalking and traffic violations that some jurisdictions treat as civil.
- **Fines:** Fines are financial obligations imposed as monetary penalties for committing an infraction, misdemeanor, or felony. Fines may be generally authorized or offense-specific.[12]
- **Fees or Costs:** Also known as *user fees* or *recoupment costs*, fees or costs are financial obligations imposed on defendants as a way for the government to recover the costs of prosecuting the defendant, or to otherwise fund operational costs of the criminal justice system. Fees may be assessed using a preset schedule, or the amount may be tied to the actual cost of providing the service. Examples include jury fees, expert witness costs, costs of incarceration, and, as described in more detail below, defense costs. Depending on the jurisdiction, costs can be imposed on both convicted and acquitted defendants. There may be limits on the amount of costs a defendant can be ordered to pay. Unlike fines, fees or costs are generally not intended to serve a punitive purpose.[13]
- **Indigent Defense Fee Recoupment ("IDFR"):** Indigent defense fees (also known as IDFR or public defense fees) are among the most common and substantial costs that can be imposed on indigent criminal defendants. Using an NPR study in 2014, at least 43 states and the District of Columbia have statutory authority to bill defendants for receipt of public defense or appointed counsel services.[14] Costs of defense can be significant—especially to those deemed indigent—and may be imposed as part of a criminal judgment and sentence or as a separate civil obligation.
- **Surcharges:** Commonly grouped together with fees or costs, surcharges are financial obligations that are imposed as a flat fee or percentage added to a fine to fund a particular government function.

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[12] *See, e.g.*, Fla. Stat. § 775.083 (general limits for fines for non-capital felony convictions); 730 Ill. Comp. Stat. § 5/5-9-1.1 (fines for certain drug convictions that must be in amounts not less the full street value of the controlled substances seized); Or. Rev. Stat. § 161.625 (maximum fine amounts for murder, aggravated murder, and general classes of felonies); Tenn. Code Ann. § 39-13-111 (fine for two or more domestic violence convictions); Wash. Rev. Code § 9.94A.550 (West) (establishing range of fines for all classes of felonies); Wash. Rev. Code § 69.50.430 (fines for specific felony drug convictions).

[13] In some instances, however, fees and costs may be considered to have a punitive or deterrent purpose. *See, e.g.,* State v. Haines, 360 N.W.2d 791 (Iowa 1985).

[14] *See* Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, National Public Radio (May 19, 2014), *available at* http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

- **Interest, collection costs, payment plan costs, and penalties:** In most jurisdictions, a defendant's financial obligations will grow significantly if he is unable to pay the debt imposed immediately as a result of interest charged on the debt, collection costs, late payment penalties, and costs associated with accessing or using a payment plan.
- **Restitution:** Restitution refers to financial obligations intended to compensate crime victims for losses suffered as a result of the defendant's actions. Restitution is generally based on actual losses and is transmitted to the victim, although there are variations nationally as to the amount of restitution that can be ordered and whether the money is transmitted directly to a victim or to a government agency.[15] Because restitution involves interests of victims, in addition to interests of the defendant and the state, imposition and non-penal collection practices relating to restitution raise more complex issues than those raised by other criminal justice debts. These issues are largely beyond the scope of this guide.

provides invaluable options for some types of criminal justice debt, and even without bankruptcy the debtor may be able to invoke federal and state exemption laws to protect key assets and income. Affirmative constitutional and statutory claims are available in some circumstances to right wrongs committed in the collection of criminal justice debt. Pursuing any of these claims successfully often requires an attorney.

1.2. Criminal Justice Debt as a Matter of Both Racial and Economic Justice

High-quality representation of individuals with criminal justice debt is especially important for the poor and people of color, as the burdens of criminal justice debt disproportionately fall upon them.

The vast majority of criminal defendants are poor. One study found that nationally, the earned annual income of two-thirds of jail inmates was under $12,000 in the year prior to their arrest.[16] And approximately eighty percent of criminal defendants are sufficiently indigent to qualify for court-appointed defense counsel.[17]

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[15] *See, e.g.,* Cal. Penal Code § 1202.4 (West); Miss. Code Ann. § 99-37-3; Or. Rev. Stat. § 137.106 (court shall enter judgment requiring defendant to pay victim restitution in a specific amount that equals the full amount of the victim's economic damages as determined by court); Wash. Rev. Code § 9.94A.753 (Washington felony restitution statute; authorizing the court to impose restitution in an amount equal to double the amount of the offender's gain or the victim's loss from the commission of the offense);

[16] Alexes Harris, A Pound of Flesh: Monetary Sanctions As Punishment for the Poor (2016) (citing Thomas Bonczar, Department of Justice, Bureau of Justice Statistics, Characteristics of Adults on Probation, 1995 (1997), *available at* http://bjs.gov/content/pub/pdf/cap95.pdf.

[17] *See, e.g.*, Thomas H. Cohen, *Who Is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 Crim. J. Pol'y Rev. 30, 35 (2014) (reporting that in forty

Poor people are in the worst position to pay for the criminal justice system. And yet, poverty often compounds the already significant impact of criminal justice debts on individuals required to pay them. Not only are the debts themselves regressive, amounting to a larger proportion of a poor person's monthly budget, but the poor also ultimately tend to owe more as a result of their poverty, given the extra interest payments, payment plan costs, collection fees, and missed payment penalties imposed on those who may struggle to pay their debts swiftly.[18] Finally, people struggling to pay their court debts are most likely to be subject to harsh consequences of missed payments—such as arrest, license suspensions, extended probation, and restrictions on expungement—that act as poverty traps, perpetuating and often worsening conditions of poverty.[19]

Nationally, the earned annual income of two-thirds of jail inmates was under $12,000 in the year prior to their arrest.

Criminal justice debt also disproportionately impacts people and communities of color.[20] First, people of color are disproportionately arrested, detained, prosecuted, convicted, and sentenced in the United States.[21] This disparity often begins with racial profiling and targeted policing of African American and Latino communities.[22] It is then often exacerbated by discretionary—and once again racially disparate—charging decisions.[23] And discretionary sentencing decisions made by judges, potentially including decisions regarding the imposition of costs and fees, are susceptible to racial bias as well.[24] Finally, in many cases a criminal defendant's family members take on the burden of paying

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of the seventy-five most populous counties in the country, indigent representation accounts for 80% of criminal cases). *See also* Sanford Kadish *et al.*, Criminal Law & Its Processes 4 (2012).

[18] *See generally Confronting Criminal Justice Debt: A Guide for Policy Reform* (2016) at 15-19 (discussing how these additional costs act as poverty penalties and proposing reforms).

[19] *See id.*

[20] *Cf.* Dan Kopf, *The Fining of Black America*, Pricenomics (June 24, 2016), *available at* http://priceonomics.com/the-fining-of-black-america (examining census data and finding that "best indicator that a government will levy an excessive amount of fines is if its citizens are Black").

[21] Alexes Harris, A Pound of Flesh: Monetary Sanctions As Punishment for the Poor 8 (2016). *See also* U.S. Dep't of Justice, Investigation of the Ferguson Police Department 64-69 (Mar. 4, 2015) (finding that in Ferguson Missouri, African Americans were more likely to be stopped and searched by police, cited for minor infractions like jaywalking, and issued multiple citations).

[22] Alexes Harris, A Pound of Flesh: Monetary Sanctions As Punishment for the Poor 8 (2016). *See also* Back on the Road California, Stopped, Fined, Arrested—Racial Bias in Policing and Traffic Courts in California 4, 21 (Apr. 2016).

[23] *See, e.g.*, Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2 (2013).

[24] *Cf.* Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. Legal Stud. 75 (2015) (finding that racial disparities in sentencing, after controlling for offender and crime characteristics, increased significantly after mandatory sentencing guidelines were struck down in 2005).

criminal justice debts,[25] and generations of discriminatory, wealth-depriving policies in the United States have caused low-income African-American families to have significantly less in assets than white families with the same income.[26] Lacking the resources to absorb the financial shock associated with criminal justice debt, poor families of color are left without a safety net that might otherwise allow a debtor to quickly pay off criminal justice costs before being exposed to the harsh consequences of missed payments.[27] For all of these reasons, effective representation of individuals with criminal justice debt is especially important in jurisdictions with large African-American and Latino communities.

1.3. Criminal Justice Debt Representation Often Falls Through the Cracks Between Existing Criminal and Civil Legal Services

Criminal justice debt problems arise at the intersection of legal systems that are generally tended by two different groups of lawyers: criminal defense attorneys and civil legal service providers. The fines and fees are typically (although certainly not always) imposed by a criminal court, where the individual will usually be represented—if at all—by an attorney specializing primarily in criminal law.[28] The various practices used to coerce payment or collect on the debt, however, can span an array of different areas of law. Some of these collection practices—like use of private debt collectors, collection calls and letters, and attempts to use a judgment to garnish assets or wages—are common in private civil debt collection.

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[25] Ella Baker Foundation, Who Pays? The True Cost of Incarceration on Families 9 (2015).

[26] *See* National Consumer Law Center, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination 1–2 (May 2016), *available at* http://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf (discussing historical and continuing causes of the racial wealth gap); Paul Kiel and Annie Waldman, ProPublica, The Color of Debt: How Collection Suits Squeeze Black Neighborhoods (Oct. 8, 2015), *available at* https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods ("According to our analysis of the Federal Reserve's 2013 Survey of Consumer Finances, the typical white family with annual income between $20,000 and $40,000 had about $2,010 in liquid assets, while the typical black family in that range had just $650."). See also Tom Shapiro, Tatjana Meschede, Sam Osoro, The Roots of the Widening Racial Wealth Gap: Explaining the Black White Economic Divide (Feb. 2013) *available at* http://iasp.brandeis.edu/pdfs/2013/Roots_of_Widening_RWG.pdf .

[27] *Cf.* Paul Kiel and Annie Waldman, ProPublica, The Color of Debt: How Collection Suits Squeeze Black Neighborhoods (Oct. 8, 2015), *available at* https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods (finding that black neighborhoods "were hit twice as hard by" by civil debt collection judgments as white neighborhoods, even when adjusting for differences in income, and pointing to the difference in liquid assets between low-income black and white families).

[28] The constitutional right to appointed counsel only applies when a defendant is sentenced to incarceration in a criminal proceeding. *See* Scott v. Illinois, 440 U.S. 367, 373–374, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979).

MOVING FROM INDIVIDUAL REPRESENTATION TO COLLECTIVE ACTION

Recent class actions challenging as unconstitutional the municipal fines practices that devastated poor and minority communities in St. Louis County illustrate how representation of individuals in criminal justice debt matters can provide the foundation for systemic reform and economic justice. St. Louis County, Missouri is made up of ninety municipalities, each of which enforces its own municipal code and has its own municipal court.[29] In 2013, St. Louis County municipalities took in hundreds of thousands or even millions of dollars in municipal fines.[30] Cities with a high percentage of African-American residents often collected more in municipal fines than wealthier cities with an equal or greater number of residents but lower proportion of African-American residents.[31] These results were symptomatic of systemic issues with racial profiling in policing and law enforcement and unfair court procedures pervading many of the St. Louis County municipalities.[32]

After several years of hearing clients' stories and witnessing the corrosive effect of municipal fines on the lives of low-income people of color, advocates at ArchCity Defenders ("ArchCity"), a non-profit legal organization based in St. Louis, and St. Louis University School of Law ("SLU Law") began to investigate municipal fines and court practices, and implemented a court watch program.[33] After observing over sixty municipal courtrooms and collecting clients' sworn statements, ArchCity concluded that St. Louis County utilized municipal fines as revenue-generating tools and disproportionately imposed such fines on people of color. Furthermore, the municipal court systems perpetuated an unfair system by carrying out policies that impeded efforts of the financially disadvantaged to pay their fines or access courtrooms.[34]

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[29] Thomas Harvey et al., ArchCity Defenders: Municipal Courts White Paper 6 (2014), *available at* http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf (citing County Council Districts (2012), http://stlouisco.com/YourGovernment/CountyCouncil (follow "Council Districts Map" link)).

[30] *See* ArchCity White Paper, *supra* n.29, at 11 (citing Office of State Courts Admin., Mo. Judicial Report Supp.: Fiscal Year 2013 294, *available at* https://www.courts.mo.gov/file.jsp?id=68905).

[31] Ray Downs, *ArchCity Defenders: Meet the Legal Superheroes Fighting for St. Louis' Downtrodden*, Riverfront Times, Apr. 24, 2014, http://www.riverfronttimes.com/stlouis/archcity-defenders-meet-the-legal-superheroes-fighting-for-st-louis-downtrodden/Content?oid=2505869.

[32] *See generally* ArchCity White Paper, *supra* n.29; U.S. Dep't of Justice, Investigation of the Ferguson Police Department (Mar. 4, 2015), *available at* https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, Washington Post, Sept. 3, 2014, https://www.washingtonpost.com/news/the-watch/wp/2014/09/03how-st-louis-county-missouri-profits-from-poverty/.

[33] Koran Addo, *ArchCity Defenders Saw Problems with Municipal Courts Before Ferguson Turmoil*, St. Louis Post-Dispatch, Apr. 15, 2015, *available at* http://www.stltoday.com/news/local/metro/archcity-defenders-saw-problems-with-municipal-courts-before-ferguson-turmoil/article_f1493907-7c8c-55af-a68b-6e36df0c2cae.html; ArchCity White Paper, *supra* n.29.

[34] Susan Weich, *Municipal Court Judges in St. Louis County Are Told to Open Doors*, St. Louis Post-Dispatch, July 1, 2014, *available at* http://www.stltoday.com/news/local/crime-and-courts/municipal-court-judges-in-st-louis-county-are-told-to/article_e965d081-758d-500a-abb7-a054916edad2.html. *See generally* Class Action Complaint, Jenkins et al., v. City of Jennings, No. 4:15-CV-00252-CEJ (E.D. Mo. Feb. 8, 2015), *available at* http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf.

ArchCity then moved from individual representation to collective action and systematic advocacy. In 2014, ArchCity and SLU Law authored a letter to the presiding judge of the St. Louis County Circuit Court, bringing her attention to courtroom accessibility issues. The judge investigated municipal court practices and urged municipal judges to change the operating policies in their courts.[35] ArchCity next released a white paper detailing the injustices in St. Louis County's municipal fees practices. In February 2015—the same month the U.S. Department of Justice published an in-depth report on its investigation of Ferguson law enforcement—ArchCity, Equal Justice Under Law (a non-profit civil rights organization) and SLU Law filed class action suits against the St. Louis County cities of Jennings and Ferguson, alleging that the cities operated unconstitutional prison and municipal fee schemes that trapped the most vulnerable members of its community in a spiral of increasing fees and jail time.[36] In July 2016, the parties agreed to a settlement of $4.75 million.[37]

ArchCity, SLU Law and Equal Justice's work illustrates one model of collective action and advocacy in this area. Through a combination of sophisticated advocacy and commitment to recognizing and giving voice to people harmed by illegal practices, this partnership of organizations has made an immediate and tangible difference in the lives community residents.

Other practices, such as revocation of probation or criminal contempt, are more familiar to criminal defense attorneys—though again, individuals do not always receive court-appointed counsel for such actions. And other practices still, such as suspension of drivers' licenses, may pose novel issues for attorneys in both groups.

The problems of criminal justice debt are thus situated at the intersection of criminal and consumer law. Indeed, in many jurisdictions, court officials, police officers, and probation officers have become de facto debt collectors. Unfortunately, representation of individuals with criminal justice debt may often fall through the cracks.

Criminal defense attorneys, for their part, are often operating within an indigent defense system that, to quote former Attorney General Eric Holder, is in a state of "crisis," due to wildly inadequate resources and soaring caseloads.[38] Attorneys working within that

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[35] Susan Weich, *Municipal Court Judges in St. Louis County Are Told to Open Doors*, St. Louis Post-Dispatch, July 1, 2014, *available at* http://www.stltoday.com/news/local/crime-and-courts/municipal-court-judges-in-st-louis-county-are-told-to/article_e965d081-758d-500a-abb7-a054916edad2.html.

[36] Class Action Complaint, Jenkins et al., v. City of Jennings, No. 4:15-CV-00252-CEJ (E.D. Mo. Feb. 8, 2015), *available at* http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf.

[37] Jenkins et al., v. City of Jennings, 4:15-CV-00252-CEJ (E.D. Mo. Feb. 8, 2015), Settlement Agreement *available at* https://secure.dahladmin.com/JENKIN/content/documents/SettlementAgreement.pdf.

[38] Eric H. Holder, U.S. Att'y Gen., Speech at Department of Justice's 50th Anniversary Celebration of the U.S. Supreme Court Decision in Gideon v. Wainwright (Mar. 15, 2015), *available at* https://perma

broken system are often focused—quite understandably—on the pressing and important tasks of keeping their clients out of prison and of maximizing their liberty during periods of court-ordered supervision. Concerns over criminal justice debt are thus often, at best, a distant second priority. Criminal courts, moreover, may not even provide public defense or appointed counsel in many criminal justice debt proceedings.

Criminal justice debt also disproportionately impacts people and communities of color. Effective representation of individuals with criminal justice debt is especially important in jurisdictions with large African-American and Latino communities.

At the same time, legal services and other consumer attorneys with experience handling civil debt matters face resource constraints of their own. And Legal Services Corporation funding rules place some limits on handling cases that are associated with the criminal justice system (although, as discussed in Section 4.2, *infra,* these restrictions should still permit representation in many critical criminal justice debt-related proceedings). More fundamentally, civil legal service providers may—quite understandably—think of *criminal* justice debt as a criminal law issue. They may thus assume—often incorrectly—that criminal defense attorneys will address the problem.

Ultimately, both communities of practitioners may assume that the other will handle criminal justice debt representation, when in truth neither is fully focused on this important set of issues or the problems it can pose for vulnerable clients. For attorneys, the line between civil and criminal justice is often of substantial importance in both our jurisprudence and our professional institutions, but it does not matter at all to criminal justice debtors facing the potentially dire consequences of their inability to pay off their debt. And far too often, those in need of representation cannot afford to obtain it.

1.4. Purpose of This Guide

In light of the problems identified, the purpose of this guide is three-fold.

First, this guide is meant to serve as a primer for criminal and civil attorneys who currently represent clients in matters involving the imposition or collection of court debt, or who may be prompted to do so by the problems described above. Because the laws and practices governing criminal justice debt vary from jurisdiction to jurisdiction, this guide does not attempt to provide an exhaustive treatment of the law, nor is it intended to serve as a final word on the various issues discussed. Instead, the goal of publishing this guide is to provide a useful starting point for attorneys—by flagging potential approaches, identifying potential defenses and claims, and ultimately assisting

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attorneys in issue-spotting a case as they prepare to conduct further research on behalf of their clients. Accordingly, the guide provides an overview of some of the key constitutional protections that animate the law in this area before proceeding to identify potential tools based in constitutional, criminal, and consumer protection law that attorneys may use to protect their clients from the severe harms and injustices that can arise from criminal justice fine and fee practices.

The guide also contains a handful of quick-reference practice tools that are designed both to help guide practitioners when returning to these topics at the beginning of and during the course of representation. These tools include three checklists—on criminal justice debt imposition issues (Section 3.8), collection issues (Section 6.10), and affirmative challenges (Section 7.8)—each of which calls out key questions that attorneys should consider when identifying potential issues and litigation strategies.

When representing clients with outstanding criminal justice debt, advocates may also consult the National Consumer Law Center's consumer law treatises, especially *Collection Actions*,[39] which includes detailed discussions on challenging collection judgments, protecting debtors' assets and liberty post-judgment, defending against collection by federal government agencies, and defending against civil collection actions. Material from this report will be incorporated into future updates to *Collection Actions*, and suggestions for additions, corrections, nuances, and new ideas for representation of individuals with criminal justice debt to include are welcome. Additional National Consumer Law Center volumes that may assist attorneys in representing individuals with criminal justice debt include *Consumer Bankruptcy Law and Practice* (11th ed. 2016), *Fair Debt Collection* (8th ed. 2014), *Credit Discrimination* (6th ed. 2013), and *Fair Credit Reporting* (8th ed. 2013), *all updated at* http://www.nclc.org/library.

Second, beyond serving as an overview primer, this guide also offers the first in-depth discussions of how two often thorny areas of consumer protection law—bankruptcy (see Section 5) and garnishment exemptions (see Section 6)—may apply to help protect those with criminal justice debt. Our goal in each of these discussions is to lay an initial foundation for practitioners to build upon when advocating on behalf of clients with respect to these often complex issues.

Finally, a third, more general goal of this project—and, more broadly, of our collaboration with the Harvard Law School Criminal Justice Policy Program—is to foster communication between attorneys who practice in the criminal and consumer spheres, and to promote better understanding of the roles each group can play in representing individuals in criminal justice debt matters. Towards this end, a discussion of overcoming the "advocacy gap" in which criminal justice debt sometimes falls is included in Section 4.2.

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[39] National Consumer Law Center, Collection Actions (3d ed. 2014), *updated at* www.nclc.org/library.

1.5. How This Guide Is Structured

Criminal justice debt issues may arise in various settings—including when representing a client in a criminal proceeding; in a defensive posture in a collection proceeding initiated by municipal or state agencies (or a contractor of such an agency); when seeking relief from the debt or negative consequences thereof (such as a suspended driver's license); or when pursuing affirmative litigation challenging illegal collection or imposition practices. This guide addresses key legal issues and discusses a range of strategies for attorneys in in each of these situations. Specifically, it addresses:

- Defending against **imposition** of criminal justice debt (Section 3)
- Defending against actions related to **collection** of criminal justice debt, including defending against **incarceration** for nonpayment based on inability to pay (Section 4)
- Obtaining relief from the financial hardship of collection through **bankruptcy** (Section 5) or **exemptions to garnishment** (Section 6)
- Seeking **affirmative relief** or **systemic reform** through assertion of affirmative consumer, constitutional, and civil rights claims (Section 7)

Additionally, as noted above, this guide includes three checklists designed to help advocates apply the discussion in the context of advising and representing a client. The first checklist, concerning imposition of fines and fees, appears at the conclusion of Section 3. The second, concerning issues related to collection and debt relief, appears at the conclusion of Section 6, following the three sections on collection defenses, bankruptcy, and protection from garnishment. Finally, the third checklist addresses affirmative litigation, and appears at the conclusion of Section 7.

Advocates may wish to flag these checklists as quick reference guides and to consult them often, particularly to help orient themselves to the issues and to guide case review when beginning a new representation. It is important to emphasize, however, that the most critical aspect of any such representation is to determine the individual client's concerns and goals at the outset, as well as his or her financial situation as it may relate to the debt.

2. CONSTITUTIONAL BACKDROP: FRAMING CRIMINAL JUSTICE DEBT QUESTIONS

2.1. Introduction

The imposition and collection of criminal justice fines and fees raise many complex issues of local, state, and federal law. Undergirding many of these questions, however, are a set of foundational constitutional principles that advocates and lawmakers should

consistently bear in mind when navigating this area of law. Accordingly, this section begins with a description of those principles, as they have been laid out by the U.S. Supreme Court in a string of four decisions from the 1970s and 1980s—*Tate v. Short*,[40] *James v. Strange*,[41] *Fuller v. Oregon*,[42] and *Bearden v. Georgia*[43]—as well as in one more recent decision, *Turner v. Rogers*.[44] These cases deal with the government's extraordinary power to collect debts through mechanisms not available to private creditors. And they set out principles that too many governmental entities have forgotten in the face of pressure to raise revenue through criminal justice fines and fees. As discussed at the conclusion of this section, many of the litigation strategies highlighted in subsequent sections of this guide—even with respect to statutory issues not directly addressed by these foundational cases—are influenced by the holdings and analyses discussed here.

2.2. *Tate v. Short and Bearden v. Georgia*: Debtors' Prisons and Limits on Incarceration as an Enforcement Device

The Supreme Court addressed the problem of debtors' prisons in *Tate v. Short*.[45] Preston Tate had accumulated $425 in fines arising from various traffic offenses—fines he could not pay because he was indigent. A local court ordered that Tate be imprisoned pursuant to a Texas law and a Houston ordinance that allowed the government to incarcerate individuals for nonpayment of fines and costs to "satisfy" the debt at a rate of $5 per day spent in prison.[46] Tate sought to avoid incarceration by arguing that he was too poor to pay the fines, but the state courts denied him relief, holding that his indigence did not justify his release.

The United States Supreme Court reversed, holding that imprisoning Tate violated his rights under the Fourteenth Amendment's Equal Protection Clause.[47] The Court observed that Texas had adopted "a 'fines only' policy for traffic offenses,"[48] meaning that imprisonment was ordinarily not a legally available sanction for a traffic offense—if the offender could afford to pay the relevant fine. The Court then held that this "statutory ceiling" on the available punishment "cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay

[40] 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971).
[41] 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972).
[42] 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).
[43] 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).
[44] 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011).
[45] 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971).
[46] 401 U.S. at 396–397.
[47] 401 U.S. at 397, 398–399.
[48] 401 U.S. at 399.

his fine."[49] Such a policy, after all, does not actually serve the governmental interest in satisfying its debt: "Imprisonment . . . is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment."[50]

The Court extended the constitutional protection of indigents who owe criminal justice debt in *Bearden v. Georgia*.[51] In 1980, Danny Bearden was charged with burglary and theft in Georgia. The trial court suspended his sentence and imposed a three-year term of probation along with a fine of $500 and $250 in restitution.[52] Bearden struggled to pay this debt, as he was laid off from his job shortly after the debt was imposed and was unsuccessful in his attempts to find new work.[53] The trial court revoked Bearden's probation for failure to pay, thus sending him to prison.[54]

The Supreme Court concluded that the revocation of Bearden's probation—and his associated incarceration— violated the Equal Protection Clause and due process because he was imprisoned for no other reason than his failure to pay his fine and restitution, and without any careful analysis of whether he was actually *able* to do so. "If the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it."[55] The Court went on to explain that although a defendant's failure to make any effort to obtain "money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime," and thus support incarceration, "it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available."[56]

In concrete terms, *Tate* and *Bearden* stand for the principle that imprisoning a criminal justice debtor solely for his failure to pay and without considering his ability to

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[49] 401 U.S. at 399.

[50] 401 U.S. at 399. *Tate* followed on and extended the Court's holding from one year earlier in Williams v. Illinois, 399 U.S. 235 (1970), which held that the state may not continue to imprison an individual beyond the maximum sentence term specified by statute because the individual is unable to pay a fine. 399 U.S. at 243. *Tate* reaffirmed that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.'" *Tate*, 401 U.S. 398-99 (quoting *Williams*, 399 U.S. 244).

[51] 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

[52] *Id.* at 662.

[53] *Id.* at 662–663.

[54] *Id.* at 663.

[55] *Id.* at 667–668.

[56] *Id.* at 668–669.

pay or alternative punishment violates the Equal Protection Clause. This principle has continued relevance, as many courts throughout the country continue to enforce—or to attempt to enforce—criminal justice debt obligations by using incarceration or the threat of incarceration as a sanction, without regard to an individual's actual ability to pay the debt.[57] When this occurs, the constitutional principles set forth in *Tate* and *Bearden* are triggered.

2.3. *James v. Strange and Fuller v. Oregon*: Restrictions on Unduly Harsh or Discriminatory Means of Collecting Government Debts

In 1972, shortly after deciding *Tate*, the Court issued *James v. Strange,*[58] which addressed limitations on tools other than incarceration that the state can use to collect criminal justice debts. David Strange had been provided appointed counsel in a criminal case on the basis of his indigence. After he pled guilty, the State of Kansas imposed $500 in indigent defense recoupment fees—that is to say, it ordered Strange to reimburse the government for a portion of the money the state had spent in affording Strange his constitutionally guaranteed right to counsel.[59] Strange was ordered to pay this debt within 60 days, otherwise—according to the Kansas statute—a judgment for that amount would be issued against him, which could in turn be converted into a lien on his real estate and could also lead to garnishment or attachment orders being issued against his wages and other property.[60]

Notably, however, the statute at issue barred Strange from invoking the vast majority of the defenses and exemptions to such collection mechanisms that were otherwise provided by Kansas law for civil judgment debtors. For example, unlike judgments arising from private debts, Strange would not be protected from "restrictions on the amount of disposable earnings subject to garnishment," nor would he enjoy protection "from wage garnishment at times of severe personal or family sickness" or "exemption from attachment and execution on [his] personal clothing, books, and tools of trade."[61] He would also not be protected from exemptions usually governing the "head of the family," including exemptions covering "furnishings, food, fuel, clothing, means of transportation, pension funds, and even a family burial plot or crypt."[62]

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[57] *See, e.g.*, American Civil Liberties Union, In for a Penny: The Rise of America's New Debtor's Prisons 5 (2010), *available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf.

[58] 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972).

[59] *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment generally gives indigent criminal defendants a right to counsel to court-appointed counsel).

[60] 407 U.S. at 130.

[61] 407 U.S. at 135.

[62] *Id.*

In considering the Kansas law, the Supreme Court held that efforts to recoup from criminal defendants some of the costs associated with running the criminal justice system—including the cost of providing appointed counsel—are not *automatically* unconstitutional.[63] The Court nonetheless struck down the statutory regime at issue. It began by remarking upon the Kansas law's severe punitiveness. "For Kansas to deny [wage garnishment exemptions] to the once criminally accused is to risk denying him the means needed to keep himself and his family afloat," the Court wrote.[64] It then further observed that the discriminatory treatment of indigent defendants versus other civil judgment debtors did not satisfy the rational basis test.[65] In discussing the irrationality of the State's practice, the Court wrote that it was "difficult to see" why an acquitted defendant should be denied basic exemptions available to other debtors. As for convicted defendants, the Court deemed the consequences of denying exemptions perverse:

> *A criminal conviction usually limits employment opportunities. This is especially true where a prison sentence has been served. It is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship. There is limited incentive to seek legitimate employment when, after serving a sentence during which interest has accumulated on the indebtedness for legal services, the indigent knows that his wages will be garnished without the benefit of any of the customary exemptions.*[66]

The Court thus struck down the Kansas regime because it embodied "elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law."[67]

Although the Court did not set out a test for determining precisely when criminal justice debt collection practices are unconstitutionally discriminatory, it did provide a general background principle that should inform many of the issues addressed in this guide. As the Court explained, while "a State's claim to reimbursement may take precedence . . . over the claims of private creditors," and while "enforcement procedures with

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[63] 407 U.S. at 141 ("[T]he state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs. . . . We thus recognize that state recoupment statutes may betoken legitimate state interests.").

[64] 407 U.S. at 136.

[65] *Id.* at 140 (stating that the "Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out'" and that "[t]his requirement is lacking where, as in the instant case, the State has subjected indigent defendants to such discriminatory conditions of repayment").

[66] 407 U.S. at 139.

[67] 407 U.S. *at* 142.

respect to judgments need not be identical" between private and public creditors, "[t]his does not mean . . . that a State may impose *unduly harsh or discriminatory terms* merely because the obligation is to the public treasury rather than to a private creditor."[68]

By contrast, if a state does *not* discriminate against criminal justice debtors as compared to civil debtors, then it is far less likely that a general constitutional challenge to enforcement mechanisms will be successful, as suggested by *Fuller v. Oregon*,[69] a case that presented a challenge to a different indigent-defense recoupment law just two years after the Court decided *Strange*. In *Fuller,* as in *Strange,* the Court addressed the constitutionality of a state statute that allowed the State to recoup the costs it had expended in providing an indigent defendant counsel. The defendant, Eric Fuller, challenged the statute by invoking *James v. Strange.* But the Court rejected the comparison, noting that—unlike the Kansas statute at issue in *James*—the challenged Oregon statute afforded the criminal justice debtor the same collection protections enjoyed by civil judgment debtors. Indeed, the criminal debtor's protections went even farther, also affording him "the opportunity to show at any time that recovery of the costs of his legal defense will impose manifest hardship,"[70] in which case the debt would not be enforced. The Court did not identify any adverse treatment of criminal justice debtors as compared to private civil debtors, and thus found no discrimination.[71]

Strange and *Fuller* both addressed indigent-defense recoupment statutes. But criminal defendants, of course, may be subjected to a wide array of criminal justice fines and fees, beyond orders to reimburse the state for the costs of appointed counsel. Some later cases have questioned the application of these precedents to other criminal justice debts that may seem less analogous to civil debts or judgments (such as fines, which are generally thought to serve partially punitive purposes).[72] However, the irrationality and

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[68] 407 U.S. at 138–139 (emphasis added).

[69] 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

[70] *Id.* at 47 (internal quotation marks omitted).

[71] The Court dedicated more attention to the question of whether the Oregon recoupment scheme violated the right to appointed counsel grounded in the Sixth and Fourteenth Amendments because the prospect of owing fees for appointed counsel may pressure indigent defendants to waive their right to counsel. *See* 417 U.S. at 51–54. In determining that the scheme did not violate the right to counsel, the Court emphasized the various protections for indigent defendants in the statute, including that "a court may not order a convicted person to pay these expenses unless he is or will be able to pay them," that debtors may petition for remission based on financial hardship at any time, that debtors may not be held in contempt for nonpayment if lacking in means to pay, and the costs may not be imposed on those who are acquitted. *Id.* at 45–46, 53–54. In light of these safeguards, the Court found the statute was "tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship." *Id.* at 54.

[72] *See, e.g.*, Fant v. City of Ferguson, 2015 WL 4232917, at *1–3 (E.D. Mo. July 13, 2015) (questioning whether James v. Strange applied to plaintiffs' claims regarding collection of fines for traffic and

perverseness—highlighted in *James v. Strange*—of subjecting criminal justice debtors to distinctly harsh collection practices beyond those available in civil debt matters need not be an argument limited to indigent defense fees. On the contrary, harsh collection of any criminal debt, regardless of its technical form, can perversely undermine a defendant's ability to pay the debt or to successfully reenter society following incarceration. And indeed, claims premised on discriminatory collection of other costs and fines are currently being pursued in several cases.[73] Furthermore, even if *Strange* were to be limited to criminal justice debts that aim to recoup government expenses, as opposed to fines imposed for punitive purposes, it bears emphasis that in today's criminal justice system, a broad array of fees—beyond merely indigent-defense recoupment—purport to refund the courts and the justice system for the costs of administering the criminal process.[74] Thus, even on an (unduly) cramped reading of *James v. Strange,* the case may provide a basis for broader application of these principles today.

2.4. Constitutionally Required Procedural Safeguards in Criminal Justice Debt Litigation

The preceding sections describe constitutional issues implicated by the tools the government uses to enforce criminal justice debt obligations. The Constitution may also be implicated if a state fails to afford meaningful procedural safeguards against erroneous deprivation of liberty for nonpayment, including in the course of making ability-to-pay determinations.

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municipal offenses rather than "merely court fees and costs," but concluding that plaintiffs should be allowed to develop the record and that claim should not be dismissed); United States v. Cunningham, 866 F. Supp. 2d 1050, 1058 (S.D. Iowa 2012) (holding that *James* did not bar discrimination against debtor who owed criminal restitution, in part based on the court's assertion that restitution is "penal in nature").

[73] *See* Rodriguez v. Providence Cmty. Corr., Inc., 2016 WL 3351944, at *11–12 (M.D. Tenn. June 9, 2016) (citing *Fant* and allowing equal protection claim based on unduly harsh collection practices applicable to criminal justice debtors in the probation system); Fant v. City of Ferguson, 2015 WL 4232917, at *1–3 (E.D. Mo. July 13, 2015) (on reconsideration, reinstating previously dismissed equal protection claim challenging "unduly harsh and discriminatory" collection practices applicable to traffic and municipal fines, as compared to those available to private creditors). *See also* Class Action Complaint, Stinnie v. Holcomb, ¶¶ 399–450. (W.D. Va. July 6, 2016) (challenging driver's license suspensions for nonpayment of criminal justice debt), *available at* https://www.justice4all.org/wp-content/uploads/2016/07/Complaint-Drivers-License-Suspension-for-Court-Debt.pdf.

[74] *See, e.g.*, Wash. Rev. Code § 10.01.160 (authorizing courts to require defendants to pay "expenses specifically incurred by the state in prosecuting the defendant or in administering the deferred prosecution program . . . or pretrial supervision"); Mich. Comp. Laws § 771.3 (authorizing courts to set as condition of probation the payment of "expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer"). *See generally Confronting Criminal Justice Debt: A Guide for Policy Reform* at 1, 6-11 (2016).

Turner v. Rogers[75] is an important recent Supreme Court decision on this issue, even though it does not directly address criminal justice debt. In *Turner*, the Court held that a court violates the Due Process Clause when it uses its civil contempt authority to jail a person for nonpayment of child support payments owed from one private party (a parent) to another private party (the other parent), without first providing the person threatened with incarceration either appointed counsel (if indigent) or alternative procedural protections designed to ensure that a meaningful ability-to-pay determination takes place.[76] The Court observed that in a *civil* proceeding such appropriate alternative procedural protections may include:

> *(1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.*[77]

Notably, however, the Court explicitly left open the possibility that more stringent safeguards—including a right to appointed counsel for indigent defendants—might be required when the party seeking to collect is represented by counsel or when the debt is owed to the state rather than to another private party—both factors that are generally true when criminal justice debt is at issue.[78] And it further noted that heightened procedural protections generally apply in criminal proceedings.[79]

2.5. How Constitutional Principles Guide Analysis of Criminal Justice Debt Issues

Notwithstanding some of the constitutional protections described above, the Supreme Court has observed that when the government acts as a creditor, it may exercise the coercive powers of the state in ways that private creditors may not—even if its conduct in doing so is "[un]wise or [un]desirable" as a matter of policy.[80] However, the Supreme Court has also made clear—in *Tate, Bearden, Strange,* and *Fuller*—that there are important constitutional limits as well. Most essentially, the government may not punish the poor

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[75] 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011).

[76] 564 U.S. at 445, 448–449.

[77] 564 U.S. at 447–448.

[78] 564 U.S. at 448–449. *See also* Fant v. City of Ferguson, 107 F. Supp. 3d 1016, 1034 (E.D. Mo. 2015), *on reconsideration*, 2015 WL 4232917 (E.D. Mo. July 13, 2015) (finding that plaintiffs in case challenging Ferguson's traffic and municipal fine practices "have stated a plausible claim that the City's failure to appoint counsel or obtain waivers thereof violated Plaintiffs' due process rights, particularly in light of their allegations that they were also not afforded any hearing, inquiry into ability to pay, or alternative procedural safeguards in connection with their incarceration.").

[79] 564 U.S. at 441–443, 445.

[80] 417 U.S. at 49.

for their poverty, either by (1) imprisoning them simply because they cannot afford to pay or (2) irrationally denying them civil protections that they would otherwise have against private debt collection efforts. In addressing constitutional and statutory questions raised by court fines and fees, these basic principles are too often forgotten. In this document, they run throughout the legal analysis.

3. DEFENDING AGAINST IMPOSITION OF CRIMINAL JUSTICE DEBT: REPRESENTATION DURING A CRIMINAL OR CIVIL PROCEEDING THAT MIGHT RESULT IN CRIMINAL JUSTICE DEBT

3.1. Introduction

The best and most effective way to avoid the adverse consequences of criminal justice debt is to prevent its imposition in the first place. Accordingly, this chapter addresses legal issues and strategies related to defending against the imposition of criminal justice debt.

While criminal justice debt can be imposed in a number of ways depending upon the court and type of debt, it often is imposed at sentencing in criminal cases. Often, counsel's paramount concern is limiting or preventing incarceration. This too, is likely the defendant's main concern—and with good reason: protection of liberty is undoubtedly the fundamental goal in criminal defense. But as the Supreme Court has recently emphasized, incarceration is not the only issue at stake when a person faces criminal prosecution.[81] Rather, other substantial and indeed life altering consequences can flow from the criminal process, affecting an individual's social standing and wellbeing for years to come. Thus, protecting a client's *liberty*—in the truest and broadest sense of that word—often requires that counsel bear in mind the fines, fees, and surcharges that could be imposed on criminal defendants at sentencing and at other stages in the proceedings.

Far from being minor or ancillary consequences of an individual's encounter with the criminal justice system, criminal justice debts can create devastating consequences, in many cases long after the defendant has been released from jail or prison. As discussed in the introduction and Section 4.1, nonpayment of criminal justice debts may result in incarceration in many jurisdictions. Payment of criminal justice debt obligations may

[81] *Cf.* Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) (holding that effective assistance of counsel under the Sixth Amendment requires a defense attorney to be mindful of—and advise her client about—the impact that at least certain "collateral consequences" of a criminal conviction, such as deportation, can have on the defendant).

also be treated as a condition of a sentence or of probation, and may thus result in extended periods of supervision and monitoring until the debts are repaid or incarceration for failure to pay.[82] Outstanding criminal justice debts can also lead to a person's repeated arrest on debt-related warrants and detention in jail while awaiting a hearing to explain the reasons for failing to pay—both of which, in addition to being psychologically traumatic, can frustrate employment and other efforts to recover from financial setback. And individuals with outstanding criminal justice debt may be required to appear at regular review hearings, which not only entail expenditures related to transportation and childcare, but could also interfere with work and family obligations—once again perversely impacting wages and financial security for the individual or other members of the family. The government's attempts to enforce criminal justice debts may also result in wage garnishment and other collection actions, aggressive or problematic interactions with debt collection agencies, suspension of drivers' licenses, and credit reporting consequences.

Beyond these various consequences, it also bears emphasis that the debt itself can get larger and more financially burdensome over time, due to mandatory interest, penalties for late or nonpayment, or other collection costs that accrue from the date of judgment or missed payment.[83] In some jurisdictions, interest may accrue during any prison or jail term that a defendant serves—a time when a person who is indigent will have little or nothing to contribute toward repayment.[84] As a result, individuals may come out of jail or prison with significantly higher debts than they had at sentencing.[85] And while

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[82] *See, e.g.*, American Civil Liberties Union of Washington & Columbia Legal Services, Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor 4 (Feb. 2014) *available at* https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor's%20Prison%20Final%20%283%29.pdf (describing ACLU and CLS attorney observations that courts in Washington State "order incarceration for non-payment" even in cases where criminal justice debtors were "homeless, unemployed, or had mental health issues that prevented them from gaining employment"); Human Rights Watch, Profiting from Probation 25–27 (2014) (describing "pay only probation" where defendants are sentenced to probation solely because they cannot afford to pay an underlying fine and are charged monthly probation fees that may make it more difficult to pay court debt and extend the probation sentence).

[83] *See* Alaska Stat. § 12.55.051(d); Ariz. Rev. Stat. Ann. § 13-805; Or. Rev. Stat. § 137.183; Va. Code Ann. § 19.2-353.5; Wash. Rev. Code § 10.82.090.

[84] *Cf.* Peter Wagner, *The Prisoner Index: Taking the Pulse of the Crime Control Industry*, Prison Policy Initiative (Apr. 2003), *available at* http://www.prisonpolicy.org/prisonindex/prisonlabor.html (minimum wages for state prisoners, in dollars per day for non-industry work, average $0.93; maximum wages paid to prisoners by the state averages $4.73 per day).

[85] *See*, e.g., Roopal Patel and Meghna Philip, Brennan Center for Justice, Criminal Justice Debt: A Toolkit for Action 17 (2012), *available at* https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf (describing woman whose criminal justice debt increased from $36,000 to over $100,000 by the time of her release from prison due to interest accrued while she was incarcerated and unable to pay).

it is possible to try to defend against the collection of criminal justice debts "on the back end," at the time when payment comes due (as discussed in Section 4), the ability to obtain relief from criminal justice debts may often be limited. Accordingly, as is true with debts and liabilities more generally, avoiding imposition at the outset is the first—and best—defense.

Unfortunately, until recently, criminal justice debt issues often received little attention in the sentencing process. But this has started to change. As criminal justice debt practices, their consequences, and their negative impact on poor defendants have become more salient across the country, there has been growing recognition among criminal defense attorneys that zealous advocacy requires defending not only against the criminal charges and possible incarceration, but also against the imposition of fines and fees. This is particularly true for public defenders, whose clients often have little or no means to pay these debts.

As a matter of both legal advocacy and sentencing strategy, the challenges facing counsel when attempting to forestall or minimize criminal justice debt at the imposition stage often remain difficult. Unlike the enforcement stage, where the Supreme Court has set some universal parameters through cases like *Bearden*,[86] there is less constitutional guidance at the imposition stage, and thus less uniformity between legal frameworks. That being said, local case law and statutes often address criminal justice debt issues at the imposition phase—albeit with a good degree of variability among jurisdictions. Thus, an important first step for defense counsel is to become aware of their local statutes and court decisions on imposition of criminal justice debts.

This section is not meant to provide an exhaustive or comprehensive survey of the law across jurisdictions, or of the various scenarios that may arise concerning criminal justice debt imposition. Rather, its goal is to provide a general overview of some of the main issues and concepts that defense counsel may face at sentencing or other proceedings where criminal justice debts may be imposed, in order to highlight some steps defense counsel may want to take to limit—or, ideally, altogether prevent—their clients from receiving criminal justice debts in the first place.

The Section begins (in Section 3.2) by describing the difference between two key types of criminal justice debts: mandatory debts and non-mandatory debts. It then provides (in Section 3.3) an overview of various legal frameworks underlying one key tool for avoiding or limiting criminal justice debt at the imposition stage: the ability-to-pay inquiry. Section 3.4 then offers guidance on how to navigate some of the legal and strategic complexities of ability-to-pay advocacy. Next, Sections 3.5 and 3.6 discuss alternative tools—and pitfalls—for avoiding or limiting debt imposition through strategic

[86] Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). *See* § 2.2, *supra*.

plea bargaining and through the substitution of community service for direct financial obligations. Finally, Section 3.7 offers advice regarding communicating with clients about criminal justice debt imposition issues, and Section 3.8 includes a quick-reference checklist and illustration to help guide attorneys in defending against imposition of criminal justice debt.

3.2. Identifying Relevant Types of Criminal Justice Debt

3.2.1. Overview

Before determining how the law applies to certain debts, defense counsel should become familiar with the different types of debts that can be imposed within their jurisdiction or on a particular defendant. Different types of obligations are imposed for different reasons, and governing statutes or cases may only apply to a certain category of debt. For example, the State of Washington requires courts to conduct an ability-to-pay inquiry prior to imposing *costs*.[87] A court recently held, however, that this procedural protection does not apply to the imposition of *fines*.[88]

The general categories and subcategories of criminal justice debt are listed in the introduction to this report (see Section 1.1). Not all criminal justice debts, however, fit neatly into one of these categories, nor are the terms themselves uniformly applicable terms of art across jurisdictions. Rather, each jurisdiction may use different terminology to describe the various criminal justice debt obligations that are locally applicable, using terms such as "fees," "assessments," or "penalties" in potentially different ways than those terms might be employed elsewhere. As a result, it can sometimes be difficult to distinguish between the different types of obligations at play in a given jurisdiction, although occasionally a statute will specifically define the obligations to which it applies. To advocate effectively regarding criminal justice debt imposition, counsel must first understand the various *categories* of debt that exist in the local jurisdiction, in order to ascertain how those categories map onto the governing legal rules and frameworks. Note that imposition of restitution, which generally requires a defendant to compensate a private party victimized by his crime, raises a distinct set of issues and is not addressed in this guide.

A more general distinction exists between *mandatory* and *non-mandatory* debts, and a lawyer's approach to representation can differ significantly between the two. The next two sections discuss these two categories.

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[87] State v. Blazina, 344 P.3d 680 (Wash. 2015).

[88] *See* State v. Clark, 362 P.3d 309 (Wash. Ct. App. 2015) (holding that fine was not a cost subject to statutory requirement that a court inquire into defendant's ability to pay before imposition).

3.2.2. Mandatory Debts

In some jurisdictions, certain criminal justice debts must be imposed automatically, as a matter of law. Statutes establishing such mandatory debts divest the trial court of any consideration of the defendant's ability to pay.[89]

Mandatory debts may not seem like huge sums of money in isolation. But they can pile up quickly, especially if multiple mandatory debts are required to be imposed for each count of conviction in a given case. Similarly, defendants who are simultaneously being prosecuted for multiple charges at once can see a dramatic rise in their exposure to mandatory financial obligations. For example, in Washington State, for every felony judgment and sentence, the court must impose a mandatory $500 victim penalty assessment, regardless of indigence.[90] Even a single payment of $500 is a substantial sum for a poor defendant. But it is not uncommon to see an individual with three, four, or five felony convictions arising from even just a single incident or course of conduct. At $500 per conviction, a person can thus easily find himself in the hole for $1500 or $2500 in debt, just in mandatory obligations.

If a criminal justice debt truly is mandatory, there will be few if any options for avoiding imposition once the triggering conditions (such as conviction) are met. This makes it all the more important for counsel to ensure that supposedly "mandatory" debts are, in fact, mandatory. This may seem an obvious point. But in practice, many criminal justice fines and fees are treated as mandatory as a matter of custom and routine practice by local actors in the criminal justice system—and thus imposed in every case as a matter of course—even though the debts may not actually be mandatory as a *matter of law* in all circumstances. Thus, a key task for a defense attorney is to conduct thorough research into the technical legal status of a given potential debt, as closer statutory examination may reveal that some debts commonly believed to be mandatory are actually waivable or reducible, or may not be imposed in certain circumstances.

A recent initiative in Washington State illustrates the value of closely examining debt imposition statutes treated as mandatory. In Washington, a number of criminal justice debts were routinely treated as mandatory by local criminal justice actors—including judges and defense attorneys—even though the statutes establishing such debts

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[89] *See* 725 Ill. Comp. Stat. 240/10 (mandatory violent crime victims assistance fund non-waivable at sentencing); Ky. Rev. Stat. Ann. § 189A.050 (West) (service fee related to specific convictions); Wash. Rev. Code § 7.68.035 (mandatory victim penalty assessment for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor); Wash. Rev. Code § 43.43.7541 (mandatory DNA collection fee); W. Va. Code, § 50-3-2; State v. Lundy, 308 P.3d 755, 758–759 (Wash. Ct. App. 2013) (courts not authorized to consider defendant's ability pay with regard to mandatory criminal justice debts).

[90] Wash. Rev. Code § 7.68.035.

contained provisions expressly precluding imposition of the debts under certain conditions.[91] To clear up this confusion, the Washington State Minority and Justice Commission conducted a comprehensive survey that classified statutory debts appropriately. It then distributed a reference guide to every judge in the state and encouraged trainings for jurists and practitioners alike on the issue, helping to clarify which debts truly are mandatory—and which are not.[92] As similar waiver provisions exist in other states' laws, assessing whether a fee is truly mandatory is important.[93]

If, after careful review, counsel concludes that a given debt is indeed mandatory under the governing statute, the only remaining recourse may be a constitutional challenge, under either the federal or state constitution. In particular, counsel should consider whether the statute suffers from the types of infirmities the Supreme Court highlighted in *James v. Strange* in holding that a Kansas indigent defense recoupment statute violated the Constitution, as discussed in Section 2.3. Further, the question of whether and in what circumstances the Constitution may require a court to determine that a defendant has ability to pay prior to imposing criminal justice debt is discussed in Section 3.3.[94]

3.2.3. Non-Mandatory Debt

Fortunately, not all criminal justice debt is mandatory. Many criminal justice debt statutes authorize or require courts to waive or choose not to impose the debt, for a variety of reasons. For example, statutes may make imposition of certain fines or fees fully discretionary, may make the amount to impose discretionary, or may include specific exemptions barring the court from imposing debt on certain classes of defendants or

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[91] For example, Washington has a statute that requires the court to consider a defendant's ability to pay if the defendant has a mental health condition, thus allowing the court to waive debts that would otherwise be mandatory. *See* Wash. Rev. Code § 9.94A.777 (provides that "before imposing any criminal justice debt upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment . . . a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.").

[92] *See* Washington State Supreme Court Minority and Justice Commission, Reference Guide on Legal Financial Obligations (LFOs) Ordered by Courts of Limited Jurisdiction in Washington State (2015 Update), *available at* https://www.courts.wa.gov/content/manuals/CLJ%20LFOs.pdf. The commission's reports and information about its education and outreach efforts are *available at* https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=publications&layout=2&showPubTab&tab=pubRes.

[93] *See, e.g.,* Cal. Health & Safety Code § 11372.7 (West) ($150 drug program fee mandatory unless court finds offender lacks the ability to pay); Cal. Penal Code § 290.3 (West) (mandatory fine for certain sex offense convictions unless defendant lacks the ability to pay); Haw. Rev. Stat. § 706-603(1) (DNA analysis fee mandatory unless defendant presents evidence of inability to pay); Ind. Code § 33-37-5-9 (court shall assess drug abuse fee, but shall consider the person's ability to pay in determining the amount of the fee).

[94] Additionally, § 2, *supra*, provides a more general discussion of constitutional principles pertinent to criminal justice debts, especially as relates to indigent defendants.

under certain scenarios.[95] In the course of reviewing local statutory codes and case law, counsel should pay close attention to provisions such as these that may offer protection from imposition of criminal justice debts.

Perhaps the most important restriction that may apply to imposition of criminal justice debt is a requirement to first determine that the defendant has the ability to pay the debt. Such ability-to-pay inquiries are critical to the protection of indigent defendants, many of whom cannot pay and may thus be legally insulated from imposition of debt. If courts fail to conduct such inquiries, or to conduct them adequately, debts that are legally non-mandatory as applied to indigent defendants can, for all intents and purposes, become mandatory in practice. It is to this ability-to-pay analysis that the next two sections turn.

3.3. Requirements to Conduct Ability-to-Pay Determinations at Imposition

3.3.1. Overview

This section provides an overview of legal requirements to conduct ability-to-pay inquiries at the imposition stage. It begins by examining whether the United States Constitution might require such an inquiry prior to the imposition of costs, especially indigent defense recoupment fees (see Section 3.3.2), and discusses differences in constitutional treatment of fines (see Section 3.3.3). It next examines (in Section 3.3.4) statutes that impose ability-to-pay inquiry requirements, and explains why the opportunity for cancellation or modification of debt at the enforcement stage should not be viewed as a substitute for challenging imposition of debts based on inability to pay at the imposition stage (see Section 3.3.5). Section 3.4 discusses legal and strategic complications that can arise in the course of representing clients in such inquiries.

3.3.2. Fuller v. Oregon and the Potential Constitutional Requirement to Conduct an Ability-to-Pay Determination Before Imposing Costs

The question of whether the Constitution requires courts to consider a defendant's ability to pay prior to imposing costs is presently unsettled. Most of the case law addressing this question focuses on indigent defense recoupment costs, which raise particularly salient right to counsel concerns, in addition to more general due process and equal protection concerns. However, as discussed below, the reasoning from the indigent

[95] *See, e.g.,* Cal. Health & Safety Code § 11372.7 (West) ($150 drug program fee mandatory unless court finds offender lacks the ability to pay); Cal. Penal Code § 290.3 (West) (mandatory fine for certain sex offense convictions unless defendant lacks the ability to pay); Haw. Rev. Stat. § 706-603(1) (DNA analysis fee mandatory unless defendant presents evidence of inability to pay); Ind. Code § 33-37-5-9 (court shall assess drug abuse fee, but shall consider the person's ability to pay in determining the amount of the fee).

defense fee cases should also apply to the many other types of criminal justice costs that implicate the Sixth Amendment.

A starting point for analysis of this issue is the Supreme Court's opinion in *Fuller v. Oregon*, which, as noted earlier (see Section 2.3), dealt with the constitutionality of an indigent-defense recoupment statute. *Fuller* upheld an Oregon indigent defense recoupment statute, distinguishing an earlier case *James v. Strange* (also discussed in Section 2.3), which had struck down Kansas's indigent-defense recoupment statute. A key difference between *Fuller* and *Strange* was that the Oregon statute upheld in *Fuller* included a number safeguards to protect indigent defendants against financial hardship, whereas the Kansas statute struck down in *Strange* denied criminal justice debtors even those protections from hardship that were otherwise afforded to civil debtors.[96] Among the safeguards included in the statute upheld in *Fuller* were requirements that "a court may not order a convicted person to pay these expenses unless he is or will be able to pay them," that debtors may not be held in contempt for nonpayment if lacking in means to pay, that debtors receive all the protections applicable to civil judgment debtors, and that debtors may petition for remission (i.e., cancellation or modification) of the debt based on financial hardship at any time.[97] In view of these statutory protections, the Court emphasized that the Oregon recoupment statute was

> *carefully designed to ensure that only those who actually become capable of repaying the state will ever be obliged to do so. Those who remain indigent or for whom repayment would work manifest hardship are forever exempt from any obligation to repay.*[98]

In *Fuller*'s wake, a split has emerged among lower courts as to how to apply the Supreme Court's holding to the question of whether courts are required to conduct an ability-to-pay inquiry before *imposing* criminal justice debt obligations—and particularly indigent defense fee obligations. Some courts have observed that the Supreme Court did not mandate, as a matter of constitutional law, *all* of the safeguards that were in place in the Oregon recoupment statute—including the imposition-stage payment ability assessment—but rather simply held that a statute with such safeguards would pass constitutional muster.[99] In jurisdictions taking this approach, recoupment statutes may only

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[96] *See* § 2.3, *supra*.

[97] 417 U.S. at 45–47, 53–54.

[98] 417 U.S. at 47.

[99] *See, e.g.,* United States v. Pagan, 785 F.2d 378, 381-82 (2d Cir. 1986) (holding that the imposition of assessments on the indigent, per se, does not offend the Constitution); State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991) (trial court not required to determine a convicted defendant's ability to pay statutorily mandated costs prior to assessing costs unless the applicable statute specifically requires such a determination); People v. Jackson, 769 N.W.2d 630, 639, 643 (Mich. 2009) (constitution does not require ability to pay analysis until fee is enforced); State v. Kottenbroch, 319 N.W.2d 465, 472 (N.D.1982) (prior determination of ability to pay not required by *Fuller* so long as judgment debtor

be considered unconstitutional to the extent the mechanisms for *enforcing* the debt are unconstitutional, such as if they fail to require a determination of ability to pay prior to imprisonment for nonpayment as required by *Bearden,*[100] or violate the principles against discriminatory collection terms discussed in *Strange* (see 2.3, *supra*).[101]

Other jurisdictions, however, see in *Fuller* more robust constitutional protections, at least as relates to indigent defense recoupment. In these jurisdictions, courts have held that some—or even each—of the statutory safeguards outlined in *Fuller* are in fact constitutionally necessary.[102] And in at least one state, courts have expressly found that a statute's failure to account for the defendant's ability to pay *at the time of imposition* violates the Sixth Amendment.[103]

While the majority of cases challenging debt at the imposition stage under *Fuller* have specifically addressed *indigent defense* recoupment orders—which raise particularly salient right to counsel concerns—there are cases that have generally applied some of *Fuller's* reasoning to other types of criminal justice debt.[104] Moreover, imposition of other types

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had opportunity to present inability to pay before probation was revoked for failure to pay); State v. Blank, 930 P.2d 1213, 1219–1220 (Wash. 1997) (appellate cost recoupment statute not constitutionally deficient because it lacked pre-imposition ability to pay inquiry).

[100] *See* § 2.2, *supra*.

[101] *See, e.g.,* State v. Albert, 899 P.2d 103, 109 (Alaska 1995) (concluding that *James v. Strange*, 407 U.S. 128 (1972), and *Fuller* do not require a prior determination of ability to pay in a recoupment system that treats recoupment judgment debtors like other civil debtors); State v. Blank, 930 P.2d 1213, 1219–1220 (Wash. 1997) (constitutional principles implicated at point of collection and when sanctions are sought for nonpayment); State v. Curry, 829 P.2d 166, 169 (Wash. 1992) (holding that it was not unconstitutional for the court to impose a mandatory fee because "there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants"); People v. Jackson, 769 N.W.2d 630, 643 (Mich. 2009) (same); State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991) (ability-to-pay inquiry must occur when state seeks to enforce collection). *See generally* § 2, *supra* (discussion of the principles of *Fuller* and *Bearden*).

[102] *See* Olson v. James, 603 F.2d 150 (10th Cir. 1979) (Kansas recoupment statute which lacks, among other safeguards, proceedings to determine the financial condition of the defendant, violated Fourteenth Amendment); People v. Cook, 407 N.E.2d 56 (Ill. 1980) (a summary decision which orders reimbursement without affording a hearing with the opportunity to present evidence and be heard acts to violate an indigent defendant's right to procedural due process); Fitch v. Belshaw, 581 F. Supp. 273, 275–276 (D. Or.1984) (striking down Oregon statute which allowed recoupment judgments to be entered without adequate procedures to ensure that defendants would be able to pay without hardship). *See also* State v. Tennin, 674 N.W.2d 403, 410 (Minn. 2004) (Sixth Amendment protections absent in Minnesota cost recoupment statute because no waiver provision either at imposition or implementation).

[103] *See* State v. Morgan, 789 A.2d 928 (Vt. 2001) ("[W]e hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered . . . .").

[104] *See* Jones v. State, 360 So. 2d 1158 (Fla. Dist. Ct. App. 1978) (applying *Fuller* to "payments by a probationer toward the costs of his supervision"); Brown v. County Comm'rs of Carroll County, 658

of criminal justice costs frequently implicate similar Sixth and Fourteenth Amendment concerns regarding burdening the right to counsel discussed in *Fuller*, as well as other Sixth Amendment rights. In particular, costs relating to prosecution, defense, case management and adjudication (including filing fees, costs for DNA tests, juror fees, witness fees, and court personnel fees) that are imposed or increased based on a defendant's exercise of his rights to counsel, to trial, or to call witnesses in his defense, have the effect of burdening those rights, especially for indigent defendants.[105] These types of costs should be subject to many of the same principles and arguments regarding ability-to-pay determinations developed in the indigent defense fee case law. Additionally, Fourteenth Amendment due process and equal protection arguments, discussed in Section 2, may apply to criminal justice debts beyond indigent defense fees.[106]

3.3.3. Requirements to Conduct Ability to Pay Determinations Prior to Imposition of Fines

The preceding section discussed arguments that ability-to-pay determinations should be required (as a matter of constitutional law) to orders requiring defendants to pay for *costs* associated with the criminal justice system. Fines, however, present a different legal analysis, as they are generally intended to be punitive, and thus may be guided by a different set of principles. Notably, in *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court explained that

> *[t]he Court has not held that fines must be structured to reflect each person's ability to pay to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances, they are guided by sound judicial discretion rather than by constitutional mandate.*[107]

Similarly, in Washington, the state Court of Appeals held that Washington's ability to pay requirement in its cost recoupment statute does not apply to fines,[108] although the

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A.2d 255 (Md. 1995) (applying *Fuller* in finding that there was no constitutional infirmity in county seeking reimbursement from an inmate or pretrial detainee for medical costs incurred on his own behalf where no other source of reimbursement is available); State v. Blank, 930 P.2d 1213 (Wash. 1997) (applying *Fuller* in case where defendant challenged constitutionality of statute that allowed court to impose appellate costs, including fees for appointed counsel, on defendant without first finding he had the ability to pay such costs).

[105] *See Confronting Criminal Justice Debt: A Guide for Policy Reform* at 19-20 (2016) (discussing how criminal justice costs burden defendant's Sixth Amendment rights).

[106] *See* Section 2.3, *infra* (noting that portions of *Fuller* and *Strange* addressing discrimination under the Equal Protection Clause should apply beyond the context of indigent defense recoupment).

[107] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 22, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). *See also* Williams v. Illinois, 399 U.S. 235, 243, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) (stating, in context of initial imposition of a fine, that nothing precludes a judge from imposing on an indigent, the maximum penalty prescribed by law); State v. Murrell, 499 S.E.2d 870, 876 (W. Va. 1997).

[108] State v. Clark, 362 P.3d 309, 312 (Wash. Ct. App. 2015).

court did "[n]onetheless . . . strongly urge trial judges to consider the defendant's ability to pay before imposing fines" given the many barriers that criminal justice debts impose on an offender's successful reentry back into the community.[109]

In the absence of a federal constitutional requirement to determine a defendant's ability to pay prior to imposition of fines, defense counsel should determine whether state law nonetheless requires or permits such assessment. Indeed, several states have enacted statutes that require some ability-to-pay analysis at the time of imposition.[110] When an ability to pay determination is required prior to imposition of fines, the discussion in this guide regarding ability-to-pay hearings is generally applicable to fines as well as to costs. Additionally, even if a statute is silent as to ability to pay at imposition, it may be interpreted to allow for defenses to imposition based on inability to pay, and asserting reasons for inability to pay may convince a court to waive or reduce fines.[111]

Finally, counsel should bear in mind that fines are uniquely subject to the Eighth Amendment, which expressly states that "excessive fines" "shall not . . . be imposed."[112] As discussed at Section 7.3.1.5, *infra*, recent scholarship argues that the Eighth Amendment should be invoked and employed in support of challenges to fines that are excessive as applied to an indigent defendant, even though most cases interpreting the clause thus far have narrowly limited its application to fines that are grossly disproportionate to the offense, without regard to the individual defendant's financial circumstances.[113]

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[109] *Id*.

[110] Cal. Penal Code § 1202.5 (West); Haw. Rev. Stat. § 706-641; 5 Ill. Comp. Stat. 283/20; 730 Ill. Comp. Stat. 5/5-9-1; Ind. Code § 35-38-1-18; Kan. Stat. Ann. § 21-6612(c); Ky. Rev. Stat. Ann. § 534.030 (West); Me. Rev. Stat. tit. 17-A, § 1302; Mont. Code Ann. § 46-18-231; N.J. Stat. Ann. § 2C:44-2 (West); Ohio Rev. Code Ann. § 2947.14 (West); 42 Pa. Cons. Stat. § 9726; R.I. Gen. Laws § 12-21-20. *See also* Ashton v. State, 737 P.2d 1365 (Alaska Ct. App. 1987) (trial court under mandatory duty to consider defendant's earning capacity in connection with any imposition of a fine); Clark v. State, 963 So. 2d 911 (Fla. Dist. Ct. App. 2007) (finding fine imposed by trial court invalid because court failed to consider defendant's ability to pay as required by statute); People v. Morrison, 444 N.E.2d 1144 (Ill. App. Ct. 1983) (finding of ability to pay implicit in imposition of fine where trial court is aware of facts in the record that would support such a finding); State v. Ramel, 743 N.W.2d 502 (Wis. Ct. App. 2007) (necessary for sentencing court to determine whether a defendant has the ability to pay a fine if the court intends to impose one).

[111] *Cf.* State v. Packer, 916 P.2d 322 (Or. Ct. App. 1996) (although statute made no mention of defendant's ability to pay, assessment of ability required before imposition of compensatory fine).

[112] U.S. Const. amend. VIII.

[113] *See* § 7.3.1.5, *infra*.

3.3.4. Statutory Requirements to Consider Ability to Pay at Imposition

While *Fuller v. Oregon* may or may not directly require imposition-stage ability-to-pay inquiries as a matter of constitutional law, the case has still had a significant impact on this issue. By affirming the Oregon statute that required such an inquiry, the Court implicitly encouraged states to model the Oregon statutory framework, which *does* require ability-to-pay inquiries at the imposition stage as a matter of state law. And indeed a number of states have taken up this invitation, creating statutory provisions that similarly require courts to consider a defendant's ability to pay prior to imposing criminal justice debt. Some statutes contain each of the safeguards included in the Oregon statute challenged in *Fuller*; in fact, many mirror the language in the Oregon statute directly. Moreover, while some statutes apply the requirement only to recoupment of indigent defense costs,[114] others apply more expansively to other types of criminal justice debts as well.[115] Thus, counsel should always make sure to check the statutory provisions in their jurisdiction for each type of criminal justice debt that may be applied to determine whether an ability-to-pay defense might be available—and if so, should consider arguing that a client's inability to pay ought to relieve him of the debt obligation (see Section 3.4, *infra*).

Below are excerpts from two statutes that resemble the Oregon recoupment statute—one pertaining to indigent defense fees, the other to costs in general—which illustrate the statutory basis for many of the options for securing relief from criminal justice debt discussed in this guide.

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[114] *See* Ala. Code § 15-12-25; Del. Code Ann. tit. 10, § 8601; Kan. Stat. Ann. § 22-4513; Mont. Code Ann. § 46-8-113; N.D. Cent. Code § 12.1-32-08; Vt. Stat. Ann. tit. 13, § 5238.

[115] *See* 730 Ill. Comp. Stat. 5/5-9-1 (fines); Haw. Rev. Stat. § 706-641 (fines); Mich. Comp. Laws § 771.3 (probation costs); Or. Rev. Stat. § 161.665 (general costs); Utah Code Ann. § 77-32a-3 (West) (general costs); Wash. Rev. Code § 10.01.160 (general costs).

TABLE 1

Examples of Cost Recoupment Statutes

STATE STATUTE	ALA. CODE 1975 § 15-12-25 (ALABAMA)	WASH. REV. CODE 10.01.160 (WASHINGTON STATE)
Types of criminal justice debts that may be imposed. *(See Section 1.1 for definitions of common types of debts; see Section 3.3.2 for a discussion of Sixth Amendment concerns that may animate restrictions on imposition of criminal justice debts that burden rights to counsel or to trial)*	(a)(1) A court may require a convicted defendant **to pay the fees of court appointed counsel.** Fees of court appointed counsel for the purposes of this section, shall mean any attorney's fees and expenses paid an appointed counsel, contract counsel, or public defender.	(1) The court may require a defendant to pay **costs**. Costs may be imposed only upon a convicted defendant... (2) Costs shall be **limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program** . . . or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees...may be included in costs the court may require a defendant to pay.
Requirement that costs only be imposed on defendants the court has determined have current or future ability to pay. (*See* Section 3.3.4, for a discussion of statutory ability-to-pay requirements at imposition; *see Sections* 3.4-3.7 for discussion of strategic and practical considerations when ability to pay inquiries are applicable at imposition.)	(2) The court shall not order a defendant to pay the fees of court appointed counsel **unless the defendant is or will be able to pay them.** In determining the amount and method of payment of these fees, **the court shall take into account the financial resources of the defendant and the nature of the burden that payment of the fees will impose.**	(3) The court **shall not order a defendant to pay costs unless the defendant is or will be able to pay them.** In determining the amount and method of payment of costs, **the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.**

STATE STATUTE	ALA. CODE 1975 § 15-12-25 (ALABAMA)	WASH. REV. CODE 10.01.160 (WASHINGTON STATE)
Requirements relating to remission of criminal justice debts after imposition based on "manifest hardship." (*See* Section 3.3.5 for discussion of why such remission provisions are not an adequate substitute for pre-imposition ability to pay determinations; see Section 4.3 for discussion of seeking remission when representing clients on whom a debt has already been imposed.)	(2) A defendant who has been ordered to pay the fees of court appointed counsel and who is not in contumacious default in the payment thereof **may at any time petition the court which sentenced him or her for remission of the payment of these fees or of any unpaid portion thereof.** If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant, the court may remit all or part of the amount due in fees or modify the method of payment.	(4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof **may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof.** If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

While the Washington statute more broadly includes additional costs, note the similarities between the two. Much like the Oregon statute in *Fuller*, they both 1) give the court authority to impose costs on a convicted defendant; 2) define the cost and its parameters; 3) only allow for imposition on those defendants who currently or in the future will have the ability to pay; 4) require the court to look at the financial circumstances of the defendant and the nature of the burden that the costs will impose; and 5) require the court to consider remitting the costs if the defendant requests this relief on the basis that payment of costs will create a manifest hardship for the defendant—a topic that is discussed in more detail in Section 4.3, *infra*.

3.3.5. Remission is Not an Adequate Substitute for a Pre-Imposition Ability to Pay Inquiry

Many states have criminal justice debt statues that model the Oregon statute upheld in *Fuller v. Oregon* by requiring an ability-to-pay inquiry at the time of imposition while *also* providing a defendant an opportunity to seek remission (i.e., cancellation or modification) of a criminal justice debt based on an inability to pay at the time payment is due. Indeed, some jurisdictions have held that a meaningful remission process is a required feature of a constitutionally permissible cost recoupment statute.[116] Seeking remission

[116] *See* Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979) (among general guides to be gleaned from *Strange* and *Fuller* are that a convicted person on whom an obligation to repay has been imposed ought at any time be able to petition the sentencing court for remission of the payment of costs); Fitch v. Belshaw, 581 F. Supp. 273 (D.C. Or. 1984); State v. Blank, 930 P.2d 1213, 1221 (Wash. 1997) (statute which imposes obligation to pay the costs of court-appointed counsel which lacks any

for clients who already owe criminal justice debt is discussed in Section 4.3. For present purposes, however, it is important to stress that counsel should *never* forgo a chance to challenge the imposition of a criminal justice debt on the theory that a client who lacks the ability to pay will be protected by remission down the road. Indeed, some cases make clear that a trial court cannot avoid its duty to inquire into a defendant's ability to pay at the time of sentencing simply because the statute allows for remission at a later date.[117] And there are a number of important practical reasons why remission does not afford the same protection as an inquiry at the imposition stage:

1. An individual who has no present or likely future ability to pay should never have to seek remission: Remission is generally intended for those defendants whom the court finds to be indigent at the time of sentencing, but *with the likely future ability* to pay the costs. If, by contrast, the defendant *will likely lack* the ability to pay *in the future,* then there is no need for remission—the cost simply should not be imposed. Moreover, a remission hearing is itself a burden and an imposition on the client, who must not only live with the cloud of a potential debt hanging over his or her head until the remission hearing is resolved but must also incur the costs of getting to the remission hearing, which requires traveling to the courthouse and may require missing work or arranging for childcare.
2. No right to counsel at remission: At sentencing, the defendant will usually enjoy a statutory or constitutional right to counsel, which means he will benefit from a lawyer's argument as to why he lacks the current and future ability to pay the debt. At remission, however, there often is no right to counsel, meaning the debtor will likely have to represent himself. *Pro se* litigants, however, routinely fare worse than litigants with even meager professional representation. Furthermore, *pro se* defendants may not receive notice that remission of costs is an option. Thus, remission may, in practice, only be available to individuals who are able to obtain help of legal aid or pro bono counsel in addressing their criminal justice debt post-imposition, or to those rare non-lawyers who happen to know the details of the jurisdiction's cost-recoupment statute (and who are further able to petition the court for remission and to argue that he meets a vague and undefined standard).
3. A different standard at remission: At sentencing the court must inquire into whether the defendant is or will be able to pay costs. It cannot order costs if the defendant

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procedure to request a court for remission of payment violates due process).

[117] State v. Simmons, 249 P.3d 15 (Kan. Ct. App. 2011) (while statute allowing assessment of fees of defense counsel permits defendant to later request modification of public defender recoupment fees because of manifest hardship, that process could not replace the trial court's studied determination of an appropriate amount in the first place), *reversed in part on other grounds by* 283 P.3d 212 (Kan. 2012); State v. Morgan, 789 A.2d 928 (Vt. 2001) (appellant not required to seek remission before appealing ability to pay challenge).

typically lacks the current and future ability to pay. Moreover, the burden to prove ability to pay may lie with the state. At a remission hearing, by contrast, the court does not have to inquire into ability to pay. Rather, the *defendant* has the burden of proving that the costs create a *manifest hardship*. This standard is generally undefined, giving the defendant no direction on what he must prove to the court.[118] Furthermore, in many jurisdictions, the court is not required to remit costs even if it finds that costs do in fact create a manifest hardship for the defendant. Rather, remission is left to the court's general discretion.

In short, remission is an important failsafe for clients who encounter challenges to repayment following the imposition of debt. And in jurisdictions without an ability-to-pay inquiry at the imposition stage, remission may afford one of the few potential avenues to relief. But remission is nonetheless a poor and inadequate substitute for an argument that a debt ought not be imposed in the first place. Counsel who have the opportunity to argue against the imposition of criminal justice debts at the outset should always take that first opportunity to do so.

3.4. Representing Clients in Ability-to-Pay Hearings

3.4.1. General

In jurisdictions that require ability-to-pay determinations at the imposition stage, the specific rules and processes governing the ability to pay hearing can vary. For example, different evidentiary presumptions may apply, and different forms of financial evidence may be deemed admissible or inadmissible. Attorneys representing clients in such proceedings should therefore be sure to familiarize themselves with the relevant statutes, case law, and court rules for their jurisdiction.

In addition to these jurisdiction-specific issues, this section highlights three key issues that advocates should consider when representing clients in ability-to-pay hearings: (1) the timeframe relevant to the consideration; (2) the evidentiary standard that will be applied; and (3) the strategic challenges inherent in balancing inability to pay arguments against arguments for a reduced sentence of incarceration. Each of these issues is taken up in the following sections.

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[118] *See, e.g.*, N.C. Gen. Stat. § 15A-1363 (allowing for remission of fines or costs if it appears to satisfaction of the court that circumstances which warranted imposition of the fine no longer exist; that it would otherwise be unjust to require payment; or that proper administration of justice requires resolution of the case). *But see* R.I. Gen. Laws § 12-20-10 (allowing for remission of costs based on defendant's indigence, with several factors establishing prima facie evidence of indigency, including receipt of certain public benefits, and outstanding payments totaling $100 or more on child support, restitution, or counseling costs).

3.4.2. The Timeframe Issue: Assessing Whether a Defendant "Is or Will Be Able to Pay"

In many jurisdictions, the ability-to-pay inquiry at the time of imposition is framed as a question of whether the defendant is *or will be* able to pay the costs at issue, either explicitly by the relevant statute or by case law in the jurisdiction. If so, the proceeding will be more complicated than simply persuading the court that the defendant lacks the ability to pay the debt on the day he or she is being sentenced. Instead, the court must consider both the defendant's current ability to pay and his future ability to pay as well.

Assessing—and thus litigating—an individual's future ability to pay can be challenging for multiple reasons. For one, criminal courts are unaccustomed to assessing a defendant's future ability to pay, as this inquiry rarely arises in other contexts. Indeed, the two most analogous scenarios for criminal court judges—determining whether a defendant qualifies for appointment of counsel and determining whether a defendant is able to satisfy criminal justice debt at the collection stage—are both assessed by examining a person's ability to pay at the time of the inquiry. Furthermore, there is little substantive guidance in the statutory or governing case law defining "future ability to pay" as a legal concept. In fact, some courts that have declined to adopt an ability-to-pay inquiry requirement at the imposition stage have rejected the idea that future ability to pay can be assessed at all.[119]

In the absence of concrete guidance as to how to conduct the future ability-to-pay inquiry, courts often look endlessly to the future and rely on speculation and conjecture to assume that the defendant will inevitably be able to pay the debt obligation *at some point*, which will generally incline the judge to conclude that imposing the fine is appropriate. If confronted with this problem, defense counsel may want to reference *Fuller* to help limit the temporal scope of the court's analysis. In stating that a court must consider whether the defendant is or will be able to pay the recoupment costs at issue in that case, the Court offered some guidance as to what constitutes an appropriate analysis of future ability to pay when it stated that the Oregon legislation was "tailored to impose an obligation only against those with a *foreseeable* ability to meet it, and enforce that obligation only against those who *actually are* able to meet it without hardship."[120] Defense counsel may be able to use this language to argue that a sentenc-

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[119] *See* State v. Blank, 930 P.2d 1213, 1221 (Wash. 1997) (stating, in context of holding that ability to pay analysis is not required before appellate costs are ordered, that "common sense dictates that a determination of ability to pay and an inquiry into a defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of ten years or longer"); People v. Wiley, 748 N.W.2d 569, 573 (Mich. 2008) (Mem.).

[120] *Fuller*, 417 U.S. at 54. *See also* People v. Schronski, 15 N.E.3d 506 (Ill. App. Ct. 2014) (a court may only order reimbursement of the public defender fee if it finds that the defendant has a reasonably foreseeable ability to pay).

ing court ought to consider not what is remotely possible but rather what is reasonably probable within a foreseeable—i.e., near—future with regards to a defendant's actual financial circumstances. Additionally, counsel should assess whether the law in their jurisdiction provides additional guidance to help guide or cabin any "future ability to pay" inquiries, such as by requiring written findings as to the reasons a defendant has a foreseeable ability to pay or by requiring consideration of how specific factors, like mental or physical disabilities, may impact future earning potential.

3.4.3. Evidence of Ability to Pay

In addition to the difficulties that may arise in determining the point(s) in time to which the court must look when determining ability to pay, there may also be difficulty in figuring out what *evidence* a defendant—or, in some jurisdictions, the prosecutor—needs to present to the court in order to show present and future ability or inability to pay. Indeed, the phrase "ability to pay" is ambiguous,[121] and statutes may not offer any further definition.[122] Absent clear and objective criteria widely varying results may (and often do) occur, not only between courts—for example across counties in a state—but also between judges in the same courthouse. Thus, as is true with sentencing advocacy more generally, counsel should consult colleagues in the relevant jurisdiction to determine what types of arguments or advocacy techniques tend to resonate in the specific forum at issue, and with individual sentencing judges.

Some jurisdictions, however, do provide at least some statutory authority or appellate case law to guide the ability-to-pay inquiry, setting out factors that a court should—or even must—consider.[123] Counsel seeking assistance in fleshing out the ability-to-pay analysis may wish to draw on the following examples from Washington State, Illinois, and Kansas:

State v. Blazina (Washington State).[124] The Washington State Supreme Court recently addressed the ability-to-pay inquiry in *State v. Blazina*. The recoupment statute at issue

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[121] *Cf. State Bans on Debtors' Prisons and Criminal Justice Debt,* 129 Harv. L. Rev. 1024, 1026 n.23 (2015) (explaining how vagueness in the *Bearden* holding has limited its protections).

[122] For instance, many recoupment statutes, such as the Oregon statute challenged in *Fuller*, only specify general requirements that the court take account of the financial circumstances of the defendant and the nature of the burden that the payment of costs will impose. *See, e.g.*, Ala. Code §§ 14-6-22, 15-12-25; Del. Code Ann. tit. 10, § 8601; Haw. Rev. Stat. § 706-641; Kan. Stat. Ann. § 22-4513; Mich. Comp. Laws § 771.3; Mont. Code Ann. §§ 46-8-113, 46-18-232; Nev. Rev. Stat. § 178.3975; N.D. Cent. Code § 29-07-01.1; Or. Rev. Stat. § 151.505; Utah Code Ann. § 77-32a-3 (West).

[123] *See generally Confronting Criminal Justice Debt: A Guide for Policy Reform* at 26-30 (2016) (recommending that legislators amend criminal justice debt statutes to include robust ability-to-pay safeguards, including clearly defined standards and definitions applicable to the inquiry, and highlighting some examples).

[124] State v. Blazina, 344 P.3d 680 (Wash. 2015).

in that State provides that the court must conduct a pre-imposition inquiry into the defendant's ability to pay, taking account of the financial resources of the defendant and the nature of the burden that costs will impose.[125] However, in conducting this inquiry, the court in appellants' cases made no findings on the record. Instead, it simply signed a boilerplate judgment form that stated the inquiry had been conducted and found that the defendant had the current and likely future ability to pay.[126] The state Supreme Court deemed this rote recitation insufficient, holding that the sentencing court must:

> *do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.*[127]

Notably, the Court then went on to hold that, "[w]ithin this inquiry, the court must also consider important *factors* . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay."[128] And the court further stated that trial courts should look to Washington's civil fee waiver court rule for additional guidance.[129] The official comment accompanying that rule in turn states that an individual should be determined indigent (and thus not subject to certain debts) if he or she: (1) is currently receiving a needs-based, means-tested public benefit such as welfare, food stamps, or SSI; (2) has total household income at or below 125% of the federal poverty line; (3) has total household income above 125% of the federal poverty line and has "recurring basic living expenses . . . that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made;" or (4) is subject to "other compelling circumstances" that make the person unable to pay fees.[130]

People v. Morrison (Illinois).[131] This Illinois case challenged the imposition of a $350 fine on the defendant at sentencing. The defendant appealed, arguing that the facts did not support the finding that he had the future ability to pay. The Illinois Supreme Court agreed, and listed facts the court may have been able to elicit from the defendant

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[125] Wash. Rev. Code § 10.01.160(3).

[126] State v. Blazina, 344 P.3d 680 (Wash. 2015).

[127] *Id.* at 685.

[128] *Id.* at 685 (emphasis added). Other cases have similarly identified pending incarceration as an important factor to consider when determining future ability to pay. *See, e.g.*, State v. Duncan, 374 P.3d 83 (Wash. 2016) (court holding that trial court's ability to pay analysis was inappropriate where court imposed costs of incarceration on defendant serving ninety-six-year prison sentence and would be released owing well over $1 million in debt).

[129] State v. Blazina, 344 P.3d 680, 685 (Wash. 2015).

[130] Washington Court Rules GR 34(3).

[131] 444 N.E.2d 1144 (Ill. App. Ct. 1983).

to show ability to pay, or lack thereof.[132] These facts included information regarding the defendant's living expenses; whether the defendant's spouse contributed income to the household and if so how much; the defendant's educational background and marketable skills; and any property or other sources of income available to the defendant.[133] Absent this information, the court held, there were insufficient facts available to the trial court to properly impose the fine. The state supreme court thus vacated the fine and remanded the case for the limited purpose of conducting a hearing to determine the defendant's ability to pay the fine, and the amount of the fine.[134]

State v. Robinson (Kansas).[135] In *Robinson*, the defendant was ordered to pay over $700 in indigent defense fees after conviction. On appeal, he argued that the sentencing judge violated the Kansas attorney fee recoupment statute by failing to explicitly consider Robinson's ability to pay and the financial burden that payment would impose at the time of the assessment. The court agreed, stating that the sentencing court, at the time of initial assessment, must not only consider the financial resources of the defendant and the nature of the burden that payment will impose, but also must state on the record how those factors have been weighed in the court's decision.[136] Without an adequate record on these points, meaningful appellate review of whether the court abused its discretion in setting the amount and method of payment of the fees would be impossible.[137]

Beyond these three cases, there are other cases addressing both the imposition and enforcement stages of criminal justice debt in which courts have offered guidance as to ability to pay, or held that a reasonable ability to pay analysis must be more than perfunctory.[138] For example, in the context of inquiries into whether a defendant who failed to pay criminal justice debt was able to pay, an appeals court found that an analysis based solely on imputed rather than actual wages was reversible error.[139] Also, before imposing indigent defense fees, some courts require a finding that circumstances have changed since the original determination of indigence was made at the time counsel was

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[132] 444 N.E.2d 1144, 1145 (Ill. App. Ct. 1983).

[133] *Id.*

[134] *Id.*

[135] 132 P.3d 934 (Kan. 2006).

[136] *Id.* at 940.

[137] *Id.*

[138] *See, e.g.* People v. Daniels, 28 N.E.3d 216 (Ill. App. Ct. 2015)(vacating public defender fee where trial court held a perfunctory hearing); State v. Carrasco, 950 P.2d 293, 296 (N.M. Ct. App. 1997) (holding that the court must make an actual ability-to-pay determination and cannot delegate this responsibility to the probation officer).

[139] *See, e.g.* Skipper v. State, 189 So. 3d 269, 271(Fla. Dist. Ct. App. 2016) (reversing a probation revocation for failure to pay restitution where "the State did not offer any evidence to contradict Skipper's testimony. Instead, the State simply argued that it believed that Skipper should be able to find work.").

appointed.[140]Additionally, some states establish presumptions regarding ability to pay, though they may or may not be reasonable or helpful as applied to a given defendant's situation. For example, in the context of collection (rather than imposition), in Florida a monthly payment amount is presumed to correspond to the person's ability to pay if the amount does not exceed two percent of the person's net annual income divided by twelve.[141] Unreasonable presumptions of ability to pay may be subject to challenge.[142]

In addition to payment ability factors established by case law or state statute, counsel should also note that the federal government has promulgated tools for assessing payment ability—albeit in other contexts—that can be cited as potential supporting authority in the absence of established jurisprudential rules. Two possible examples are the National Collection Standards employed by the IRS[143] and the standards for income-driven repayment options for federal student loans.[144] These existing government standards are designed to balance the repayment of a debt obligation owed to the federal government against the need to ensure that the debtor and his or her household are able to meet their basic needs. If a client would be deemed to face a financial hardship or be authorized not to have to make actual payments under these federally approved standards, that may make for a persuasive argument to a court that he or she lacks the ability to pay a court-imposed debt.

3.4.4. Strategic Considerations Concerning When to Raise Ability to Pay Arguments

In addition to the complicated legal issues discussed above regarding how to assess an individual's present or future ability to pay, there remains a separate—and essential—strategic consideration facing any defense attorney tasked with making inability-to-pay arguments in the course of a sentencing hearing: How to highlight a client's inability to pay while simultaneously emphasizing the client's capacity to become a productive, i.e., a responsible and perhaps ultimately *employable,* member of society—a showing often essential to obtaining a favorable non-monetary sentence.

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[140] *See, e.g.*, Museitef v. United States, 131 F.3d 714, 716 (8th Cir. 1997) (holding that after a defendant has demonstrated an inability to pay counsel fees, the fees can only be recouped if the person has the ability to pay "in light of the liquidity of the individual's finances, his personal and familial needs, or changes in his financial circumstances.").

[141] Fla. Stat. § 28.246 (4).

[142] *See, e.g.*, People v. Cook, 407 N.E.2d 56, 57 (Ill. 1980) (finding that presumption that posting of bail demonstrated an ability to pay could not substitute for a due process hearing to determine if a defendant was indigent).

[143] Internal Revenue Service, Collection Financial Standards (eff. Mar. 28, 2016) *available at* https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards.

[144] *See* National Consumer Law Center, Student Loan Law § 3.3.3.3 (5th ed. 2015), *updated at* www.library.nclc.org (describing income-driven federal student loan payment plans that set monthly payments as a function of a limited percentage of income in excess of household poverty guidelines, including payments of as little as $0).

Practically speaking, this can be a fine line to walk. Oftentimes, at sentencing, the defendant will need to show herself in the best light possible in order to request the court's leniency or to persuade the court that a long prison sentence is not warranted. The alternative to a long sentence is usually some form of court supervision, such as probation. Courts, however, are considerably more inclined to impose a shorter sentence when the defendant shows a likelihood of being a responsible and productive member of the community—which often includes being employable. Indeed, in many courts, seeking and maintaining employment may be a standard condition of probation. Thus, an argument that a person is unlikely to have a steady income not only at the time of sentencing but also going forward into the foreseeable future may affirmatively undercut the perhaps far more important argument to be made at sentencing: that she is ready, willing and able to reenter the community and secure a steady income.

One tactic counsel might be able to implement in order to address this inherent tension is to seek bifurcation of the sentencing hearing in order to separate the determination of the punitive sentence from the legally distinct inquiry into a defendant's ability to pay criminal justice debt. Bifurcation can help focus the court's attention on these two separate inquiries and alleviate the dilemma discussed above by separating the "contributions to society" arguments from the "inability to pay" arguments. Bifurcation can also help to establish a clear record of the arguments and evidence considered for purposes of any subsequent appeal.

If bifurcation is not an option—or even if it is—counsel should also bear in mind that the strategic dilemma posed in this section can often be navigated by nuanced and thoughtful sentencing advocacy. After all, in a criminal justice system where upwards of eighty percent of the defendants are in fact indigent, most judges will be aware that the defendants appearing before them often face considerable financial hardships. And yet, many poor defendants are not only sentenced to probation, but complete their terms of probation successfully—a point judges will also either know or remember if prompted by defense counsel.

Simply put: being poor and being a productive, contributing member of society—worthy of a lenient or probationary sentence—are hardly mutually exclusive. Indeed, far from it. Thus, even without bifurcation as an option, a sentencing hearing is often an opportunity to humanize a client's financial hardships and to highlight how the client's history of enduring and persevering *in the face of those hardships* demonstrates resiliency—a trait that sentencing advocates will often wish to emphasize. Moreover, the sentencing hearing is an opportunity to educate the court as to the hardships inherent in criminal justice debt obligations and the perverse consequences that such debts can impose on a person whom the court and the justice system are supposed to be trying to rehabilitate. In short, by discussing the financial realities facing a person with a criminal

conviction,[145] counsel may be able to avoid a lengthy sentence and imposition of debts at the same time. Even if not, incorporating such arguments into sentencing advocacy can help to broaden judges' perspectives in the long run, perhaps softening judges to clients' hardships at the enforcement or remission stage, or altering their views on debt imposition practices over time.

Finally, it is important to note that many courts in jurisdictions with ability-to-pay inquiry requirements do not—in practice—actually conduct anything more than a perfunctory "hearing" on the issue. In such cases, defense counsel should object to the imposition of the debt during the hearing in order to preserve the issue for appeal. If possible, counsel should attempt to state with as much specificity as possible the reasons why the debt ought not be imposed—for example, by citing any authority requiring an inquiry into ability to pay and providing evidence of inability, or by providing reasons that the fee or fine is inapplicable or unwarranted under the circumstances. Counsel should be mindful, however, not to jeopardize the outcome of the sentencing hearing itself—for example, by frustrating the judge with an extended (and perhaps uncustomary) argument about the need to comply with the applicable ability-to-pay statute, right before the judge sentences the client. Failure to object at all may be considered a waiver and should be avoided,[146] but even a brief *pro forma* objection may be sufficient to preserve the issue for appeal, without detracting from other sentencing hearing objectives.

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[145] There is substantial information available on the impact of a criminal conviction and the general circumstances of those who have them. This information may be useful in showing what a defendant's life will look like once the conviction is entered, or how it will worsen if the individual has previous convictions in addition to the current one. For example, the individual may be reentering society with a limited education, which along with the conviction, will create serious limitations on future employment prospects and one's ability to pay criminal justice debts. *See* Bannon, et. al., *supra* at 4 (between 15-27 percent of prisoners expect to live in homeless shelters upon release); John Schmitt & Kris Warner, Center for Economic and Policy Research, Ex-Offenders in the Labor Market 2 (2010) (felony conviction or time in prison makes individuals significantly less employable). A person with a criminal conviction is also more likely to have a substance abuse problem or a physical or mental disability that precludes gainful employment and is also more likely to be forced into a tenuous housing situation. *See* National Center on Addiction and Substance Abuse, Columbia University, Behind Bars II: Substance Abuse and America's Prison Population 25–26 (2010) (of the 2.3 million prisoners in U.S., 1.5 million meet the DSM-IV medical criteria for substance abuse or addiction; 32.9% have a mental health disorder).

[146] *See* People v. McCullough, 298 P.3d 860 (Cal. 2013) (holding that a defendant waived his right to challenge the imposition of a booking fee when he failed to object during the ability to pay determination). *But see* People v. Trujillo, 340 P.3d 371, 378 (Cal. 2015) (holding that "in an appropriate case a defendant's discovery of trial counsel's failure properly to advise the defendant, before the sentencing hearing, of the requirement of a waiver of a court hearing on ability to pay probation costs may constitute a change of circumstances supporting a postsentencing request for such a hearing.").

BIFURCATION CONSIDERATIONS

In considering whether to seek to bifurcate penalty sentencing and imposition of costs, counsel should consider:

- **Whether the client has a strong argument that he or she would be unable to pay the potential debt that may be imposed:** If a client's inability-to-pay defense is unlikely to be successful in avoiding the debt obligation, then it may not be worth risking that such arguments could undermine sentencing arguments that highlight her capacity and eagerness to obtain employment. Conversely, if a client has a strong shot at both avoiding debt imposition *and* benefitting from "productive member of the community" arguments, bifurcation may be worthwhile.
- **How much discretion the sentencing judge has in setting the length of any incarceration or supervision terms or conditions that may be imposed:** If the client's likely sentence is fairly predictable, either due to the nature of the case or the terms of any applicable plea bargain, then the risk that inability-to-pay arguments will adversely affect the sentencing decision may be mitigated. On the other hand, if the sentencing judge has a wide range of discretion, bifurcation may be worthwhile.
- **Whether the facts or arguments that would support limiting incarceration or supervision would undermine an argument for inability to pay, and vice versa:** Inability-to-pay arguments are not always in tension with effective sentencing advocacy, which means bifurcation may not be necessary in every case. It should be considered, however, when the arguments for debt waiver and the arguments for a low or a probationary sentence truly are in tension. For example, a client who has a full-time and well-paying job with a steady work history may wish to highlight this fact at sentencing to demonstrate his or her reliability—while perhaps simultaneously wishing to downplay the fact that he or she is, say, in default on child support payments (raising an inference of poor character), or is subject to a series of preexisting criminal justice debt obligations (highlighting a criminal history). Those debts, however, may constitute the very reason why the client lacks the ability to pay any additional debts. Bifurcation may be a useful tool in situations similar to this one.

3.5. Plea Bargaining and Criminal Justice Debt

In jurisdictions that provide for ability-to-pay determinations at the imposition stage, it may be common practice for prosecutors to demand waiver of such an inquiry as a condition of a plea agreement. Plea negotiations are inherently case-specific, and the proper approach to conducting them will necessarily depend on both the strengths and weaknesses of the parties' cases and on the goals and interests that the client is

hoping to maximize. Still, even taking such nuances into account, one point bears special emphasis: Ability-to-pay hearings have value—potentially quite significant value—to *both* sides in the plea negotiation, and therefore should not be waived thoughtlessly, or without obtaining a commensurate concession from opposing counsel.

On the defendant's side, the potential value of an ability-to-pay hearing is obvious: it could save the client from the imposition of a potentially sizable criminal justice debt, and spare her all of the associated difficulties that can arise from years of payment and potentially devastating enforcement actions. Of course, the value of the hearing is not static—some defendants will have a better chance at demonstrating inability-to-pay than others, or will be more sympathetic at a payment capacity hearing. Similarly, some judges will be more amenable to inability-to-pay arguments than others, which could affect how valuable the hearing will be perceived by counsel on both sides of the negotiation. At a minimum, however, it is incumbent on defense counsel to ensure that her client understands the potential value of the ability-to-pay inquiry, the likelihood of success, and the potential long-term hardship that could follow from allowing debt to be imposed without challenge. Only by understanding the value of the hearing can *the client* decide whether it is worth waiving the inquiry as part of a plea bargain.

In advising clients with respect to that assessment, it is important for defense counsel to bear in mind that prosecutors often have an interest in *avoiding* the ability-to-pay hearing altogether. For one thing, hearings require time and resources—particularly if the governing statute puts the burden on the prosecutor to affirmatively establish the defendants' ability to pay. Prosecutors, who often also face resource constraints, may not have the time or energy to assemble the necessary documentation or to prepare arguments for a hearing in every case. They may thus have a strong incentive to secure waiver of the hearing. Moreover, as a representative of the state, the prosecutor may have a more direct, budgetary interest in making sure that debts are imposed and paid—and may even face some institutional pressure in this regard. All of which is to say that the prosecutor may have a strong incentive to *guarantee* the imposition of debt by securing waiver of a payment-ability inquiry from the defendant. And that means that a defendant who is legally entitled to such a hearing has something of value that the prosecutor wants—his waiver. Defense counsel should thus be thoughtful in exploring concessions that the client might be able to bargain for in exchange for agreeing to waive the hearing—e.g., dropped charges, lower sentences, more favorable conditions of supervision. And counsel should then be sure to discuss with the client whether he or she in fact prefers receiving those concessions to having the opportunity to argue against imposition of the debt.

Finally, apart from considering whether and how to bargain over waiver of payment ability determinations, defense counsel should also more generally consider ways to

negotiate plea terms that decrease or avoid the risk of excessive fines and fees for the client. The strategies through which this could succeed are likely to vary by jurisdiction and judge, but some options may include: (1) pleading guilty to charges or offenses that carry lower mandatory fees than other charges, or to charges that do not carry mandatory fees; (2) negotiating the amount of the fines or fees that the prosecutor will recommend the judge should impose, if the prosecutor has a say in the matter at sentencing; (3) negotiating the content of the factual recitation the prosecutor will proffer regarding the defendant's financial circumstances; or perhaps even (4) negotiating that the prosecutor will either not oppose or will affirmatively endorse a finding by the court that the defendant is unable to pay fines and fees, either at all or in excess of a negotiated amount.

3.6. Community Service as an Alternative to Criminal Justice Debt

If a client is too poor to pay criminal justice debts, one potential option to mitigate this problem can be to seek alternatives to imposition of the debt. In several jurisdictions, this can be achieved via statutes that allow a court to convert criminal justice debts into community service.[147] Community service can be an acceptable alternative for some defendants who lack the ability to pay, especially if the service that may be completed is meaningful, promotes useful job skills or connections, and is reasonably convenient.[148]

Community service is not, however, a one-size-fits-all solution for every debtor, and may not be an appropriate option for a number of reasons:

- Physical and mental disabilities and substance abuse issues: Many defendants have mental or physical disabilities or substance abuse issues that make community service inappropriate, if not impossible, or that interfere with treatment schedules.[149]

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[147] *See, e.g.,* Cal. Penal Code § 1209.5 (West) (authorizing court to convert fine for infraction to community service upon showing fine would pose hardship to defendant or his or her family); Kan. Stat. Ann. § 8-1567 (authorizing community service in lieu of payment of fine for DUI convictions); Minn. Stat. § 609.101 (allowing for conversion of fine to community service if court finds on record that person is indigent or that payment could create undue hardship on person or person's immediate family); N.M. Stat. Ann. § 31-12-3 (giving court discretion to allow any person who has been sentenced to pay a fine, or fees and costs to serve a period of time in labor in lieu of them); Okla. Stat. tit. 11, § 27-122.2 (municipal court authorization to order term of community service in lieu of fine or in conjunction with imprisonment); Va. Code Ann. § 19-2-354 (allowing defendant assessed fines or costs to discharge all of part of fines or costs through community service); W. Va. Code § 62-4-16 (allowing municipal judge to substitute community service in lieu of sentence of incarceration or imposition of fine); Wis. Stat. § 973.05(3)(a) (community service in lieu of fine authorized at sentencing).

[148] For a discussion of elements and benefits of well-designed community service programs, see *Confronting Criminal Justice Debt: A Guide for Policy Reform* at 21-22 (2016).

[149] *See* National Center on Addiction and Substance Abuse, Columbia University, Behind Bars II: Substance Abuse and America's Prison Population 25–26 (2010) (of the 2.3 million inmates in the

- Lack of access to transportation: Getting to the community service location can be problematic, especially in rural or other sparsely populated areas.
- Time restrictions: Many indigent clients have work or child care obligations, or need to be looking for work or stable housing or addressing other immediate needs during much of the day. Community service options may not be available during the hours the client is available. It may also be counterproductive to require that an individual perform community service—especially tasks that cannot translate into marketable job skills or are not otherwise rehabilitative—while abandoning responsibilities that better promote accountability and successful reintegration back into the community.
- Multiple debt obligations: Many individuals who cannot afford to pay tickets or other court costs promptly end up accruing several debts (including traffic and other municipal infractions) from different counties, all of which may be owed at the same time. It might not be possible to convert the payment of each of these fines into community service, as it could take a year or more of full time service to pay off debts throughout a state.

It is also important to realize that community service is not a "risk free" alternative to criminal justice debt, as a client who is ordered to complete community service as (for example) a condition of probation, could potentially have his or her probation revoked—and thus face incarceration—for failure to complete the community service on time, just as is true when a more formal financial debt is not paid on time. Community service, moreover, is nontransferable: unlike financial debt obligations, a client cannot get help from family members or friends to "pay off" community service. An attorney should always consult his or her client regarding whether community service is a viable option and should discuss all of the possible pitfalls that could make completion of community service difficult.

Finally, even for clients for whom community service may be a viable alternative to the imposition of criminal justice debt, defense counsel should still first attempt to argue that costs are not appropriate for an indigent defendant in the first place. The best alternative to the imposition of criminal justice debt is always not having the debt imposed at all.

3.7. Communicating with Your Client

Attorneys who represent indigent clients know that their clients are poor. The details of a client's financial circumstances, however, are rarely the subject of extensive discussion between the attorney and the client—especially when criminal justice debt issues are treated as peripheral concerns, or worse, ignored altogether. For all the reasons

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nation's prisons, 1.5 million meet the DSM-IV medical criteria for substance abuse or addiction; 32.9% of inmates have a mental health disorder).

discussed in this guide, however, criminal justice debt issues should not be allowed to fall through the cracks. And in order to address them effectively—at the imposition stage and, subsequently, in the course of potential enforcement proceedings—counsel must develop a sound understanding of their clients' financial status.

As with all aspects of criminal defense representation, it is important to build a relationship of trust so that defendants feel comfortable sharing what can often be deeply personal hardships and struggles. Similarly, as is true of criminal representation more generally, it is important for counsel to make certain that the client fully understands the obligations and consequences associated with criminal justice debt, pre- and post-conviction. Just as an attorney must advise a defendant about the consequences of violating conditions of probation, parole, community corrections or supervised release, so too should an attorney be sure to explain the meaning of legal financial obligations and the consequences that ensue when they are not paid or addressed.[150] Defense counsel have a duty to understand the details of the debt obligations themselves. And they have an obligation to explain those obligations to the defendant, making clear the defendant's responsibilities regarding timely payment, the potential consequences of failure to pay, the processes for making payments during and post-incarceration, and any potential avenues for remission. A defendant's liberty and successful re-entry could depend on these concepts being fully and clearly understood.

For all of these reasons, successful representation regarding criminal justice debt issues requires open communication between client and counsel. Here are some specific steps defense counsel should take when communicating with a client about these issues:

First, counsel should incorporate discussion of criminal justice debt issues into their existing conversations about the nature and consequences of the case—at each stage of the representation. Defense counsel are accustomed to talking with their clients about the substantive criminal law that governs the case, explaining how the evidence obtained through discovery or investigation relates to the elements of the offense or potential defenses. Similarly, defense counsel routinely walk clients through the mechanics of sentencing, describing concurrent versus consecutive sentencing as well as the details of probation, parole, supervised release, and good-time credit. The same attention to detail should be paid to the financial consequences of a criminal case.

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[150] *Cf.* American Bar Ass'n, Criminal Justice Standards for the Defense Function, Collateral Consequences 4-5.4(a) (4th ed.) ("Defense counsel should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction. Counsel should investigate consequences under applicable federal, state, and local laws, and seek assistance from others with greater knowledge in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial, plea, or other dispositions.").

This of course requires, first and foremost, that counsel know the details themselves. As emphasized in earlier parts of this guide, counsel should study the statutory framework, case law, and common practices in the jurisdiction in order to determine the range of criminal justice debts that could be imposed, the consequences for failure to pay, the process for remission, and the law governing ability to pay. Once the attorney masters these details, she should then take the time to explain them to the client—clearly and patiently—just as she would for other aspects of the case.

It is important to bear in mind that for many clients, the details of criminal justice debt and its consequences will likely be unfamiliar. Moreover, some clients may lack financial literacy or sophistication. And even sophisticated clients often experience common and well known psychological traits that cause people to discount the significance of seemingly far off consequences—like future debt. For all these reasons, it is incumbent on the attorney to make sure that the client fully understands the nature of the criminal justice debt at issue and the consequences at stake.

It may be helpful along these lines to provide a one or two page summary to the client, written in plain language (and translated into the client's native language if necessary). Such a summary can both help the client understand the criminal justice debt landscape and also help eliminate any element of surprise. Counsel, public defender agencies, or legal service providers may also consider developing short summaries that incorporate illustrations or other visual cues that simplify the criminal justice debt issues into easily understandable formats, as research shows such illustrations substantially enhance comprehension.[151]

Finally, and most importantly, counsel should be sure to continue discussions of criminal justice debt issues throughout the course of representation, folding this aspect of the case into each significant discussion of the client's goals and strategic choices. This includes discussing criminal justice debt issues as they relate to plea negotiation, plea offer evaluation, sentencing preparation, and post-conviction support and litigation.

Second, counsel should determine the totality of the client's financial circumstances early in the representation. Defense attorneys must understand all aspects of their clients' financial circumstances in order to represent them successfully regarding debt obligations. This requires the attorney to gain understanding of, among other things, the client's income (formal and informal), their financial obligations and expenses (including monthly expenditures and obligations to dependents), their outstanding debts, and any circumstances (such as medical and mental health needs or physical

[151] W. Howard Levie & Richard Lentz, *Effects of Text Illustrations: A Review of Research*, 30 Educ. Commc'n & Tech. 195, 206 (1982) (analyzing 155 studies on the effect of illustrations on reading comprehension).

disabilities) that could impact earning capacity. It may be helpful to develop a chart or check list of questions that counsel or an intake staff person can go through with clients. Ask questions that invite specificity rather than asking broad, sweeping, open-ended questions. For example, instead of asking "what are your monthly expenses," try asking:

1. How much is your rent?
2. How much are your phone and utility bills per month?
3. How much do you spend on food each month?
4. How much do you spend on household supplies?
5. How much do you spend on transportation?
6. How much do you spend on daycare?
7. How much do you spend on prescriptions or other medical expenses?

Some clients overestimate such expenses while others may underestimate their income, expenses, assets, debts and other factors that affect their ability to pay criminal justice debt. It is the duty of defense counsel to gain an accurate understanding of the client's circumstances—both in order to advise the client properly and, potentially, to help the court gain a complete understanding of the client's current and future ability (or inability) to pay. Counsel should consider having the client sign a generalized release that authorizes the attorney or her investigator to obtain records detailing the client's key financial transactions or account balances, and should further consider incorporating collection of such information into the standard tasks assigned to an investigator (if available) prior to sentencing. In short, the more information obtained, the better and more comprehensive the representation will be.

It is important to stress, however, that the details a client shares about his or her financial circumstances are not only potentially sensitive but are also covered by the attorney client privilege. This is especially important to bear in mind regarding information about income or other issues that may reflect potentially suspicious activity—such as unreported taxable income or income gained from potentially illegal activity. Counsel must always give careful thought to such aspects of a client's financial profile in order to avoid inadvertently disclosing information that could expose the client to criminal liability. And even where criminal liability is not at risk, counsel should never disclose the details of the client's finances without the client's permission.

Third, defense counsel should prepare the client for any criminal justice debt hearings. As with sentencing hearings more generally, defense counsel will often be in the best position to steer the proceedings on the client's behalf, arguing the law and explaining how the circumstances surrounding the client's financial posture, criminal history and collateral consequences of a conviction might affect the client's current and future

ability to pay criminal justice debt. The presiding judge, however, often may direct questions to the defendant him or herself. Defense counsel should prepare the defendant for these questions, including by practicing common questions and responses in advance. Counsel should also advise the client to think critically about her answers and advise her to request a moment to speak with counsel privately should she feel uncomfortable or confused at any point during the hearing. Furthermore, the client should be informed that if she fails to provide complete information, the court may accept what is presented as the truth and make imposition determinations based on the information that is provided.[152] Finally, it is important to make sure the client understands that the ability to pay inquiry is not an assessment of character and that, in most cases, honestly conveying her financial hardship is likely to help the client—not to result in more jail time due to inability to pay.

Additionally, it is important to remember that clients present themselves with more than just their words. It is always in a client's interest to come to a sentencing hearing presenting themselves—through words, action, and appearance—as a responsible member of the community. With respect to ability-to-pay inquiries, however, this can become more complicated, as it may not be in a client's best interest, for example, to bring or wear especially expensive or flashy items or clothing to such a hearing. Counsel should not shy away from advising a client even at this level of detail, always being mindful, of course, to treat the client with dignity and respect.

Fourth and finally, counsel should thoroughly review the criminal justice debt portion of the judgment and sentence with the client. The discussion with a defendant after sentencing typically involves a review of the sentence imposed, conditions of supervised release, and avenues for appeal, among other things. Defendants are rarely as concerned about the sometimes long list of costs and fees printed at the end of the judgment form. However, failure to pay these criminal justice debts can cost defendants dearly, perhaps even landing them back in jail, or otherwise preventing them from securing employment and housing, harming their credit, and generally impairing their ability to rebuild their lives. As a result, defense attorneys should take the time to explain what a defendant should do to address criminal justice debt upon release from incarceration, and what collateral consequences flow from failure or inability to pay. Even the simple act of using a highlighter or a marker to emphasize payment amounts and due dates on the judgment order can be helpful. And once again, preparing a standard and visually informative handout to simplify the process can be valuable as well.

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[152] *See, e.g.,* People v. Green, 1998 WL 1991155 (Mich. Ct. App. June 12, 1998) (holding that the court may rely on information in the presentencing report, which is presumed to be accurate, when making an ability to pay determination unless the defendant objects).

Finally, if the attorney or the attorney's office is available to offer ongoing representation for the client in the event issues arise in the course of payment and collection, the attorney should stress to the client that he or she should contact the attorney at the first sign of difficulty fulfilling a debt. Oftentimes, a proactive attorney can try to work things out with a probation officer or other monitoring official to gain more time to make a payment or to otherwise lend assistance before the situation becomes dire. But such opportunities for early intervention only arise if the client alerts the attorney to potential problems in advance, before the attorney is served with notice that the client is in violation of the payment terms of her sentence.

3.8. Checklist for Representation of Clients Facing Imposition of Criminal Justice Debts

Below is a brief checklist that attorneys may use to help guide representation of clients facing imposition of criminal justice debts, along with cross references to the sections in this guide that discuss each issue.

- What types and amounts of debts might be imposed on your client? *(see 1.1, 3.2)*
  - Indigent defense fees?
  - Other fees or costs?
  - Surcharges?
  - Fines?
  - Restitution?
  - Other?

- Are the debts mandatory?
  - Debts that are commonly treated as mandatory may actually be discretionary or include conditions under which they should not be imposed. (*see 3.2.2)*
  - Imposition of non-mandatory debts may be avoided or reduced based on the existence of specified conditions—often including a defendant's inability to pay—or as a matter of the court's discretion. (*see 3.2.3)*
  - Consider potential constitutional challenges to imposition of mandatory debts. (*see 3.2.2)*

- If your client is indigent, does the law require an ability to pay analysis prior to imposition of costs or fines?
  - Review statutory language and case law for your jurisdiction to determine which types of debt, if any, require an ability to pay analysis prior to imposition. *(see 3.3.4)*
  - If the statutory or case law is indeterminate, consider potential constitutional arguments that an ability to pay determination is needed. *(see 3.3.2, 3.3.3)*

- Recognize and educate courts as to why post-sentencing remission options may not be an adequate substitute for a pre-imposition ability to pay determination. *(see 3.3.5)*

- If an ability to pay analysis is required or permitted, must future ability to pay be considered?
  - If the law clearly requires consideration of future ability to pay, focus on whether such future ability is reasonably foreseeable for this client. *(see 3.4.2)*
  - If the statute is silent as to the time period to consider for ability to pay, focus on current ability and financial condition. *(see 3.4.2, 3.4.3)*

- If an ability to pay analysis is required or permitted, what evidence will the court consider and how?
  - As "ability to pay" is often not defined, look not only to statutory authority, but also to case law in the jurisdiction and beyond, ask colleagues about their experiences with particular judges' approaches, and consider federal standards applied to other government debts. *(see 3.4.3)*
  - Potentially relevant factors include:
    - Whether the client was deemed indigent for purposes of appointment of counsel
    - Employment status and prospects
    - Income in relation to federal poverty guidelines for household size
    - Comparison of income to necessary expenses
    - Debt-to-income ratio
    - Receipt of benefits
    - Pending incarceration
    - Physical or mental disabilities
    - Substance abuse issues
    - Other debt

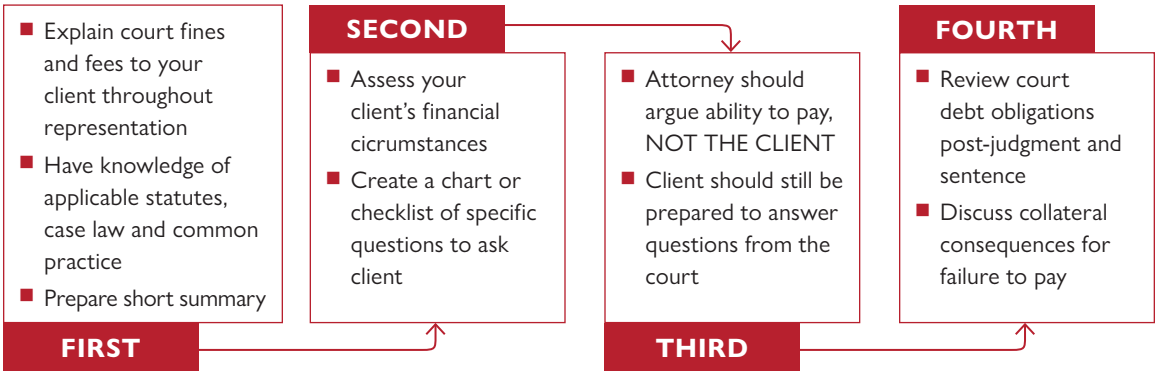
- What is your client's financial position and what capacity does your client have to pay such debts?
  - Open communication with your client about the details of their financial condition is critical to effective representation in ability to pay hearings. *(see 3.7)*
  - Communication regarding the rights, obligations, and risks associated with criminal justice costs is similarly critical. *(see 3.7)*

- Is your client interested in pursuing a plea agreement?
  - Counsel the client regarding the risks of any proposals by the prosecutor to waive the ability to pay determination as part of a plea deal. *(see 3.5)*
  - Consider ways plea bargaining may be used to reduce the likelihood of imposition of burdensome debts or other negative sentencing outcomes, and discuss such options thoroughly with the client. *(see 3.5)*

- Is community service an alternative to fines and fees?
  - If so, determine key facts like hours, accessibility, and type of service.
  - Community service may be a good option for some individuals, but there are a number of pitfalls to be aware of and discuss with clients as relates to their specific circumstances and goals. *(see 3.6)*
  - Avoiding service and financial obligations to the state altogether best protects the liberty of clients who are too poor to pay. *(see 3.6)*

TABLE 2

Key Steps Defense Counsel Should Take to Address Criminal Justice Debts at Imposition



4. DEFENDING COLLECTION OF CRIMINAL JUSTICE DEBT: REPRESENTATION OF CLIENTS FACING COLLECTION OR SANCTIONS FOR NONPAYMENT OF CRIMINAL JUSTICE DEBT, INCLUDING THOSE FACING THREATS TO THEIR LIBERTY

4.1. Introduction

In at least 44 states and the District of Columbia, individuals may be incarcerated for "willful" nonpayment of criminal justice debts.[153] Incarceration may be imposed in a number of different ways. Among the most common are civil or criminal contempt orders for violation of the order to pay; sanctions imposed for failure to appear at a debt-related hearing; revocation of probation or parole where payment was a condition of supervision; and "pay or stay" policies that offer individuals the "choice" of serving time in jail in lieu of paying a criminal justice debt.[154] Additionally, in many jurisdictions,

[153] *See* Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor 50 (2016). For a summary of all states, see *id.* at tbl. 4.2, and for a chart of the state law authority relied upon, see *id.* at tbl. A2.2.

[154] *See* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, Criminal Justice

nonpayment of criminal justice debt can result in governmental sanctions—beyond imprisonment—that can infringe on vital rights and interests essential to self-sufficiency, including suspension of driver's or professional licenses, restrictions on expungement of criminal records, and denial of the right to vote.[155] All attorneys—civil and criminal—who represent individuals who owe criminal justice debt should educate themselves on the consequences of missed criminal justice debt payments or hearings related to criminal justice debts in their jurisdiction, and should counsel clients with criminal justice debt accordingly.

In light of these potential consequences, the most urgent legal needs of criminal justice debtors will often consist of finding ways to defend against incarceration, forestalling the loss of an essential right, or quickly reducing the risk of nonpayment consequences through modification of the debt or payment plan. This section addresses several potential grounds for defending against incarceration and other collection actions related to criminal justice debts, focusing specifically on modification or remission of criminal justice debts based on financial hardship or other circumstances, constitutional protections against incarceration for inability to pay, other potential federal and state constitutional defenses, and statutes of limitations. These approaches are by no means exhaustive. However, they may often address the most immediate or serious needs of a client facing incarceration or other severe consequences arising from a difficulty in paying criminal justice debts. Advocates should also consider whether bankruptcy (discussed below in Section 5) and exemptions from garnishment, seizure, and offset (discussed in Section 6) might provide relief from collection, as well as other constitutional and statutory protections discussed below in the context of affirmative claims (see Section 7).

4.2. The Advocacy Gap

Before describing the various tools attorneys can use to help protect individuals facing criminal justice debt collection actions, one critically important point bears emphasis: Far too often, attorneys are not involved in these proceedings at all. While the Constitution generally precludes ordering imprisonment of a defendant in a criminal prosecution

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Debt: A Barrier to Reentry 20–23 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf. *See also* Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor 50, 104, 115 (2016).

[155] *See, e.g.*, Ark. Code. Ann, § 16-90-1404 (driver's license suspensions); Iowa Code §§ 901C.1, 907.9 (expungement). *See also* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry 2, 25, 29 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf; Allyson Fredericksen and Linnea Lassiter, Alliance for Justice, Disenfranchised by Debt (2016). *See generally Confronting Criminal Justice Debt: A Guide for Policy Reform* at 15-17, 22-23 (2016).

without the right to appointed counsel for those who cannot afford counsel,[156] the scope and application of the right to the various types of post-sentencing nonpayment proceedings is complex, varies by jurisdiction, and sometimes depends upon case-by-case factors.[157] Additionally, some states do not recognize a right to counsel in civil contempt proceedings under state law, even when incarceration may result.[158]

These gaps in the right to appointed counsel for indigent debtors create a significant representation need in many jurisdictions—a need that all attorneys, civil and criminal, who represent criminal justice debtors can help fill by educating themselves on criminal

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[156] *See* Scott v. Illinois, 440 U.S. 367, 373–374, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979) (holding "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense"); Gideon v. Wainwright, 372 U.S. 335, 343–345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding right to appointed counsel applies to state criminal prosecutions).

[157] *See generally* 3 Crim. Proc. § 11.2(b) (4th ed. updated Dec. 2015) (addressing when the right to appointed counsel attaches in criminal proceedings, including the circumstances under which a Sixth Amendment or due process right to counsel applies in probation and parole revocation proceedings); Colin Reingold, *Pretextual Sanctions, Contempt, and the Practical Limits of Bearden-Based Debtors' Prison Litigation*, 21 Mich. J. Race & L. 361, 369–372 (2016) (discussing right to appointed counsel in criminal contempt proceedings and application to contempt proceedings for failure to appear at a criminal justice debt status or payment hearing). *See also* Turner v. Rogers, 564 U.S. 431, 441, 448-449, 131 S. Ct. 2507, 180 L .Ed. 2d 452 (2011) (noting that there is generally a Sixth Amendment right to counsel in criminal contempt proceedings, but holding "that the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)," though explicitly leaving open the possibility of a right to appointed counsel in civil contempt proceedings in which the debt is owed to the state, especially if the state is represented by counsel); Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (distinguishing probation and parole revocation hearings from criminal trials, and concluding that "the need for counsel" at such hearings "must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system").

[158] *See, e.g.,* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry 22, nn.32–136 (2010), *available at* **http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf** (noting that some states order incarceration for nonpayment of criminal justice debt through the civil contempt process and that "[w]hile most states recognize a right to counsel in civil proceedings that could result in incarceration, high courts in Florida, Georgia, and Ohio have rejected this notion (although lower courts in Ohio are divided as to whether the high court's ruling continues to be good law)"). *See also* Turner v. Rogers, 564 U.S. 431, 441, 448-449, 131 S. Ct. 2507, 180 L .Ed. 2d 452 (2011) (noting that there is generally a Sixth Amendment right to counsel in criminal contempt proceedings, but holding "that the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)," though explicitly leaving open the possibility of a right to appointed counsel in civil contempt proceedings in which the debt is owed to the state, especially if the state is represented by counsel).

justice debt collection in their jurisdiction and by offering counsel to clients with criminal justice debt issues. Attorneys can provide critical assistance in defending against incarceration by identifying and pursuing available defenses, as well as by navigating the often complex procedural processes and identifying types and sources of relevant evidence.

Legal services and other civil attorneys may also play important roles in representing clients in collection-related proceedings—including, potentially, when incarceration is a risk. Attorneys with expertise in debt collection actions and in representing indigent clients may provide a valuable service by defending clients in collection actions or representing them in hearings related to criminal justice nonpayment. Additionally, legal services and pro bono attorneys may provide valuable representation in affirmative proceedings to modify a debt obligation or repayment plan. In such situations, debtors are unlikely to have court-appointed counsel or to be able to afford private counsel.

LEGAL SERVICES ATTORNEYS AND CRIMINAL JUSTICE DEBT

Legal Services Corporation ("LSC") regulations restrict when LSC funds may be used for representation of clients in relation to criminal matters, but do not preclude representation in many types of proceedings related to criminal justice debt. Three key restrictions bar use of LSC funds to represent clients with respect to: (1) "criminal proceedings" in which a client has been charged with an offense punishable by "death, imprisonment, or a jail sentence," 45 C.F.R. § 1613; (2) actions collaterally attacking a criminal conviction—such as habeas corpus proceedings, 45 C.F.R. § 1615; and (3) representation of prisoners and incarcerated pre-trial detainees in civil litigation, 45 C.F.R. § 1637.

These rules leave open significant opportunities for LSC-funded attorneys to represent clients in proceedings involving criminal justice debt. Notably, as stated in the preamble to 45 C.F.R. § 1613, the "criminal proceedings" rule "does *not* prohibit legal assistance with respect to any matters that are not part of a criminal prosecution such as probation revocation after a sentence has been imposed . . . [or] parole revocation." 41 Fed. Reg. 38,506 (Sept. 1976) (emphasis added) (internal citations omitted). (Attorneys must still, however, determine whether representation in specific instances would violate the limitations in § 1637 on representation of pre-trial detainees and other incarcerated persons.) The preamble also emphasizes that because infractions "punishable by no more than a fine" are "basically civil in nature," and "because the imposition of a fine may be extremely burdensome for the clients of legal services programs, the regulation permits representation of defendants in such cases." 41 Fed. Reg. 38,506 (Sept. 1976). Further, the rules do not preclude use of LSC funding to represent clients in civil proceedings related to criminal justice debt or in proceedings where the underlying conviction or culpability is not at issue, and where the client is not in jail or prison.

Given these rules, there is one area in which LSC-funded attorneys likely *cannot* provide assistance: serving as defense counsel when a client is being prosecuted for an independent charge of *criminal* contempt or other criminal violation due to nonpayment or failure to appear, if incarceration may be ordered. However, the regulations should generally permit representation in many proceedings, often including: (1) seeking remission or modification of criminal justice debt or payment plans, (2) defending against probation or parole revocation, (3) defending against collection actions for criminal justice debt, including garnishment and license suspension hearings, and (4) defending against civil contempt—although an individualized analysis will often be necessary to determine whether a given contempt matter is civil or criminal. *See* LSC Advisory Opinion EX-1999-05 (Mar. 4, 1999), *available at* http://www.lsc.gov/sites/default/files/LSC/laws/pdfs/olaeo/EX-1999-05.pdf.

The National Legal Aid & Defender Association has prepared a detailed analysis and guidance on LSC-funding restrictions as applied to various criminal justice debt proceedings; the memorandum is available to members of the Association. See Robin C. Murphy, National Legal Aid & Defender Association Guidance for LSC Programs RE: Criminal Justice Debt Collection (July 2016).

4.3. Seeking Remission or Modification of Criminal Justice Debts or Payment Plans After Imposition

When individuals are burdened by criminal justice debt, counsel can provide substantial assistance by seeking to have the debts remitted (i.e., cancelled) in whole or in part, or by seeking to have a payment plan created or modified, based on the client's financial situation or other relevant factors. Depending on the jurisdiction, counsel may be able to modify or cancel a debt in various procedural settings, including (1) in a defensive proceeding, such as a hearing to show cause for nonpayment; (2) in the course of a routine administrative hearing, such as a probation or payment status hearing; or (3) through an affirmative petition to remit the debt.[159] Complete cancellation of an obligation to pay a criminal justice debt will often relieve a debtor not only of the threat of incarceration for nonpayment, but also of other significant threats to liberty and livelihood related to collection of the debt or consequences of nonpayment. Modification of the amount of a debt or the terms of a payment plan, though not as complete a remedy, may make it possible for a client to make more manageable payments, avoid imminent penalties for nonpayment, avoid collection costs, or reduce the amount of time he or she will remain subject to payment terms.[160]

[159] See, e.g., Wash. Rev. Code § 10.01.160(4). *See also* Wash. Rev. Code § 10.01.160(4).

[160] For example, Community Legal Services has created a pamphlet on Criminal Court Fines and Fees in Philadelphia: Know Your Rights that describes how to get an affordable payment plan for local court

Advocates representing individuals with criminal justice debt should thus be sure to determine what opportunities for cancellation and modification are available in their jurisdiction, paying special attention to the procedural rules governing how such claims may be raised and what criteria the court will apply. Criminal justice debt waiver and modification opportunities may be provided by statute, court rules, or judicial discretion. Additionally, at least with respect to indigent defense fees, some jurisdictions have held that a meaningful remission process is a required feature of a constitutionally permissible cost recoupment statute;[161] counsel should consider the availability of such arguments in their jurisdiction if remission is not otherwise provided.

Although the availability and terms of remission vary by jurisdiction, many state remission statutes are similar in their language. As seen in Table 3, which collects examples of such statutes, many states authorize courts to remit all or part of court costs, costs of defense, or costs of incarceration if the debt will impose "manifest hardship" to the defendant or the defendant's family, so long as the defendant is not willfully or contemptuously refusing to pay. Other statutes are more explicit about what circumstances merit remission, and may also expressly state that remission is available for fines as well as costs in cases of financial hardship. For example, a Georgia statute mandates that all non-restitution criminal justice debt from misdemeanors or ordinance violations "shall be waive[d], modif[ied], or convert[ed] . . . upon a determination . . . that a defendant has a significant financial hardship or inability to pay or that there are any other extenuating factors which prohibit payment or collection."[162] The Georgia statute further provides a rebuttable presumption that an individual has a significant financial hardship in several circumstances, including if he: (i) "earns less than 100 percent of the federal poverty guidelines unless there is evidence that the individual has other resources that might reasonably be used without undue hardship for such individual or his or her dependents;" (ii) has certain disabilities; or (iii) has recently experienced a month or more of incarceration.[163]

Remission may also be authorized under court rules. For example, as discussed in the companion *Guide for Policy Reform* at 24-25, the Supreme Court of Michigan recently enacted court rules that allow Michigan courts to waive all or part of a criminal justice debt owed, modify an existing payment plan, or impose a payment alternative upon finding that the debtor is unable to comply with an order to pay without "manifest hardship."[164]

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debts—and the benefit of getting such a plan before being subjected to collection costs of 25%. It also describes when and how supervision fees and bail judgments may be waived or reduced, and has copies of the forms needed. *See* https://clsphila.org/learn-about-issues/court-fines-and-costs-guide.

[161] *See* §§2.3, 3.3.5, *supra*.

[162] Ga. Code Ann. § 42-8-102(c)–(e).

[163] *Id.*

[164] Michigan Supreme Court, Order No. 2015-12 (May 25, 2016), *available at* http://courts.mi.gov/

TABLE 3

Examples of Remission Statutes

STATE	REMISSION PROVISION
Alabama: Ala. Code 1975 § 15-12- 25(2) (defense costs)	"A defendant who has been ordered to pay the fees of court appointed counsel and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him or her for remission of the payment of these fees or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant, the court may remit all or part of the amount due in fees or modify the method of payment."
Alaska: Alaska Stat. § 18.85.120(c) (costs of defense)	"Upon the person's conviction, the court may enter a judgment that a person for whom counsel is appointed pay for services of representation and court costs... Upon a showing of financial hardship, the court ... (3) may remit or reduce the balance owing on the judgment or change the method of payment if the payment would impose manifest hardship on the person or the person's immediate family."
Delaware: Del. Code Ann. tit. 10, § 8601(d) (costs of defense)	"A defendant who has been required to pay the costs of defense and who is not in contumacious default in the payment thereof may at any time petition the court for remission of the payment of such costs, or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment."
Georgia: Ga. Code Ann. § 42-8-102(e) (fines, surcharges, and any other costs assessed)	"(e)(1)(B) 'Indigent' means an individual who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the individual has other resources that might reasonably be used without undue hardship for such individual or his or her dependents. (e)(1)(C) 'Significant financial hardship' means a reasonable probability that an individual will be unable to satisfy his or her financial obligations for two or more consecutive months. (e)(2) The court shall waive, modify, or convert fines, statutory surcharges, probation supervision fees, and any other moneys assessed by the court or a provider of probation services upon a determination by the court prior to or subsequent to sentencing that a defendant has a significant financial hardship or inability to pay or that there are any other extenuating factors which prohibit payment or collection; provided, however, that the imposition of sanctions for failure to pay such sums shall be within the discretion of the court through judicial process or hearings. (e)(3) Unless rebutted by a preponderance of the evidence that a defendant will be able to satisfy his or her financial obligations without undue hardship to the defendant or his or her dependents, a defendant shall be presumed to have a significant financial hardship if he or she: (A) Has a developmental disability; (B) Is totally and permanently disabled; (C) Is indigent; or (D) Has been released from confinement within the preceding 12 months and was incarcerated for more than 30 days before his or her release."

Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2015-12_2016-05-25_formatted%20order_various%20MCRs-ability%20to%20pay.pdf.

STATE	REMISSION PROVISION
Montana: Mont. Code Ann. § 46-8-113(5) (costs of defense)	"A defendant who has been sentenced to pay costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs or modify the method of payment."
Nevada: Nev. Rev. Stat § 178.3975(3)	"A defendant who has been ordered to pay expenses of the defendant's defense and who is not willfully or without good cause in default in the payment thereof may at any time petition the court which ordered the payment for remission of the payment or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due or modify the method of payment."
Oregon: Or. Rev. Stat. § 161.665 (costs)	"A defendant who has been sentenced to pay costs under this section and who is not in contumacious default in the payment of costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant, the court may enter a supplemental judgment that remits all or part of the amount due in costs, or modifies the method of payment..."
Utah: Utah Code Ann. § 77-32a-4 (West) (defense costs)	"If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs..."
Vermont: Vt. Stat. Ann. tit. 13, § 5238(f) (defense costs)	"A person who may be or has been ordered to pay all or part of the cost of representation by co-payment or reimbursement order may at any time petition the Court making the order for remission of all of the amount or any part thereof. If it appears to the satisfaction of the Court that payment of the amount due will impose manifest hardships on the defendant or the defendant's immediate family or that the circumstances of case disposition and the interests of justice so require, the Court may remit all or part of the amount due or modify the method of payment."
Washington: Wash. Rev. Code § 10.01.160(4) (costs)	"A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs..."
West Virginia: W. Va. Code § 7-8-14(c) (costs of incarceration)	"A defendant who has been sentenced to pay costs and who is not in willful default in the payment of the costs may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's family or dependents, the court may excuse payment of all or part of the amount due in costs, or modify the method of payment."

4.4. Defending Against Incarceration Based on Inability to Pay

When representing a criminal justice debtor who is facing incarceration as a potential consequence for nonpayment or late payment, it is critical that counsel determine whether the client has the ability to pay the debt, including through a repayment plan. If the client is unable to pay, this should be raised as a constitutionally-grounded defense to incarceration for nonpayment. Depending on the jurisdiction, inability to pay may also provide a basis for a defense to other sanctions or negative repercussions, and, as discussed above in Section 4.3, it may provide a basis for waiver or modification of the debt.

As discussed above in Section 2.2, *Bearden v. Georgia*[165] makes clear that incarcerating a defendant for nonpayment of criminal justice debt without careful analysis of his or her ability to pay and of alternative methods of punishment violates the Fourteenth Amendment. Further, subsequent case law has made clear that the ability to pay analysis must comport with sufficient safeguards to protect against erroneous deprivation of liberty.[166] This may require provision of counsel or other protections such as notice, a hearing at which the debtor can present information and respond, and express findings on ability to pay.[167] Further, state procedural protections may exceed federal constitutional minimums.[168]

Thus, in theory, no individual should be incarcerated for nonpayment without meaningful assessment of ability to pay, and lack of ability to pay should provide a constitutional defense to incarceration. In practice, however, substantial anecdotal accounts from knowledgeable observers and public defenders report that courts in many jurisdictions often do not engage in the required analysis of ability to pay, or do so in a cursory or inadequate manner.[169] It is therefore critical that advocates vigorously assert

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[165] 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

[166] *See* §§ 2.2, 2.4-2.5, *supra*.

[167] See § 2.4, *supra* (discussing Turner v. Rogers, 564 U.S. 431, 45–49 (2011)).

[168] *See, e.g.*, Jordan v. State, 939 S.W.2d 255, 257 (Ark. 1997) (requiring written findings of fact regarding ability to pay); Greene v. Dist. Ct. of Polk Cnty., 342 N.W.2d 818–821 (Iowa 1983) (requiring a hearing to determine responsibility for failure to pay prior to commitment and finding that jailing defendant without notice or an opportunity to explain why he had not satisfied the conditional order was a denial of due process); Hendrix v. Lark, 482 S.W.2d 427, 431 (Mo. 1972) (remanding indigent defendant to city court for a hearing to determine her ability to pay the fines and costs, and if unable to pay immediately, ordering an opportunity for her to pay in reasonable installments based upon her ability to pay); Gilbert v. State, 669 P.2d 699, 703 (Nev. 1983) ("[B]efore a defendant may be imprisoned for nonpayment of a fine, a hearing must be held to determine his financial condition, and an indigent defendant must be allowed reduction of fine or discharge of fine through installment payments.").

[169] *See, e.g.*, Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor 120 (2016) (describing courtroom observations of ability to pay in Washington State, and noting officials who deemed debtors willful in nonpayment if they received disability or unemployment benefits but did

this defense if there is risk of incarceration. It is also essential to work with clients to collect and effectively present evidence of their inability to pay. Moreover, if a judge indicates an inclination to reject the claim, counsel should demand express findings and otherwise take all steps to preserve the issue for potential appeal.

While an ability to pay analysis is mandated by the federal constitution, the process and standards for assessing ability to pay, including any evidentiary presumptions and guidance regarding financial evidence the court will consider, vary by jurisdiction[170] as well as by type of proceeding.[171] However, the general principles and strategies laid out above in Section 3.4 for defending against imposition of court fines and fees based on inability to pay are equally applicable to defending against incarceration for nonpayment, and should be considered alongside any jurisdiction-specific laws or court rules.

4.5. Other Constitutional Defenses

In addition to the right to an ability to pay assessment prior to incarceration, rooted in the Fourteenth Amendment, a range of other potential constitutional defenses to collection or incarceration for nonpayment of criminal justice debts may be applicable. For convenience, this guide groups discussion of Due Process and other constitutional challenges to criminal justice debt practices below under "Affirmative Constitutional Claims."[172] Many of the constitutional issues discussed there may also be raised in a defensive posture.

Moreover, some potential constitutional protections may be particularly suited to an individualized defensive proceeding. For example, defendants who face activation of a suspended prison sentence as a result of nonpayment (where payment was a condition

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not make payments, and those who even encouraged begging); Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry 21 (2010) ("For example, a public defender in Illinois observed that rather than evaluating a person's assets and obligations, one judge simply asked everyone if they smoked. If they smoked and had paid nothing since the last court date, he found willful nonpayment and put them in jail without doing any further inquiry.")

[170] *See Confronting Criminal Justice Debt: A Guide for Policy Reform* at 27-30 (2016) for discussion of statutory ability-to-pay schemes, as well as a list of critical elements of such schemes that states should adopt. *See also* Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1634 (2015) ("There has been conflicting case law among the lower courts . . . as to whether the defendant or the state bears the burden of proving indigence and willfulness.").

[171] *See, e.g.*, Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624, 637, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988) (explaining that in a contempt proceeding for willful failure to pay that is criminal in nature, a statute requiring the defendant to carry the burden of persuasion in showing inability to pay would violate the Due Process Clause because it would be inconsistent with state's burden to prove guilt, but that the same statute would be constitutional as applied in a civil proceeding).

[172] *See* § 7.3, *infra*.

of the suspended sentence) may be able to raise a defense based on lack of appointed counsel during the underlying criminal proceeding. In *Alabama v. Shelton*, the Supreme Court concluded that courts may not impose a suspended sentence that may result in imprisonment, and may not activate a suspended sentence of incarceration, without having afforded an indigent defendant appointed counsel during the initial criminal proceeding.[173]

Some lower courts have applied similar analysis to bar the imposition of a suspended sentence conditioned on payment of court fines or fees if the defendant did not have or waive a right to counsel during the underlying criminal proceeding.[174] For example, in *United States v. Reilley*,[175] the trial court imposed a suspended sentence of imprisonment plus a $500 fine on an unrepresented defendant, conditioned on the defendant's payment of $100. On appeal, the Tenth Circuit vacated the prison sentence, holding that as a constitutional matter "a conditionally suspended sentence of imprisonment cannot be imposed on a defendant who has been denied counsel."[176] The court observed that because of the lack of counsel at the underlying criminal proceeding, the threat of imprisonment "could never be carried out . . . and should be considered a nullity."[177] Following this reasoning and that in *Shelton*, one should similarly be able to argue against activation of a suspended sentence based on nonpayment, if the suspended sentence was originally imposed in a proceeding for which the debtor was not provided counsel.[178]

4.6. Defenses Based on State Constitutional Violations

Beyond federal constitutional claims, counsel should also explore the possibility that state constitutions might provide additional—and sometimes novel—protections against criminal justice debt practices. For example, some states have rejected fines

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[173] 535 U.S. 654, 658, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002) ("We hold that a suspended sentence that may "end up in the actual deprivation of a person's liberty" may not be imposed unless the defendant was accorded "the guiding hand of counsel" in the prosecution for the crime charged."); *id.* at 662 (concluding also that, "[w]here the State provides no counsel to an indigent defendant" the constitution does not "permit activation of a suspended sentence upon the defendant's violation of the terms of probation").

[174] *See generally* 3 Crim. Proc. § 11.2(a) (4th ed. updated Dec. 2015) (discussing United States v. Foster, 904 F.2d 20 (9th Cir.1990); State v, Stott, 576 N.W.2d 843 (Neb. Ct. App. 1998), *reversed on other grounds*, 586 N.W.2d 436 (Neb. 1998)).

[175] 948 F.2d 648, 654 (10th Cir. 1991).

[176] *Id.*

[177] *Id.*

[178] For further discussion of the constitutional considerations around limits on activation of a suspended sentence based on failure to provide counsel to indigent defendants at the time of the underlying conviction, see Alabama v. Shelton, 535 U.S. 654, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002).

or fees imposed by judges without specific statutory authority, on the grounds that such debts violate separation of powers principles. In *State v. Lanclos*,[179] the Louisiana Supreme Court concluded that an extra assessment added to the fines imposed for certain traffic citations violated state separation of powers law because it amounted to a tax, because it was used to fund "police salaries and uniform equipment," and it was not directly related to the "administration of justice."[180] A Texas court addressing a similar challenge, however, rejected it after concluding that the fine at issue was "directly related to the recoupment of costs of judicial resources expended in connection with the prosecution of criminal cases within [the] criminal justice system," even if not directly related to the prosecution at issue.[181]

4.7. Statute of Limitations

4.7.1. General

When representing a client whose criminal justice debt was imposed many years earlier, counsel should consider whether a statute of limitations on collection actions, a limit on the period of enforcement of a debt tied to the term or limit of probation, or a statute of repose that could extinguish the underlying state right to collect, should be raised as an affirmative defense. The defensive application of statutes of limitations in criminal justice debt collection proceedings is highly variable across jurisdictions.

This section discusses some of the aspects of statutes of limitations and repose that are particularly relevant or unique to defending against criminal justice debt collection. These include arguments that civil judgment periods should be applied if the state law does not explicitly provide a limitation period for criminal justice debt; possible shortcomings of limitations periods when the government has coercive non-judicial means to collect; and the potential of statutes of repose and similar limitations periods to stop non-judicial collection actions.

For more detail on statutes of limitations generally, including issues such as tolling and revival of the limitations period, see National Consumer Law Center, *Collection Actions* § 3.6 (3d ed. 2014), updated at **www.nclc.org/library**.

4.7.2. Limitations Periods Applicable to Criminal Justice Debt

Whether a statute of limitations applies to criminal justice debts and, if so, the length of the limitations period, varies by jurisdiction and sometimes by type of debt. In the

[179] 980 So. 2d 643, 645 (La. 2008).
[180] *Id.* at 654.
[181] Peraza v. State, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1188 (2016).

federal system, criminal justice debt can be collected up to twenty years after either imposition or release from incarceration on the underlying charge, whichever is later.[182]

On the state level, some jurisdictions have explicitly codified limitations periods for collection of criminal justice debt.[183] These periods may or may not differ from the jurisdiction's general limitations period for collection of a civil judgment through garnishment, execution, and other civil processes. The period may also differ depending on the type of criminal justice debt.[184]

Alternatively, some states provide by statute that limitations periods do not apply to the collection of criminal justice debt.[185] Additionally, at least one state, Mississippi, provides in its state constitution that no statute of limitations shall apply to civil actions by the state or a subdivision thereof.[186]

Still others provide that criminal justice debt shall be "written off" after a specified period of time, but do not explicitly reference or supersede the general limitation on judgments.[187] Some states also provide different limitations periods for different kinds of actions—for example, limiting actions for contempt to two years, while presumably allowing civil collection of the judgment under the general limitations on judgments statute for ten years.[188]

Notwithstanding the above examples, statutory clarification of criminal justice debt limitations periods remains the exception rather than the rule. Most states do not have

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[182] 18 U.S.C. § 3613(b).

[183] *See, e.g.*, Conn. Gen. Stat. § 53a-28a (limiting collection period for criminal restitution to ten years after imposition or after release from incarceration, whichever is longer); N.D. Cent. Code § 29-26-22.1 (providing that a criminal judgment imposing fines and costs in North Dakota may be docketed for up to ten years from the date of judgment, and that once docketed the order is subject to the same statute of limitations as applies to civil judgments for money); Va. Code Ann. § 19.2-341 (limiting criminal justice debt collection to ten or twenty years, depending on whether the criminal case was adjudicated in district or circuit court).

[184] *Compare* N.D. Cent. Code § 29-07-01.1 (six years for indigent defense reimbursement) *with* N.D. Cent. Code § 29-26-22.1 (ten years for criminal justice debt generally). *See also* Conn. Gen. Stat. § 18-85a (providing a shorter limitations period for collection of costs of incarceration).

[185] Cal. Penal Code § 1214(e) (West) (limitations period applicable to civil money judgments does not apply to court-ordered judgments for fines, restitution, and fees); Utah Code Ann. § 76-3-201.1(11) (West) (debts arising from criminal judgments, including criminal fines and costs, are not subject to a limitations period); Vt. Stat. Ann. tit. 13, § 7179 ("A criminal fine owed to the state . . . shall not be subject to a statute of limitations.").

[186] Miss. Const. art. 4, § 104. Oklahoma's constitution has been similarly interpreted to bar application of statutes of limitations in some situations when the state, or its agents, acts to collect on a debt owed to the state. *See* State *ex rel.* Oklahoma Student Loan Auth. v. Akers, 900 P.2d 468, 470 (Okla. Civ. App. 1995).

[187] Iowa Code § 602.8107.

[188] W. Va. Code § 62-4-15.

limitations statutes that explicitly reference criminal justice debt. In such cases, absent contrary case law, advocates should argue for application of the general limitations period for post-judgment actions upon a civil judgment.[189] This argument is bolstered by the fact that, in many states, criminal justice debt obligations are treated as civil judgments for the purposes of post-judgment collection, codifying the common law rule.[190]

Equal protection arguments may sometimes support the application of the same limitations on collection enjoyed by civil judgment debtors, even in the face of statutory language to the contrary. To the extent that criminal justice debt is owed to the state solely by virtue of indigence, for example, for indigent defense fee reimbursement, imposition of a limitations period more onerous than that which would apply to collection of a civil judgment may be barred under the logic of *James v. Strange* and *Fuller v. Oregon*, discussed in Section 2.3. An example of such reasoning is evidenced in the 1977 Florida case *State v. Williams*,[191] which applied *James* and *Fuller*. In *Williams*, the Florida Supreme Court struck down a portion of a statute that created a perpetual lien for indigent defense fee reimbursement.[192] This provision was found to hold the debtor to a "different standard of indebtedness than the ordinary [civil judgment] debtor" without a rational basis, thus depriving these debtors of equal protection of the laws.[193] Notably, at least one state specifically limits the period for civil recovery of indigent defense fee

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[189] *See, e.g.*, Smith v. Whatcom Cnty. Dist. Ct., 52 P.3d 485 (Wash. 2002) (finding that the general ten-year limitations period for post-judgment collection of civil judgments applied, in the absence of specific language referencing criminal justice debt).

[190] *See* Ariz. Rev. Stat. Ann. § 13-805 (criminal justice debt order is "enforceable as any civil judgment"); Ark. Code Ann. § 16-13-707 (criminal justice debt "may be collected by any means authorized for the enforcement of money judgments in civil actions"); Conn. Gen Stat. § 53a-28a (criminal justice debt "may be enforced in the same manner as a judgment in a civil action"); Fla. Stat. § 922.02 (collection of criminal justice debt is subject to execution in the same manner as a civil judgment); N.D. Cent. Code § 29-26-21 (criminal justice debt considered to be collectible as a civil judgment); Or. Rev. Stat. § 137.450 (criminal justice debt collectible as a civil judgment); Tenn. Code Ann. § 40-24-105 (criminal justice debt collected as a civil judgment); Tex. Code Crim. Proc. Ann. art. 43.07 (West) (execution shall be collected and return as in civil actions); Tex. Code Crim. Proc. Ann. art. 45.047 (West) ("fine and costs collected by execution against the defendant's property in the same manner as a judgment in a civil suit"); Utah Code Ann. § 77-18-6 (West) (criminal justice debt collected in like manner as a civil judgment, although a separate provision [Utah Code Ann. § 76-3-201.1 (West)] abolishes statute of limitations); Utah Code Ann. § 77-32a-12 (West) (indigent defense fee reimbursement judgments collected in the same manner as a civil judgment); Wash. Rev. Code § 10.01.160 (criminal justice debt constitutes a civil judgment); W. Va. Code § 62-5-7 (cost judgments constitute civil judgments); Wis. Stat. § 973.20 (restitution is a civil judgment); Wis. Stat. § 977.076 (judgments for indigent defense fee reimbursement are a civil judgment); Wyo. Stat. Ann. § 7-13-109 (jail fees constitute a civil judgment); Wyo. Stat. Ann. § 7-9-103 (restitution constitutes a civil judgment).

[191] State v. Williams, 343 So. 2d 35, 37–38 (Fla. 1977).

[192] *Id.*

[193] *Id.* at 38.

reimbursement to a shorter period of time than criminal justice debt generally.[194] There may also be statutory limits precluding delayed imposition, rather than enforcement, of indigent defense fees.[195]

Finally, limitations periods are often subject to tolling (or suspension of the running of the period) and reviving (restarting the limitations period from the beginning) based on certain actions by a debtor. In many states, making a payment on a debt can revive the statute of limitations.[196] For more on tolling and reviving of statutes of limitations in collection actions, see National Consumer Law Center, Collection Actions § 3.6.8 (3d ed. 2014), *updated at* www.nclc.org/library.

4.7.3. Raising the Defense

Statutes of limitation are affirmative defenses and may be used as grounds for a motion to dismiss. They are not jurisdictional absent clear statutory language to the contrary.[197] In other words, if the defense is not raised, it is waived.[198] Moreover, as a general rule, if a party has two or more remedies to enforce a right, the fact that one is barred by the statute of limitations does not bar the other, unless the law requires an election of remedies.[199]

One potential complication with a statute of limitations argument is that a statute of limitations generally extinguishes the remedy—usually an enforcement lawsuit—not the underlying right. For example, in the context of private sector debt collection, while a debt based on a written contract may only be recoverable by lawsuit for a certain number of years from breach, the debt itself may continue indefinitely, albeit unenforceable by lawsuit.[200] This concept is especially important in regard to collection actions

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[194] *Compare* N.D. Cent. Code § 29-07-01.1 (six years for indigent defense fee reimbursement judgments) *with* N.D. Cent. Code § 29-26-22.1 (ten years for criminal justice debt generally).

[195] *See, e.g.*, People v. Barger, 158 Cal. Rptr. 825 (Cal. Ct. App. 1979) (applying a three-year statute of limitations from date of criminal judgment to preclude later order imposing costs of court-appointed counsel on defendant).

[196] *See* Kan. Stat. Ann. § 60–520(a); Krawczyk v. Centurion Capital Corp., 2009 WL 395458 (N.D. Ill. Feb. 18, 2009); Martindell v. Bodrero, 63 Cal. Rptr. 774 (Cal. Ct. App. 1967); Portfolio Recovery Associates, L.L.C. v. Neska, 2010 WL 696649 (Minn. Ct. App. Mar. 2, 2010); Dodeka, L.L.C. v. Campos, 377 S.W.3d 726 (Tex. App. 2012); Citibank S.D. v. Cramer, 139 Wash. App. 1089 (Wash. Ct. App. 2007). *See also* Davis v. World Credit Fund I, L.L.C., 543 F. Supp. 2d 953 (N.D. Ill. 2008); Davis v. Unifund CCR Partners, 2008 WL 191272 (N.D. Cal. Jan. 22, 2008). *See generally* Annotation, *Payment on Account, or Claimed to be on Account, as Removing or Tolling Statute of Limitations*, 156 A.L.R. 1082 (1945); National Consumer Law Center, Collection Actions § 3.6.8.3.1 (3d ed. 2014), *updated at* www.nclc.org/library.

[197] 54 C.J.S. *Limitations of Actions* §§ 20–21 (2010).

[198] United States v. Kwai Fun Wong, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015).

[199] 54 C.J.S. *Limitations of Actions* § 22 (2010).

[200] *See* Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3d Cir. 2011); Freyermuth v. Credit Bureau Services,

pursued by governmental actors, given that the range of collection tools at the state's disposal—including driver's license suspensions and bars on expungement relief—is usually far broader than that available to the private sector civil judgment creditor. Additionally, some jurisdictions use non-judicial administrative garnishment procedures.[201] States may argue that these sanctions, denials of relief, and alternative garnishment procedures can be imposed indefinitely, even if they cannot collect the amounts through the judicial remedies barred by a statute of limitations.

This wider problem created by the expanded set of remedies afforded to the state should not be confused with the issue of a debt collector threatening to collect on a debt when the remedy itself is barred. Some federal circuit courts have found such demands for payments of debt beyond the applicable statute of limitations to be actionably deceptive under the Fair Debt Collection Practices Act (FDCPA), even when the demands did not explicitly threaten an illegal action (for example, filing a lawsuit).[202] In part, these courts reached these holdings by applying the "least sophisticated consumer" standard—in other words, the recipients of these letters would read them as implicitly threatening to bring a lawsuit. Other circuit courts have rejected such liability, arguably by misapplying the least sophisticated consumer standard, finding that the demand for payment did not explicitly deceive debtors into believing that they would be subject to suit.[203] It should be noted that the Consumer Financial Protection Bureau is also contemplating rulemaking that may affect this issue in the context of FDCPA claims.[204]

Finally, as discussed in the next sections, it may be possible to show that the limitations period is jurisdictional, that the limitation is based on a statute of repose, or that the action is barred by laches.

4.7.4. Statutes of Repose and Limitations on the Underlying Obligation

Some statutes impose more stringent limitations that affect the underlying obligation, not just the state's remedies to collect. These statutes fall into three main classifications: statutes of repose, jurisdictional statutes of limitation, and "non-claim" statutes.

Inc., 248 F.3d 767 (8th Cir 2001).

[201] *See, e.g.*, Iowa Code § 421.17A; Utah Code Ann. §§ 63A-3-502, 76-3-201.1 (West); Va. Code Ann. § 19.2-349.

[202] Buchanan v. Northland Grp., Inc., 776 F.3d 393 (6th Cir. 2015); McMahon v. LVNV Funding, L.L.C., 744 F.3d 1010 (7th Cir. 2014). *See generally* § 7.9, *infra*; National Consumer Law Center, Fair Debt Collection § 5.5.2.13.3.2 (8th ed. 2014), *updated at* www.nclc.org/library.

[203] Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3d Cir. 2011); Freyermuth v. Credit Bureau Services, Inc., 248 F.3d 767 (8th Cir 2001).

[204] *See* Consumer Financial Protection Bur., Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking, Outline of Proposals Under Consideration and Alternatives Considered (July 28, 2016), *available at* http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

Statutes of repose generally serve to extinguish the underlying legal right.[205] Jurisdictional statutes of limitation clearly set out a jurisdictional limitation that similarly acts to extinguish the underlying right.[206] "Non-claim statutes" simultaneously provide both for a statutorily created right and a limit on the time during which that right may be exercised.[207] It may be possible for advocates to argue that a statute in their jurisdiction that specifically addresses criminal justice debt falls into one or more of these categories and thus extinguishes the right to collect.

4.7.5. Laches

The equitable defense of laches is established by proving both an unreasonable delay in asserting a right, and prejudice against the party raising the defense. Thus, in the context of criminal justice debt, a debtor may wish to argue that laches precludes the state from pursuing a right to enforce the debt when the state has unreasonably delayed attempting to enforce it. However, this theory may be of limited use in the collection of criminal justice debts, due to the theory of *nullum tempus occurit regi*.[208] In essence, this doctrine provides that equitable limitations do not apply against state governmental entities. It is based on the public policy that the state should not be limited in the same manner as private parties, because it is enforcing the rights and defending the interests of the collective public.[209]

Some states have abrogated sovereign immunity for contract claims and other actions in which the state is a plaintiff, and this abrogation of sovereign immunity has sometimes been considered an abrogation of *nullum tempus*, given the intertwined and overlapping policy justifications for these doctrines.[210] Other jurisdictions have distinguished the two, applying *nullum tempus* even in situations in which sovereign immunity was clearly abrogated, by drawing nuanced distinctions between the underlying policies.[211]

Also, municipalities may or may not enjoy the full protection of the *nullum tempus* doctrine, depending on the jurisdiction.[212] In most jurisdictions, municipalities may only invoke the doctrine to the extent that they are carrying out a public rather than a "private or proprietary function." One court has held that the primary issue in determin-

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[205] 54 C.J.S. *Limitations of Actions* § 27 (2010).

[206] John R. Sand & Gravel Co. vs. United States, 552 U.S. 130, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008).

[207] 54 C.J.S. *Limitations of Actions* § 33 (2010).

[208] "Time doesn't run against the king."

[209] Joseph Mack, *Nullum Tempus: Governmental Immunity to Statutes of Limitation, Laches, and Statutes of Repose*, 73 Def. Couns. J. 180 (2006).

[210] *See* New Jersey Educ. Facilities Auth. v. Gruzen P'ship, 592 A.2d 559 (N.J. 1991).

[211] *See* Ohio Dept. of Transp. v. Sullivan, 527 N.E.2d 798 (Ohio 1988).

[212] *See generally* City of Colorado Springs v. Timberlane Associates, 824 P.2d 776, 799 n.5 (Colo. 1992) (providing a list of states that limit applicability of *nullum tempus* when invoked by municipalities).

ing whether a political subdivision is engaged in governmental or proprietary activity is "whether it is seeking to vindicate rights of the state or the citizens of the state as a whole, as opposed to only the citizens within its own jurisdiction."[213] This distinction may create an opportunity to raise the equitable defense of laches in the context of municipal criminal justice debt.

Finally, the general rule is that laches is not available in circumstances to which a clear statute of limitations applies.[214]

5. CRIMINAL JUSTICE DEBT AND BANKRUPTCY

5.1. Introduction

The Bankruptcy Code offers debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[215] For criminal justice debtors, bankruptcy can be a powerful tool. It can eliminate the obligation to repay certain criminal justice debts or provide an orderly mechanism for repaying debts that cannot be discharged. Bankruptcy can open the door to relief, such as expungement or sealing that may otherwise be unavailable due to outstanding criminal debt.[216] Where use of an automobile is a necessity, the Bankruptcy Code can help debtors by preventing government entities from withholding drivers' licenses and vehicle registrations based on the non-payment of dischargeable traffic fines or other court debt.[217]

The relief from criminal justice debts available under the Bankruptcy Code depends on both the nature of the debt and the bankruptcy chapter used. Most individual bankruptcy cases are filed under chapter 7 or chapter 13 of the Bankruptcy Code. Chapter 7 cases are commonly referred to as "liquidations," while chapter 13 cases are often called "reorganizations." In a chapter 7 case, a court-appointed trustee examines the debtor's assets to determine if anything is available to be sold or recovered for the benefit of creditors. In most individual bankruptcy cases virtually all of the debtor's assets are "exempt"[218] leaving no property available for liquidation and distribution to creditors. At the end of a chapter 7 case, the debtor receives a discharge, which prohibits creditors from taking or continuing action to collect personally from the debtor on account

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[213] Fennelly v. A-1 Mach. & Tool Co., 728 N.W.2d 163 (Iowa 2006).
[214] Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164 (8th Cir. 1995).
[215] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
[216] *See, e.g.*, Iowa Code § 901C.1 (2016) (permitting expungement of dismissed or acquitted cases if certain conditions are satisfied including the payment of all required court costs).
[217] 11 U.S.C. § 525(a). *See* Perez v. Campbell, 402 U.S. 637 (1971).
[218] *See* 11 U.S.C. § 522(b).

of the discharged debt. Some debts, however, including certain criminal justice debts, cannot be discharged in chapter 7.

Chapter 13 cases work very differently than chapter 7 liquidations and provide debtors with the opportunity to adjust their financial affairs without liquidating assets. In a chapter 13 case, the debtor submits a plan to repay creditors all or part of what they are owed. Upon successful completion of the plan the debtor receives a discharge. The chapter 13 discharge is broader than the chapter 7 discharge. As a result, some criminal debts that are not dischargeable in chapter 7 may be discharged in chapter 13.

This chapter is not intended to be an exhaustive review of bankruptcy issues, but rather focuses on the intersection between criminal justice debts and bankruptcy. Section 5.2 examines the Bankruptcy Code's automatic stay provisions, which generally provide an immediate stay of all actions against the debtor upon the filing of a bankruptcy petition. Section 5.3 discusses the dischargeability of a range of criminal justice debts in chapter 7. Finally, section 5.4 provides a brief overview of chapter 13 and the broader discharge available for criminal justice debts. For a more comprehensive discussion of bankruptcy, see the National Consumer Law Center's *Consumer Bankruptcy Law and Practice*.[219]

5.2. Automatic Stay

The automatic stay is a fundamental cornerstone of bankruptcy law.[220] It is triggered instantly upon the filing of a bankruptcy petition and operates to stay almost all actions against the debtor and the debtor's property.[221] With few exceptions the automatic stay stops creditors from taking collection action, pursuing or continuing a court case against the debtor, or seizing any property of the debtor based on debts that arose before the debtor filed the bankruptcy petition. The purpose of the stay is twofold: to provide the debtor a "breathing spell" from his creditors, and to allow the bankruptcy court to centralize and resolve claims against the debtor in an orderly manner. The stay remains in place unless the bankruptcy court terminates it or until other events specified in the Bankruptcy Code occur (e.g., case dismissal or discharge). Actions taken in violation of the stay are void, and creditors taking such action may be punished

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[219] National Consumer Law Center, Consumer Bankruptcy Law and Practice (11th ed. 2016), *updated at* www.nclc.org/library.

[220] 11 U.S.C. § 362(a); H.R. Rep. No. 95-595, at 340 (1977) ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization, or simply to be relieved of the financial pressures that drove him into bankruptcy.").

[221] For repeat bankruptcy filers, limited exceptions to this general rule apply. *See* 11 U.S.C. § 362(c)(3), (c)(4).

by contempt. In addition, the Bankruptcy Code contains a specific cause of action for willful violations of the stay under which the debtor may be awarded actual damages, including attorney fees.[222]

While the automatic stay operates broadly, it does not prohibit the commencement or continuation of criminal proceedings.[223] Thus, the automatic stay is of limited help in stopping criminal prosecution, and possible incarceration. For example, a criminal case based upon a bad check can continue without violation of the stay even though the underlying debt to the payee may be dischargeable in bankruptcy.[224] However, the automatic stay exception generally does not protect a private creditor who attempts to use criminal proceedings to collect a debt. For example, a creditor may violate the stay by reporting a bad check claim to the local police and encouraging prosecution of the debtor.[225]

While the statutory exception is commonly applied to original prosecutions, several courts have held that the enforcement of sentencing orders is also excepted. As a result, these courts hold that probation revocation based on a failure to pay a restitution obligation does not violate the stay.[226] One municipal court, after learning of the debtor's intent to discharge criminal justice debt in bankruptcy, vacated the prior sentence of a fine in lieu of jail and ordered the debtor to jail. A bankruptcy court subsequently held that this action did not violate the automatic stay.[227]

Whether the automatic stay can forestall the use of civil processes, such as garnishment or execution on a debtor's property, to collect criminal justice debt remains an open question. Under the Mandatory Victims Restitution Act (MVRA), Congress granted the federal government the authority to use civil procedures to enforce penal fines

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[222] 11 U.S.C. § 362(k). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice Ch. 9 (11th ed. 2016), *updated at* www.nclc.org/library (discussing the automatic stay).

[223] 11 U.S.C. § 362(b)(1). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 9.4.6.2 (11th ed. 2016), *updated at* www.nclc.org/library.

[224] *See* Dovell v. Guernsey Bank, 373 B.R. 533 (S.D. Ohio 2007); *In re* Nash, 64 B.R. 874 (B.A.P. 9th Cir. 2012); *In re* Pickett, 311 B.R. 492 (Bankr. D. Vt. 2005). *See also* Gruntz v. County of Los Angeles (*In re* Gruntz), 202 F.3d 1074 (9th Cir. 1999) (prosecution for failure to pay child support not barred by automatic stay).

[225] *In re* Brown, 213 B.R. 317 (W.D. Ky. 1997); *In re* Heeley, 2014 WL 7012652 (Bankr. E.D.N.C. Dec. 11, 2014); *In re* White, 2010 WL 2465340 (Bankr. E.D.N.C. June 11, 2010); *In re* Pearce, 400 B.R. 126 (Bankr. N.D. Iowa 2009).

[226] United States v. Colasuonno, 697 F.3d 164 (2d Cir. 2012); United States v. Caddell, 830 F.2d 36 (5th Cir. 1987); United States v. Moore, 825 F. Supp. 754 (N.D. Miss. 1993); *In re* Williams, 528 B.R. 814 (Bankr. D. Kan. 2015); *In re* Sims, 101 B.R. 52 (Bankr. W.D. Wis. 1989); Birk v. Simmons, 108 B.R. 657 (Bankr. S.D. Ill. 1988); *In re* Gilliam, 67 B.R. 83 (Bankr. M.D. Tenn. 1986).

[227] *In re* Perrin, 233 B.R. 71 (Bankr. D.N.J. 1999).

notwithstanding any other federal law.[228] Courts considering the intersection between the MVRA and the Bankruptcy Code have concluded that the MVRA trumps the automatic stay.[229] Therefore, the federal government may garnish a debtor's wages or benefits without first obtaining the bankruptcy court's permission. Despite this weight of authority, there are good arguments that the application of the automatic stay, which does not affect the government's substantive rights to collect criminal justice debts, is not precluded by the MVRA. Specifically, the authority to enforce a criminal fine under the MVRA is subject to the "practices and procedures" for enforcing debts under state and federal law. It would seem that the automatic stay, which only limits the timing of collection, is a procedural mechanism that is not in conflict with the MVRA's substantive provisions.[230] Further, the "breathing spell" provided by the automatic stay is essential to protect the interests of debtors and creditors alike.[231] Those interests are directly undermined by permitting the government to ignore the stay and frustrate the orderly bankruptcy process.

The MVRA is not applicable to state actors, and therefore the automatic stay should limit efforts by non-federal entities to collect criminal justice debts through traditional civil mechanisms.[232] However, some courts have concluded that enforcement actions to collect criminal justice debt are a continuation of criminal proceedings within the scope of section 362(b)(1) or that such efforts are an exercise of the government unit's police and regulatory power excepted from the automatic stay by section 362(b)(4).[233]

By contrast, civil contempt proceedings, even if they can result in incarceration, are generally not excepted from the automatic stay. Plainly, civil contempt or bench warrants based on civil contempt do not fall within the criminal exception to the stay.[234] Bankruptcy courts have repeatedly held that civil contempt proceedings, which allow the debtor to purge himself of contempt by paying the amount due to the creditor, are stayed.[235]

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[228] 18 U.S.C. § 3613.

[229] *In re* Partida, 531 B.R. 811 (B.A.P. 9th Cir. 2015), *appeal docketed* No. 15-60045 (9th Cir. June 29, 2015); United States v. Robinson, 494 B.R. 715 (W.D. Tenn. 2013), *aff'd*, 764 F.3d 554 (6th Cir. 2014).

[230] *See* Houck v. Substitute Trustee Servs., Inc. 791 F.3d 473, 481 (4th Cir. 2015) (automatic stay is a "procedural mechanism").

[231] *See* Weber v. SEFCU, 719 F.3d 72, 76 n.5 (2d Cir. 2013).

[232] *See In re* Blair, 62 B.R. 650 (Bankr. N.D. Ala. 1986); *In re* Landstrom Distributors, Inc., 55 B.R. 390 (Bankr. C.D. Cal. 1985).

[233] *See In re* Valle, 456 B.R. 228 (Bankr. D. Md. 2011); *In re* Scott, 106 B.R. 698 (Bankr. S.D. Ala. 1989).

[234] *See In re* Iskric, 496 B.R. 355, 362 (Bankr. M.D. Pa. 2013) (explaining different underlying purposes of civil and criminal contempt and relationship to Bankruptcy Code). *But see In re* Dingley, 514 B.R. 591 (B.A.P. 9th Cir. 2014) (Jury, J., concurring) (holding civil contempt proceeding not stayed based on incorrect circuit precedent), *appeal docketed* No. 14-60055 (9th Cir. Sept. 5, 2014).

[235] *See In re* Iskric, 496 B.R. 355, 362 (Bankr. M.D. Pa. 2013): *In re* Galmore, 390 B.R. 901 (Bankr. N.D. Ind. 2008); *In re* Daniels, 316 B.R. 342 (Bankr. D. Idaho 2004); *In re* Atkins, 176 B.R. 998, 1006 (Bankr. D. Minn. 1994); *In re* Woodall, 161 B.R. 969 (Bankr. N.D. Ill. 1994); Rook v. Rook (*In re* Rook),

Many states employ a process by which the debtor may be examined if she fails to pay a civil judgment. The debtor's exam, or supplementary process as it may be called, is used to determine whether or not the debtor has an ability to pay.[236] Creditors have been known to abuse this process by setting frequent debtor's exams even though the debtor's circumstances have not changed or scheduling the exam in a distant location. If the debtor fails to appear for the hearing or exam, the court may issue a bench warrant. The automatic stay has been found to bar execution of warrants issued under such circumstances in a civil judgment setting.[237]

Finally, criminal justice debt derived from indigence rather than culpability—for example indigent defense fee debt—may necessitate different treatment under the stay than other criminal justice debt like victim restitution or fines. Debt that is essentially payment for services should be treated largely the same as private sector debt, and therefore should be subject to the automatic stay and other protections applicable to ordinary civil judgment debtors.

5.3. Criminal Justice Debts in Chapter 7

5.3.1. Overview

The principal goal of most bankruptcies is the discharge, which frees the debtor from personal liability on most debts. It is this clean slate that normally gives debtors the fresh start that bankruptcy is meant to provide. However, the discharge is not absolute. Some types of debts, including some criminal justice debts, may not be discharged in a chapter 7 bankruptcy.[238]

The most common basis for finding criminal justice debts are not dischargeable is section 523(a)(7), which excepts from discharge a "fine, forfeiture, or penalty, payable to and for the benefit of a governmental unit [that] is not compensation for actual pecuniary loss."[239] Based on the plain language of this section, to be nondischargeable a debt

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102 B.R. 490 (Bankr. E.D. Va. 1989), *aff'd*, 929 F.2d 694 (4th Cir. 1991). *But see* Stovall v. Stovall, 126 B.R. 814, 816 (N.D. Ga. 1990).

[236] *See* National Consumer Law Center, Collection Actions § 12.13 (3d ed. 2014) (general discussion of debtor's examinations).

[237] *See In re* Galmore, 390 B.R. 901 (Bankr. N.D. Ind. 2008).

[238] *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 15.4.3 (11th ed. 2016), *updated at* www.nclc.org/library.

[239] 11 U.S.C. § 523(a)(7). Other less common exceptions to discharge are "for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing," 11 U.S.C. § 523(a)(17); domestic support obligations (in regard to parental responsibility for costs to incarcerate juveniles), 11 U.S.C. § 523(a)(5); and fraud 11 U.S.C. § 523(a)(2). *See* United States v. Horras (*In re* Horras), 443 B.R. 159 (B.A.P. 8th Cir. 2011) (Medicare fraud).

must be 1) a fine, forfeiture or penalty, 2) punitive, rather than compensatory, 3) payable to a governmental unit, and 4) for the benefit of a governmental unit.

Despite the clear statutory text, the Supreme Court in *Kelly v. Robinson*[240] seemingly broadened the scope of section 523(a)(7) to include criminal restitution obligations that are arguably compensatory in nature. In *Kelly*, the debtor was convicted of welfare fraud and ordered to pay restitution in the amount of the welfare overpayment to the State of Connecticut as a condition of probation. The debtor later filed bankruptcy and sought to discharge the debt, arguing that the restitution was compensation for a monetary loss. The Court concluded that, even though the obligation was the exact amount of the improperly received benefits, the debt was not merely compensation for actual pecuniary loss. Rather, the Court focused on the penal purpose of the restitution, concluding that it served a punitive function even if calculated based on the actual pecuniary loss to a victim. The Court also relied on the principles of federalism and its "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings."[241] According to the Court, the bankruptcy exception for "fines, forfeitures, and penalties" "preserv[ed] from discharge any condition a state criminal court imposes as part of a criminal sentence."[242]

Based on the Court's reasoning in *Kelly*, courts have created a complicated patchwork of discharge exceptions and caveats for criminal justice debts, with considerable variation across jurisdictions. Even though exceptions to discharge are construed narrowly,[243] courts have nevertheless expanded *Kelly* beyond its limited holding related to criminal restitution orders. In addition, an explosion in cost shifting measures, designed to place the onus of funding the courts on largely low-income criminal defendants, and a crisis in access to reasonable bail, have fundamentally changed the landscape from that in which *Kelly* was decided.

5.3.2. Dischargeability Under Chapter 7 by Type of Debt

5.3.2.1. Criminal Fines in Chapter 7

Fines—financial obligations ostensibly established to serve a punitive function—are not dischargeable in a chapter 7 bankruptcy.[244] This includes traffic and parking fines.[245]

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[240] 479 U.S. 36 (1986).

[241] *Id.* at 360.

[242] *Id.* at 361.

[243] Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998).

[244] McNelis v. Verano (*In re* McNelis), 2013 WL 5376525 (Bankr. M.D. Pa. Sept. 25, 2013); *In re* Farnsworth, 283 B.R. 503 (Bankr. W.D. Tenn. 2002).

[245] *In re* Branch, 525 B.R. 388 (Bankr. E.D. Mich. 2015); *In re* Stevens, 184 B.R. 584 (Bankr. W.D. Wash. 1995); *In re* Gallagher, 71 B.R. 138 (Bankr. N.D. Ill. 1987) (parking fines not dischargeable regardless of lack of evidence they were "imposed by a court").

5.3.2.2. Civil Penalties in Chapter 7

Courts have generally found penalties in civil and administrative proceedings to be excepted from chapter 7 discharge. Non-dischargeable civil penalties include remediation fees and penalties arising from violations of environmental protection statutes,[246] administrative penalties for illegal access to utilities,[247] civil disgorgement orders in SEC enforcement actions or similar proceedings,[248] treble damages and restitution in Medicaid fraud matters,[249] Foreign Bank Account Reporting penalties,[250] HUD penalties,[251] NLRB penalties,[252] penalties assessed in contractor licensing proceedings,[253] and civil penalties imposed for fraudulent acquisition of unemployment benefits.[254] One court has found civil fees imposed for reestablishing a driver's license after adjudication of guilt in certain traffic offenses to be non-dischargeable.[255] Another court has held that civil penalties related to private attorney general actions brought by individuals cannot be discharged.[256]

Several courts have found penalties, fees, and costs associated with civil consumer fraud actions to be dischargeable because they are payable to but not for the benefit of a governmental unit.[257] But other courts have made a distinction between consumer fraud fines on one hand and restitution, attorney fees, and costs on the other hand, finding

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[246] Whitehouse v. LaRoche, 277 F.3d 568 (1st Cir. 2002); *In re* Strong, 305 B.R. 292 (B.A.P. 8th Cir. 2004); *In re* Warfel, 268 B.R. 205, 213 (B.A.P. 9th Cir. 2001); Kentucky Natural Res. & Envtl. Prot. Cabinet v. Seals, 161 B.R. 615 (W.D. Va. 1993); Pennsylvania Dep't of Envtl. Prot. v. Thebes (*In re* Thebes), 2011 WL 1239847 (Bankr. M.D. Pa. Mar. 30, 2011); Ohio Envtl. Prot. Agency v. Kirby (*In re* Kirby), 2007 WL 2492682 (Bankr. N.D. Ohio Aug. 28, 2007); *In re* Damm, 2001 WL 34065016 (Bankr. C.D. Ill. May 10, 2001).

[247] Maldonado v. Autoridad de Acueductos y Alcantarillados (*In re* Maldonado), 2013 WL 6860807 (Bankr. D. P.R. Dec. 27, 2013).

[248] *In re* Ott, 218 B.R. 118 (Bankr. W.D. Wash. 1998); *In re* Telsey, 144 B.R. 563 (Bankr. S.D. Fla. 1992).

[249] State v. Sokol (*In re* Sokol), 170 B.R. 556 (Bankr. S.D.N.Y. 1994), *aff'd*, 108 F.3d 1370 (2d Cir. 1997); *In re* Kelly, 155 B.R. 75 (Bankr. S.D.N.Y. 1993).

[250] United States v. Simonelli, 614 F. Supp. 2d 241 (D. Conn. 2008).

[251] United States Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc., 64 F.3d 920 (4th Cir. 1995).

[252] *In re* Fogerty, 204 B.R. 956 (Bankr. N.D. Ill. 1996).

[253] *In re* Poule, 91 B.R. 83 (B.A.P. 9th Cir. 1988).

[254] *In re* O'Brien, 110 B.R. 27 (Bankr. D. Colo. 1990). However, in many cases courts rely on the fraud exception to discharge in § 523(a)(2) to prevent the discharge of debts resulting from fraudulently obtained unemployment benefits.

[255] *In re* Clayton, 199 B.R. 29 (Bankr. W.D. Tenn. 1996).

[256] Medina v. Vander Poel, 523 B.R. 820 (E.D. Cal. 2015).

[257] *In re* Towers, 162 F.3d 952 (7th Cir. 1998); *In re* Styer, 477 B.R. 584 (Bankr. E.D. Pa. 2012).

only the former excepted from discharge.[258] Civil contempt fees between private parties have been found to be dischargeable.[259]

5.3.2.3. Victim Restitution in Chapter 7

Victim restitution is generally not subject to discharge in a chapter 7 bankruptcy. However, like many other terms in the world of criminal justice debt, the term "restitution" is defined in different ways across jurisdictions. In certain jurisdictions, for example, the term is confusingly applied to all criminal justice debt, including fines and fees owed to the state and not the victim. This misleading use of nomenclature confuses the fundamental purpose of victim restitution and other types of criminal justice debt. Victim restitution compensates the victim for the damage caused by the crime and implicates very different purposes and economic dynamics than "restitution" that compensates the state for the costs of administering the justice system. Victim restitution is generally not a revenue generator for the state, but rather a mechanism to make a victim whole. Victim restitution is generally calculated from acts directly related to criminal culpability; it is not dependent upon indigence. Advocates should make sure to carefully disambiguate true victim restitution from other criminal justice debt nominally labeled as such in order to determine whether debt falls within an exception to discharge.

Courts since *Kelly* have held that most victim restitution included in a criminal sentencing order is non-dischargeable under section 523(a)(7). This is generally true even if the state collects money solely for distribution to the victim.[260] Courts are divided on whether a restitution debt owed directly to a non-governmental victim also fits within the exception.[261] Those courts holding that restitution owed to non-governmental units is still non-dischargeable, expand on *Kelly*, and conclude that the state "benefits" from such payments as they help to carry out criminal judgments.[262]

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[258] *In re* Parsons, 505 B.R. 540 (Bankr. D. Haw. 2014); Hessler v. Maryland Consumer Prot. Div. (*In re* Hessler), 2013 WL 5429868 (Bankr. D. Md. Sept. 30, 2013); *In re* Jensen, 395 B.R. 472 (Bankr. D. Colo. 2008) (AG assessments for violations of various consumer protections statutes non-dischargeable).

[259] *In re* Strutz, 154 B.R. 508 (Bankr. N.D. Ind. 1993).

[260] *I In re* Troff, 488 F.3d 1237 (10th Cir. 2010); *In re* Verola, 446 F.3d 1206 (11th Cir. 2006); *In re* Thompson, 418 F.3d 362 (3d Cir. 2005). *But see In re* Rayes, 496 B.R. 449 (Bankr. E.D. Mich. 2013) (restitution dischargeable where ultimate destination of funds was non-governmental unit).

[261] *Compare* Farmers Ins. Exch. v. Mills (*In re* Mills), 290 B.R. 822 (Bankr. D. Colo. 2003) (debt to insurance company "victim" was non-dischargeable as restitution "for the benefit" of the state) *with In re* Towers, 162 F.3d 952 (7th Cir. 1998) and *In re* Rashid, 210 F.3d 201 (3d Cir. 2000).

[262] United States v. Vetter, 895 F.2d 456, 459 (8th Cir. 1990); *In re* Reif, 363 B.R. 107 (Bankr. D. Ariz. 2007); Woods v. Ritter (*In re* Ritter), 2006 WL 3065518 (Bankr. S.D.N.Y. Oct. 27, 2006); *In re* Ginesin, 2005 WL 3789127 (Bankr. S.D.N.Y. Dec. 7, 2005); *In re* Wolfson, 261 B.R. 369 (Bankr. E.D.N.Y. 2001); *In re* Emerson, 1991 WL 11731127 (Bankr. S.D. Iowa Apr. 5, 1991); Brown v. State, 2012 WL 3061868 (Nev. July 26, 2012); People v. Riverhead Park Corp., 982 N.Y.S.2d 839 (N.Y. App. Term 2013); United Bldg. Centers v. Ochs, 781 N.W.2d 79 (S.D. 2010).

Costs flowing from a victim's loss that are not included in the sentencing order, but may nevertheless be considered "restitution" in a broad sense, are typically dischargeable.[263] Conversely, amounts need not be explicitly called "restitution" to fall under the 523(a)(7) discharge exception. For example, a condition of probation to repay a debt owed to a victim, although not labeled as restitution, may not be dischargeable.[264]

5.3.2.4. Juvenile Restitution Owed by Parents in Chapter 7

Courts have generally held that juvenile criminal justice debt owed by parents is dischargeable in a chapter 7 bankruptcy. Courts have focused primarily on two factors, namely the essential non-penal nature of the action, and the fact that the parents who owe the debt are not themselves the culpable actor.[265] The Ninth Circuit has also rejected the argument that the costs of a juvenile's incarceration charged to a legal guardian are excepted from discharge as a domestic support obligation under section 523(a)(5).[266]

5.3.2.5. Costs or "User Fees" in Chapter 7

5.3.2.5.1. The Importance of Differentiating Between the Various Types of Costs

Until recently, the underlying purpose of a particular cost has rarely been a substantial part of chapter 7 dischargeability analysis. A wide variety of fees and costs, serving many very different purposes and paying many different entities, are often lumped together when reviewed for nondischargeability. For this reason, courts have generally held that financial obligations labeled simply as "costs" in criminal cases are excepted from discharge.[267] However, when costs are broken down into their constituent components, partial discharge may be possible. In at least one case, service fees attached to parking fine were held to be dischargeable.[268]

In re Lopez illustrates the undifferentiating manner in which many courts have considered "costs," and the deficiency of that approach.[269] The bankruptcy court originally

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[263] *In re* Wilson, 299 B.R. 380 (Bankr. E.D. Va. 2003) (restitution "in the amount determined by civil court" in a criminal judgment for removal of collateral dischargeable); *In re* Martonak, 67 B.R. 727 (Bankr. S.D.N.Y. 1986) (costs of an audit by a debtor's ex-employer conducted after the employee was found guilty of embezzlement, not included in a restitution order, found dischargeable).

[264] New Image Motor Sports Fin., L.L.C. v. Jackson (*In re* Jackson), 2012 WL 6091401 (Bankr. E.D. Tex. Dec. 7, 2012).

[265] Smith v. Sims (*In re* Sims), 2012 WL 528156 (Bankr. S.D. Miss. Feb. 17, 2012); *In re* Ellis, 224 B.R. 786 (Bankr. D. Idaho 1998).

[266] Rivera v. Orange Co. Probation Dep't, ___ F.3d ___, 2016 WL 4205946 (9th Cir. Aug. 10, 2016).

[267] *In re* Hollis, 810 F.2d 106 (6th Cir. 1987); McNelis v. Verano (*In re* McNelis), 2013 WL 5376525 (Bankr. M.D. Pa. Sept. 25, 2013); *In re* Farnsworth, 283 B.R. 503 (Bankr. W.D. Tenn. 2002); *In re* Emerson, 1991 WL 11731127 (Bankr. S.D. Iowa Apr. 5, 1991).

[268] Williams v. Motley, 925 F.2d 741 (4th Cir. 1991).

[269] *In re* Lopez, 531 B.R. 554 (Bankr. E.D. Pa. 2015); *In re* Lopez, 475 B.R. 418 (Bankr. E.D. Pa. 2012).

determined that, given the expansiveness of *Kelly*, any costs associated with a criminal adjudication were not dischargeable in chapter 7.[270] The Court did not examine the underlying purposes of the costs, and further disregarded state law that held costs "are not part of the sentence."[271] However, the Third Circuit vacated and remanded the case to the bankruptcy court to develop the record on the purpose of each of the costs assessed.[272] On remand, the bankruptcy court found collection costs, lien filing fees, and probation fees to be dischargeable, given state law interpreting these charges as merely compensatory.[273] Treatment of specific types of costs under chapter 7 are discussed further below in sections 5.3.2.5.2 through 5.3.2.5.5.

5.3.2.5.2. Costs of Prosecution in Chapter 7

"Costs of prosecution" is a loose term that can include many different amounts chargeable to a defendant, including but not limited to transcripts, depositions, and mileage for witnesses and prosecution staff. When included in the restitution order itself, courts have generally found the costs to be excepted from discharge,[274] but when the fees are imposed outside of the restitution order, they are generally dischargeable.[275] In some circumstances, costs of prosecution can include indigent defense fees, which are discussed separately below.

5.3.2.5.3. Indigent Defense Fees in Chapter 7

Few courts have directly dealt with indigent defense costs. Courts are split as to whether such costs are dischargeable.[276] The decisions on both sides of the question are sparse on analysis.

The reasoning of the *James v. Strange* and *Fuller v. Oregon* cases[277] suggests that denying bankruptcy relief for unpaid attorney fees to indigent debtors who rely on court-appointed counsel, while allowing relief for unpaid attorney's fees to debtors who could afford to hire a private attorney, would be a denial of equal protection. This appears to be a novel argument in the bankruptcy context. However, in a criminal context, the

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[270] *In re* Lopez, 475 B.R. 418 (Bankr. E.D. Pa. 2012).

[271] *Id.*

[272] *In re* Lopez, 579 Fed. Appx. 100 (3d Cir. 2014).

[273] *In re* Lopez, 531 B.R. 554 (Bankr. E.D. Pa. 2015).

[274] *In re* Thompson, 16 F.3d 576, 577–578 (4th Cir. 1994); *In re* Hollis, 810 F.2d 106 (6th Cir. 1987); *In re* Zarzynski, 771 F.2d 304 (7th Cir. 1985) (pre-*Kelly* case); *In re* Ryan, 389 B.R. 710 (B.A.P. 9th Cir. 2008); *In re* Garvin, 84 B.R. 824 (Bankr. M.D. Fla. 1988) (does not cite *Kelly*, but rather prior convention).

[275] United States v. Laws, 88 Fed. Appx. 448 (2d Cir. 2004) (cost of audit in embezzlement case not included in restitution order was dischargeable), *vacated on other grounds*, Radford v. United States, 543 U.S. 1106 (2005).

[276] *Compare In re* Emerson, 1991 WL 11731127 (Bankr. S.D. Iowa Apr. 5, 1991) *with In re* Polk, 2012 WL 8123378 (Bankr. E.D. Cal. Jan. 31, 2012), *aff'd*, 2014 WL 3940206 (E.D. Cal. Aug. 12, 2014).

[277] *See* § 2.3 *supra* (full discussion of *Strange* and *Fuller*).

South Dakota Supreme Court rejected a sentencing provision imposing probation revocation for attempting bankruptcy discharge of indigent defense fees on equal protection grounds under *Strange*.[278]

5.3.2.5.4. Costs of Incarceration in Chapter 7

Most courts have found jail fees to be non-dischargeable in a chapter 7 bankruptcy,[279] with at least one exception where these fees were imposed outside of the criminal sentence itself.[280] Usually costs of incarceration are calculated on a flat periodic rate for room and board, but sometimes costs are assessed on individualized bases—for example, administrative penalties covering costs for an inmate's failed suicide attempt,[281] destroyed prison property, [282] or costs associated with an attempted escape.[283]

There is an argument that *pretrial* incarceration debt should be dischargeable under equal protection principles if the debt was incurred due to indigence rather than culpability. In those circumstances where bail is set at unreasonable levels, indigent defendants have no choice but to either plead guilty or remain incarcerated until their cases can go to trial. In the latter circumstance, jail fees continue to mount as the defendant waits. In contrast, equally culpable non-indigent defendants who are able to make bail do not incur this cost. This creates a two-tiered system where costs are automatically substantially higher for indigent defendants who choose to go to trial.

5.3.2.5.5. Costs Related to Deferred Judgment in Chapter 7

In many criminal sentencing systems, an option exists for the deferred adjudication of a criminal proceeding. In these cases, what is "deferred" is the actual finding of guilt by the court; typically, the defendant pleads guilty and submits to probation and payment of certain costs, and at the end of the term of probation the matter may even be expunged. There does not appear to be any authority determining whether, in a bankruptcy context, payments associated with a deferred judgment satisfy section 523(a)(7)'s exception to discharge. However, at least one court has found that a deferred

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[278] State v. Huth, 334 N.W.2d 485 (S.D. 1983) (pre-*Kelly case*).

[279] *In re* Donohue, 2006 WL 3000100 (Bankr. N.D. Iowa Oct. 16, 2006) (citing Fourth Circuit case *In re Thompson*; "since the debtor's parole was contingent on payment of court costs and such costs are assessed only against convicted criminal defendants, they constitute a part of the criminal sentence"); *In re* Maxwell, 229 B.R. 400 (Bankr. W.D. Ky. 1998); *In re* Neil, 131 B.R. 142 (Bankr. W.D. Mo. 1991) (jail fees not dischargeable, characterized as fine).

[280] *In re* Miller, 511 B.R. 621 (Bankr. W.D. Mo. 2014).

[281] *In re* Reimann, 436 B.R. 564 (Bankr. E.D. Wis. 2010).

[282] *In re* Merritt, 186 B.R. 924 (Bankr. S.D. Ill. 1995).

[283] State v. Van Horn (*In re* Van Horn), 2012 WL 2476415 (Bankr. D. Kan. June 26, 2012) ("$2,921.94, the precise amount of overtime, mileage and expenses relating to the use of a K–9 unit to track and apprehend" inmate who escaped confinement, was assessed administratively to inmate; court ruled an administrative penalty was non-dischargeable even though it was calculated by compensation).

adjudication preceded by a guilty plea under the somewhat more debtor-friendly chapter 13 standard constitutes a "criminal conviction."[284] Based on that standard, there is no difference in the analysis between debts imposed as part of a deferred adjudication and a criminal conviction. This opinion draws on *Dickerson v. New Banner Institute*, in which the Supreme Court held that a guilty plea combined with imposition of probation constituted a conviction for federal firearms restriction purposes.[285] Components of criminal justice debt assessed in a deferred adjudication should be analyzed for dischargeability like other any other criminal justice debt.

5.3.2.6. Surcharges in Chapter 7

Most if not all states charge, in addition to wholly punitive fines, various surcharges earmarked to fund specific initiatives. Whether discharge is permitted varies from jurisdiction to jurisdiction. Courts finding surcharges not to be dischargeable focus on the fact that the charges are included as penalties in the underlying criminal action.[286] Courts finding such obligations dischargeable generally focus on the administrative or pecuniary functions of such charges.[287]

5.3.2.7. Bail Bonds in Chapter 7

In order to secure appearance at trial of a criminal defendant who has been granted pretrial release, the court may require the payment of an amount of money as security (bail). Bail is generally, but not always, returned at the conclusion of trial, regardless of the outcome.[288] If the defendant does not show up for trial, on the other hand, or violates the terms of pretrial release, bail may be forfeited. Given the often unaffordable nature of bail, an industry of private bondsmen has arisen over the last 100 years, offering what is essentially an exotic form of insurance. Bondsmen generally take up to 10% to 15% of the bail amount as an upfront fee for their services, and require indemnification from the defendant or her guarantors or her guarantors in the event that the bond is forfeited. Bondsmen also frequently take security interests in the property of the defendant or her guarantors.

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[284] *In re* Wilson, 252 B.R. 739 (B.A.P. 8th Cir. 2000).

[285] 460 U.S. 103, 103 S. Ct. 986, 74 L. Ed. 2d 845 (1983).

[286] Lugo v. Paulsen, 886 F.2d 602 (3d Cir. 1989); *In re* Hollis, 810 F.2d 106 (6th Cir. 1987); McNelis v. Verano (*In re* McNelis), 2013 WL 5376525 (Bankr. M.D. Pa. Sept. 25, 2013); *In re* Curtin, 206 B.R. 694 (Bankr. D.N.J. 1996).

[287] Williams v. Motley, 925 F.2d 741 (4th Cir. 1991) (service fee attached to parking fine dischargeable); *In re* Pulley, 295 B.R. 28 (Bankr. D.N.J. 2003), *aff'd*, 303 B.R. 81 (D.N.J. 2003).

[288] Some states also authorize the re-application of bail to outstanding criminal justice debt. Idaho Code Ann. § 19-2908; Obregon v. State, 703 N.E.2d 695, 696 (Ind. Ct. App. 1998); Maine Comm'n on Indigent Legal Services ch. 401, § 2(1). *But see* State v. Zamarron, 806 N.W.2d 128 (Neb. Ct. App. 2011) (application of bond to court costs not allowed).

The dischargeability of forfeited bail and bond debt in a chapter 7 bankruptcy is frequently litigated, and has been accorded varying treatment across jurisdictions. The primary factor courts have looked to is who owes the debt, and to whom.[289] In cases where the defendant owes the state directly for forfeited bail, the debt has been deemed a "forfeiture" which is "payable to and for the benefit of a governmental unit" and thus excepted from discharge.[290] Courts have found this to be the case even where the debtor is not the criminal defendant, but rather the criminal defendant's personal guarantor (usually a family member). While the debtors in such cases are not the defendants, and not subject to debt imposed as part of a criminal sentence, such debts have been nevertheless deemed to be in the nature of a "forfeiture," and their non-dischargeability justified based on the same reluctance of the bankruptcy courts to interfere with administration of criminal justice proceedings.[291] In cases where a debt for forfeited bail is owed to the private bondsman, rather than the state, most courts have found the debt is either not in the nature of a "fine, penalty, or forfeiture," or it is not owed "to and for the benefit of a governmental unit," and is thus subject to discharge.[292]

To the extent that a bondsman's fee is itself financed by the bondsman or a third party, a common practice in some jurisdictions, that debt may be dischargeable in a chapter 7 bankruptcy as long as no forfeiture takes place. There does not appear to be a case where this issue has been litigated. However, as bondsmen regularly take security in collateral like homes and vehicles, even if the debt for the bondsman's fee is discharged a bondsman may still be able to foreclose on the security interest. Still, it may be possible to reduce or eliminate the bail bondsman's lien in a chapter 13 case.[293]

5.3.2.8. Interest in Chapter 7

Interest on criminal justice debt has generally been found to be dischargeable only to the extent the underlying debt is dischargeable.[294] Flowing from this, to the extent interest is generated upon an indigent defense fee balance, it should be dischargeable (and should have the same rate of interest as is allowable under rules for a civil judgment).

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[289] Affordable Bail Bonds, Inc. v. Thompson (*In re* Thompson), 2007 WL 2738171 (Bankr. N.D. Okla. Sept. 12, 2007) (good discussion of the three major configurations of parties in bail bond dischargeability).

[290] Virginia v. Collins (*In re* Collins), 173 F.3d 924, 932 n.4 (4th Cir. 1999).

[291] *In re* Gi Nam, 273 F.3d 281 (3d Cir. 2001); United States v. Zamora, 238 B.R. 842 (D. Ariz. 1999).

[292] *In re* Sandoval, 541 F.3d 997 (10th Cir. 2008); *In re* Hickman, 260 F.3d 400 (5th Cir. 2001); *In re* Sanchez, 365 B.R. 414 (Bankr. S.D.N.Y. 2007); *In re* Lopes, 339 B.R. 82 (Bankr. S.D.N.Y. 2006).

[293] *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 11.6 (11th ed. 2015), *updated at* www.nclc.org/library (general discussion of dealing with claims of secured creditors).

[294] *In re* Parsons, 505 B.R. 540 (Bankr. D. Haw. 2014); State v. Cunningham, 69 P.3d 358 (Wash. Ct. App. 2003).

5.3.2.9. Collection Costs in Chapter 7

As noted elsewhere in this report, third party collection by private contractors is becoming a more prevalent feature in the collection of criminal justice debt. In many instances, these companies collect their fee off the top of the debtor's delinquent balance. These fees can be as high as 40 percent of the total amount owed.[295] Collection fees imposed by private debt collectors have been found dischargeable, as they are not due and owing to governmental entities, nor are they in and of themselves punitive.[296] The latter part of this logic would seem to hold true for collection costs imposed by governmental collectors as well, although there do not appear to be any cases clearly discussing this distinction.

5.4. Criminal Justice Debts in Chapter 13

5.4.1. Introduction

In contrast to chapter 7, chapter 13 can provide relief from a somewhat broader, although not entirely comprehensive, variety of criminal justice debt. Unlike the chapter 7 process of liquidation and distribution of assets by the Trustee, the chapter 13 reorganization process allows debtors to place some or all of their debts into a plan for payment. The debtor's chapter 13 plan payments are based on the debts to be paid under the plan, the requirements of chapter 13, and the debtor's ability to pay based on disposable income. In most instances criminal justice debt is unsecured debt, meaning that there is no collateral that can be taken by the creditor in the event of nonpayment. Depending upon the amount of the debtor's nonexempt property and income left over after paying necessary living expenses, the debtor's plan may pay unsecured creditors at less than one-hundred percent of what they are owed, in some cases as low as zero to ten percent. In most cases consumers are not required to pay unsecured creditors for any interest, late fees, and other penalty charges incurred once the chapter 13 case is filed.

Provided that the plan is approved by the court and then successfully completed, the bankruptcy court will grant the so-called "super-discharge" to the debtor—thus named because of the relatively smaller number of exceptions to discharge as compared to chapter 7. The debtor's liability on the remaining portion of any debt provided for under the plan that was not paid during the plan is eliminated once the discharge is entered. It is notable that, in recent years, the broad nature of the super-discharge has eroded and is now subject to more exceptions. Nonetheless, even for debt that is not

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[295] Fla. Stat. § 28.246.

[296] *In re* Lopez, 531 B.R. 554 (Bankr. E.D. Pa. 2015); *In re* Dickerson, 510 B.R. 289 (Bankr. D. Idaho 2014); *In re* O'Brien, 110 B.R. 27 (Bankr. D. Colo. 1990). To the extent that percentage fees are calculated from balances comprised of indigent defense fees, there may also be equal protection arguments against exception from discharge. *See* § 2.3, *supra*.

dischargeable under either chapter, chapter 13 can sometimes be used to force a more reasonable payment plan for non-dischargeable criminal justice debt.[297]

There are limitations to chapter 13. For instance, a debtor needs a steady income in order to qualify, though that income can be from public assistance, child support, Social Security, a pension, or any other form of regular income. In some cases, the plan also may be funded by the sale of the debtor's property. The plan must be approved by the court, and cannot unfairly discriminate among various similar creditors. If the plan fails, the debtor can seek a hardship discharge, but that discharge is subject to the same limits as a chapter 7 discharge.

Prior to 1990, the nature of chapter 13 dischargeability under 11 U.S.C. § 1328 was subject to varying interpretations. Courts wrestled with the idea of whether criminal justice debt was a debt at all, or whether it was a type of obligation that was not subject to the framework of bankruptcy.[298] In *Pennsylvania Department of Public Welfare v. Davenport*, which like *Kelly* involved a debtor facing restitution after a conviction for welfare fraud, the Supreme Court held restitution to be dischargeable in a chapter 13 case notwithstanding the holding in *Kelly*. The Court relied on the definition of "debt" in the Bankruptcy Code and the differences between the chapter 7 and chapter 13 discharge provisions.[299] The majority determined that section 523(a)(7) did not apply to the broader chapter 13 discharge, as it was omitted from the more limited set of exceptions to discharge enumerated by statute in chapter 13. In so holding, the Court stated that "[t]he dischargeability of debts in chapter 13 that are not dischargeable in chapter 7 represents a policy judgment that [it] is preferable for debtors to attempt to pay such debts to the best of their abilities over three years rather than for those debtors to have those debts hanging over their heads indefinitely, perhaps for the rest of their lives."[300]

The decision in *Davenport* led to a quick response from Congress, which amended the chapter 13 statutory exceptions to discharge to include restitution included as part of a sentence in a criminal case. Notably, this legislative change did not include fines, preserving the broader chapter 13 discharge for criminal justice debt other than

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[297] *In re* Coulter, 305 B.R. 748 (Bankr. D.S.C. 2003).

[298] *In re* Norman, 95 B.R. 771 (Bankr. D. Colo. 1989) (fines, costs, and victim's assistance surcharge non-dischargeable in chapter 13); *In re* Ferris, 93 B.R. 729 (Bankr. D. Colo. 1988); *In re* Cullens, 77 B.R. 825 (Bankr. D. Colo. 1987) (restitution properly discharged in chapter 13 prevented state from revoking probation).

[299] Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990).

[300] Id.

restitution.[301] However, four years later in 1994, fines included in a criminal sentence were also excepted from discharge.[302]

5.4.2. Criminal Justice Debt Subject to Discharge in Chapter 13

In contrast to the complicated exception analysis applicable to chapter 7, the application of chapter 13 to criminal justice debt is straightforward. Under chapter 13 all criminal justice debt except punitive fines or restitution entered as part of a sentence in a criminal case is generally dischargeable upon successful completion of a chapter 13 plan. Types of criminal justice debt that have been classified as dischargeable in chapter 13 include court costs[303] and costs of prosecution.[304]

Fines and restitution must be included in a criminal sentence in order to be excepted from discharge, which means that discharge may be had if the advocate can successfully argue that the underlying nature of the action is not criminal. Mere association with a criminal act is not enough to invoke the discharge exception.[305] However, "conviction of a crime" has been interpreted broadly to include a guilty plea followed by probation, without formal conviction.[306]

Municipal court fines and traffic fines are frequently found to be dischargeable in chapter 13 if the underlying nature of the action is determined to be civil rather than criminal.[307] Juvenile delinquency restitution debt has been found dischargeable given that a juvenile adjudication is considered non-criminal under federal and state law, notwithstanding the fact that the underlying conduct was analogous to criminal conduct.[308] However, simply because a restitution judgment is civilly enforced or assigned to a third party does not mean it is dischargeable.[309]

5.4.3. Plan Confirmation

If the bankruptcy plan is considered to unfairly discriminate between a class of creditors, favoring some more strongly than the others within the designated class, the court

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[301] *In re* Hardenberg, 42 F.3d 986 (6th Cir. 1994).

[302] 11 U.S.C. § 1328(a)(2). *See also* Michigan Unemployment Ins. Agency v. Andrews (*In re* Andrews), 2015 WL 5813418 (Bankr. E.D. Mich. Oct. 2, 2015) (rejecting attempt to use § 523(a)(2)(A) exception to discharge for fraud, as the debt was owed to the government rather than between private parties).

[303] *In re* Hardenberg, 42 F.3d 986 (6th Cir. 1994).

[304] *In re* Ryan, 389 B.R. 710 (B.A.P. 9th Cir. 2008).

[305] *In re* Fleisch, 543 B.R. 166 (Bankr. M.D. Pa. 2015).

[306] Wilson v. Cumis Ins. Soc'y, Inc. (*In re* Wilson), 252 B.R. 739, 742 (B.A.P. 8th Cir. 2000).

[307] *In re* Raphael, 238 B.R. 69 (D.N.J. 1999); *In re* Osorio, 522 B.R. 70 (Bankr. D.N.J. 2014); *In re* Colon, 102 B.R. 421 (Bankr. E.D. Pa. 1989). *See also In re* DeBaecke, 91 B.R. 3 (Bankr. D.N.J. 1988) (insurance surcharges imposed for traffic violations are dischargeable debts in chapter 13).

[308] *In re* Sweeney, 492 F.3d 1189 (10th Cir. 2007).

[309] *In re* Bova, 326 F.3d 300 (1st Cir. 2003).

may deny confirmation and thus deprive the debtor of relief.[310] Although chapter 13 can sometimes be used to force a more reasonable payment plan even for debt that is not dischargeable, plans that provide for payment of selected non-dischargeable debts have sometimes been seen as being discriminatory.[311] Plans that only include restitution while paying nothing on other unsecured debts have been denied as discriminatory,[312] as have plans that give preference to otherwise dischargeable traffic fines.[313] However, the debtor may be able to show that a plan does not unfairly discriminate, such as when the debtor's failure to pay restitution or other debt included in a criminal sentence might lead to the loss of employment.[314]

A plan must also be proposed "in good faith," or be subject to denial.[315] To determine whether a plan is in good faith, courts will look at "[f]actors such as the type of debt sought to be discharged, whether the debt is non-dischargeable in chapter 7, and the debtor's motivation and sincerity in seeking chapter 13 relief[.]"[316] Citing these factors, at least one court has denied a plan that proposed to pay only restitution and indigent defense fees.[317] Other courts, however, have found plans to be filed in good faith even if they provide for debts that would be non-dischargeable in chapter 7, as long such debts are dischargeable in chapter 13.[318]

6. PROTECTING ASSETS, WAGES, AND BENEFITS FROM INVOLUNTARY COLLECTION

6.1. Introduction

Governmental actors have at their disposal a wide variety of civil methods to collect criminal justice debt in addition to the threat of incarceration for failure to pay. These methods may include enhanced versions of garnishment of wages and bank accounts,

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[310] 11 U.S.C. § 1322(b)(1). *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.4 (11th ed. 2015), *updated at* www.nclc.org/library (general discussion of separate classification of claims).

[311] *In re* Gallipo, 282 B.R. 917 (Bankr. E.D. Wash. 2002); *In re* Ponce, 218 B.R. 571 (Bankr. E.D. Wash. 1998).

[312] *In re* Limbaugh, 194 B.R. 488 (Bankr. D. Or. 1996).

[313] *In re* Osorio, 522 B.R. 70 (Bankr. D.N.J. 2014); *In re* Games, 213 B.R. 773 (Bankr. E.D. Wash. 1997).

[314] *See, e.g.*, *In re* Etheridge, 297 B.R. 810 (Bankr. M.D. Ala. 2003) (debtor who feared losing her job as a teacher permitted to separately classify bad check debt that was subject of criminal proceedings).

[315] *See* National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.3 (11th ed. 2015), *updated at* www.nclc.org/library (general discussion of plan confirmation requirements).

[316] *In re* LeMaire, 898 F.2d 1346 (8th Cir. 1990).

[317] *In re* Emerson, 1991 WL 11731127 (Bankr. S.D. Iowa Apr. 5, 1991).

[318] *In re* Short, 176 B.R. 886 (Bankr. S.D. Ind. 1995).

alternative administrative levy processes, and offset of public benefits and tax refunds. As a practical matter, these types of involuntary or coercive collection practices often create the crises that will drive many clients to contact an attorney in order to seek relief. Particularly for the many people with criminal justice debt living below the poverty line, the abrupt loss of wages or benefits that are already stretched thin can cause cascading crises.

It is therefore valuable for advocates to understand the strategies available to challenge or limit involuntary collection of criminal justice debt. This section addresses strategies specific to involuntary debt collection, focusing on the application of state and federal exemptions to criminal justice debt collection. The section also highlights the susceptibility of involuntary collection practices to due process challenges for not providing adequate notice and an opportunity to be heard.

Advocates should also keep in mind strategies to avoid collection of the debt at all. For example, in any case where a debtor faces involuntary debt collection, the constitutional and statutory arguments outlined in Sections 2 and 4 should be available. Additionally, collection may be avoidable in some jurisdictions through entry of a repayment agreement with the entity collecting, or through demonstration of financial hardship or inability to pay. Advocates should therefore determine if such avenues for relief are available in their jurisdiction and if so whether they present good options for the client.

6.2. Purposes of Exemption Laws

To balance the potentially devastating effects of unchecked collection on the debtor, the debtor's family, and society at large, federal, state, and local legislatures have enacted various "debtor's exemption" laws.[319] These exemptions allow debtors to retain certain property and income enumerated in the law, even in the face of involuntary collection processes. This exempted property and income—often necessary for the basic survival of the debtor and her household—is thus protected from involuntary collection methods such as garnishment, attachment, levy, and execution. Depending on the jurisdiction, exempted property can include everything from the tools of one's trade, to a homestead, to personal earnings or public benefits.

Exemption laws are venerable, and recognize the longstanding value of allowing debtors to preserve enough of their property to maintain a basic standard of living for their families. Over 100 years ago, in holding that exemption laws applied to enforcement of fines and costs, the Kentucky Court of Appeals wrote that exemption statutes were "designed to protect the family. The exemption is not for the benefit of the debtor; it

[319] *See generally* National Consumer Law Center, Collection Actions Ch. 12, Appxs. C, D, E, G (3d ed. 2014), *updated at* www.nclc.org/library (detailed text and statutory appendices regarding debtor's exemptions generally).

is for the benefit of the family. It is to the interest of the state that children should be protected from want, and that families should be kept together."[320]

6.3. Whether Exemption Laws Apply to Criminal Justice Debt

Despite this clear and longstanding policy, the application of debtor's exemptions to the collection of criminal justice debt has evolved into a highly complex area, given the interplay between civil and criminal law, and between federal, state, and municipal law. By way of example, some states' collection statutes explicitly provide that no exemptions apply to the involuntary collection of criminal justice debt,[321] theoretically allowing for 100% of a debtor's income and assets to be taken by involuntary collection mechanisms. As discussed in § 6.6.1, *supra*, these statutes appear to be preempted by federal law protecting certain kinds of property. Other states explicitly segregate criminal justice debt from other types of debt and provide a more limited set of exemptions for criminal debt.[322] Most commonly, state codes are simply silent on the issue, and leave it up to courts to determine on an *ad hoc* basis.

Another complication in determining the applicability of exemption law is presented by the much wider array of collection mechanisms available to the government than to private creditors. For example, both the federal government[323] and several states[324] have alternative "administrative garnishment" procedures by which employers, banks, or other entities can be ordered to turn over the debtor's funds to the state, without court involvement. Administrative garnishment procedures, contrasted with judicial garnishment, are carried out by agencies rather than a court, and are generally conducted in a highly automated fashion with a minimum of process. Similarly, both the

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[320] Commonwealth v. Cassady, 169 S.W. 497 (Ky. 1914). *See also* Commonwealth v. Lay, 75 Ky. 283 (Ky. 1876). *See generally* National Consumer Law Center, Collection Actions § 12.2.2 (3d ed. 2014), *updated at* www.nclc.org/library (purposes and liberal construction of state exemption laws).

[321] *See, e.g.*, Haw. Rev. Stat. § 651-122; Iowa Code 909.7 (fines); Neb. Rev. Stat. 29-2407 (anyone sentenced to less than two years of incarceration has no debtor's exemptions in regard to fines, costs, and forfeited recognizances); N.C. Gen. Stat. § 1C-1601(e) (exemptions do not apply to appearance bonds, criminal justice debt liens, and restitution); 42 Pa. Cons. Stat. 8127(a)(5); State v. Allen, 71 Ala. 543 (Ala. 1873); Newburn v. RFB Petroleum, Inc., 775 P.2d 93 (Colo. Ct. App. 1989) (exemptions do not apply to collection of fines).

[322] *See, e.g.*, Del. Code Ann. tit. 11, 4104(c) (limiting normal wage exemptions); N.Y. Executive Law § 632-a (McKinney) (Son of Sam Law); N.D. Cent. Code § 28-22-01; S.D. Codified Laws § 43–45–10; Tenn. Code. Ann. § 26-2-306.

[323] 31 U.S.C. § 3720D (authorizing administrative wage garnishment to collect federal claims); 31 C.F.R. pt. 285 (implementing regulations). *See generally* National Consumer Law Center, Collection Actions § 12.4.2.1 (3d ed. 2014), *updated at* www.nclc.org/library.

[324] *See, e.g.*, Iowa Code 421.17A (allowing administrative levy on bank account to collect debts owed to the state); Va. Code Ann. § 19.2-349 (allowing state to collect fines, costs, forfeitures, and penalties by using the setoff procedure created by statute for collection of delinquent taxes).

federal government[325] and most if not all states[326] have a process by which tax refunds, state benefits, and other money owed to the debtor by the governmental entity may be set off against criminal justice debt.

Also, the type of criminal justice debt affects the analysis, and in particular whether the fee is punitive or compensatory. That distinction is critical as a matter of many state laws regarding garnishment, but also as a matter of federal constitutional law. As mentioned throughout this report, a debtor who owes indigent defense fees may be entitled on equal protection grounds to protections roughly commensurate with those enjoyed by ordinary civil judgment debtors.[327] However, given the increasing reliance of governmental entities on user fees to fund the basic structure of the judicial system, the constitutional logic of *James v. Strange* and its progeny should not be limited solely to indigent defense fees. The transition from a system of mostly punitive debt to mostly compensatory debt creates many opportunities to expand the constitutional reach of *James v. Strange* to, for example, investigator and expert fees,[328] jury fees,[329] medical and psychiatric examination costs,[330] and the costs of interpreters.[331] Wherever a clear two-tiered system singles out some defendants for harsher treatment solely due to indigence, the advocate should consider whether *James v. Strange* may be applicable.

6.4. The Role of Exemption Laws at the Imposition Stage

Another complication is whether exemptions apply when the debt or a payment schedule is initially imposed, or only at the point when the debtor is being sanctioned for failing to pay it.[332] Since exemptions are designed as defenses to be raised in post-judgment collection actions and are tied to those processes, they are not generally directly applicable in the context of imposition of criminal justice debt. Attempts to expand their scope to cover the imposition of payment schedules, largely in the context of federal wage protection under the Consumer Credit Protection Act (CCPA), have been largely unsuccessful.[333]

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[325] 31 U.S.C. §§ 3701, 3716; 31 C.F.R. §§ 285.4, 901.3. *See generally* National Consumer Law Center, Collection Actions §§ 10.2.6–10.2.8 (3d ed. 2014), *updated at* www.nclc.org/library.

[326] *See, e.g.*, Colo. Rev. Stat. § 16-11-101.8; Iowa Code § 8A.504.

[327] James v. Strange, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972). *See* § 2.3, *supra*.

[328] Martin v. State, 405 S.W.3d 944, 948 (Tex. App. 2013) ("Like the fees of a court-appointed expert or attorney, an appointed investigator is 'a basic tool' an indigent defendant can use to present a defense.") *See also* Fant v. City of Ferguson, 2015 WL 4232917 (E.D. Mo. July 13, 2015) (equal protection concerns raised in *James v. Strange* are applicable to criminal justice debt generally).

[329] State v. Rideau, 943 So. 2d 559 (La. Ct. App. 2006).

[330] Cal. Penal Code § 987.8 (West).

[331] State v. Diaz-Farias, 362 P.3d 322 (Wash. Ct. App. 2015).

[332] *See generally* § 3, *supra* (more detailed discussion of imposition issues in general).

[333] *See, e.g.*, United States v. Jaffe, 417 F.3d 259 (2d Cir. 2005); State v. Loving, 905 N.E.2d 1234 (Ohio Ct. App. 2009).

That said, there are at least two ways in which exemptions are relevant to imposition of the debt and establishment of a mandatory installment payment plan. First, these exemptions may provide a framework for ability-to-pay determinations. Some states provide by statute or rule certain basic parameters tying ability to pay to certain factors, for example percent of federal poverty guidelines or receipt of public benefits. However, most states provide no guidance at all as to what facts may demonstrate ability or inability to pay. This discretionary void may be filled by borrowing from pre-existing ability to pay determinations from other areas of the law. Debtor's exemptions are one of several models from which corollaries may be drawn – *i.e.* any debt that would be collectible only through levy or garnishment of exempt income or assets is not within the debtor's ability to pay.[334]

The second way that exemptions are relevant outside of involuntary post-judgment collection procedures is specific to the nature of mandatory installment plans. The federal anti-alienation provisions for Social Security, Supplemental Security Income (SSI), benefits covered by the Employee Retirement Income Security Act (ERISA), and Veteran's Administration (VA) benefits are very broad. These clauses cover not only garnishment and similar types of process like attachment and levy, but also forbid alienation of benefits by "other legal processes."[335] At the stage where a payment plan is imposed, imposing a plan where a criminal justice debtor's only income comes from these sources, and where the debtor faces sanctions such as incarceration or loss of licensure for nonpayment of an installment, may constitute "other legal process" and thus may be barred by the anti-alienation provisions.

6.5. Exemptions Applicable to Federal Criminal Justice Debt Collection

6.5.1. Introduction

Federal criminal justice debt can be collected through a number of involuntary collection mechanisms, including judicial garnishment,[336] administrative offset of federal benefits, tax refunds, and other payments,[337] administrative wage garnishment,[338] and

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[334] *See also* § 3.4.3, *supra* (other models).

[335] Philpott v. Essex County Welfare Bd., 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973) (assignment of future social security disability benefits to a state in return for receipt of immediate temporary interim benefits violates anti-alienation provision). However, the term "other legal process" is not unlimited. *See generally* National Consumer Law Center, Collection Actions § 12.5.3.2 (3d ed. 2014), *updated at* www.nclc.org/library.

[336] 28 U.S.C. §§ 3201–206. Private parties who are owed victim restitution may also privately enforce restitution orders by this section. United States v. Witham, 648 F.3d 40 (1st Cir. 2011).

[337] 31 U.S.C. §§ 3701, 3716; 31 C.F.R. §§ 285.4, 901.3. *See* National Consumer Law Center, Collection Actions §§ 10.2.6–10.2.8 (3d ed. 2014), *updated at* www.nclc.org/library.

[338] 31 U.S.C. § 3720D; 31 C.F.R. § 285.11. *See* National Consumer Law Center, Collection Actions §

incarceration.[339] In addition, federal law provides that restitution debt may be collected by "all other available and reasonable means."[340] As with any analysis of the applicability of consumer law protections to criminal justice debt collection, however, the subtype of criminal justice debt determines the applicability of exemptions. Fines and restitution are explicitly subject to a different exemption scheme than are other types of federal criminal justice debt.[341] These other types of criminal justice debt, such as federal indigent defense fees or costs,[342] are not separately addressed in statute as are fines and restitution. Arguably, debts not discussed in the statute should be considered collectible in the manner of a normal civil judgment owed to a federal agency. For these debts, the debtor has the right to choose either the federal bankruptcy code exemptions, or all applicable state and non-bankruptcy federal exemptions.[343]

State law exemptions are generally not available in post-judgment proceedings to collect federal criminal justice debt.[344] One exception is when state law post-judgment procedures are used to collect federal criminal justice debt; in these instances, state law exemptions may apply.[345]

6.5.2. Earnings

The earnings exemptions under the federal Consumer Credit Protection Act (CCPA) explicitly apply to federal criminal justice debt, regardless of the type of underlying debt (fines, costs, restitution, etc).[346] The CCPA protects a certain amount of "disposable earnings." The term "earnings" is defined as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program."[347] The term "disposable earnings" means "that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law

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12.4.2.1 (3d ed. 2014), *updated at* www.nclc.org/library.

[339] 18 U.S.C. §§ 3614–3615.

[340] 18 U.S.C. § 3664(m)(1)(A)(i).

[341] 18 U.S.C. § 3613.

[342] 18 U.S.C. § 3006A.

[343] 28 U.S.C. § 3014. *See* National Consumer Law Center, Collection Actions § 10.3.5 (3d ed. 2014), *updated at* www.nclc.org/library.

[344] United States v. Furkin, 165 F.3d 33 (7th Cir.1998) (table); United States v. Johnson, 2009 WL 1033773 (E.D. La. Apr. 15, 2009); United States v. Cunningham, 866 F. Supp. 2d 1050 (S.D. Iowa 2012); United States v. Citigroup Global Mkts., 866 F. Supp. 2d 1050 (E.D. Texas 2007).

[345] Paul Revere Ins. Group v. United States, 500 F.3d 957 (9th Cir. 2007).

[346] 18 U.S.C. § 3613 (fines and restitution). Other federal criminal justice debt, such as indigent defense fees, should be subject to the general laws concerning garnishment, and are thus also subject to CCPA protections.

[347] 15 U.S.C. § 1672(a). *See* National Consumer Law Center, Collection Actions § 12.4.1.4 (3d ed. 2014), *updated at* www.nclc.org/library.

to be withheld."[348] The CCPA sets out a formula that allows for no more than 25% of a debtor's disposable wages to be garnished, with a minimum protected amount of thirty times the current federal minimum wage.[349] At this time, the minimum protected weekly amount is $217.50.

Notwithstanding these limitations, courts sometimes order garnishment of earnings in excess of the amounts allowed by the CCPA.[350] Advocates should be aware of this possibility and raise the issue in a motion to quash. Also, federal courts are empowered to garnish less than the maximum amount allowed by law.[351] Unlike many state law wage exemption regimes, federal law is silent as to what discretionary factors should be considered by the courts in reducing the amount below the maximum. The advocate is thus free to establish her own. Some sources the advocate may analogize to are those state exemption statutes that require consideration of an open-ended list of equitable factors, such as number of dependents, health considerations, age, and other considerations.[352] Other potential standards are the National Collection Standards employed by the IRS,[353] or those for income-driven repayment options for federally connected student loans.[354]

A major source of litigation in this area has been the protection of payments such as such as disability and retirement benefits that are derived from earnings. Some courts have held that private disability payments are derived from earnings and are protected by the CCPA.[355] In *United States v. France*, the Seventh Circuit came out the other way and held private disability benefits not to be earnings for the purposes of CCPA.[356] The debtor filed for *certiorari* to the U.S. Supreme Court, but before the Court considered the petition, the Solicitor General reversed its position, conforming it to the current interpretation of the U.S. Department of Labor, which considers these payments as "earn-

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[348] 15 U.S.C. § 1672(b).

[349] 15 U.S.C. § 1673. *See* National Consumer Law Center, Collection Actions § 12.4.1.5 (3d ed. 2014), *updated at* www.nclc.org/library (calculation of protected amounts).

[350] *See, e.g.*, United States v. Mayes, 2007 WL 3001670 (S.D. Oct. 10, 2007) (amount mentioned in opinion exceeds maximum under the CCPA).

[351] United States v. George, 144 F. Supp. 2d 161 (E.D.N.Y. 2001). *See* National Consumer Law Center, Collection Actions § 10.3.4.3 (3d ed. 2014), *updated at* www.nclc.org/library.

[352] *See, e.g.*, Iowa Code § 630.3A.

[353] *Available at* https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards/ *See also* Internal Revenue Manual 5.15.1.

[354] *See generally* National Consumer Law Center, Student Loan Law § 3.3 (5th ed. 2015), *updated at* www.nclc.org/library. *See also* Fed. Student Aid, Income-Driven Repayment Plans for Federal Loans Resource, *available at* https://studentaid.ed.gov/sa/sites/default/files/income-driven-repayment.pdf.

[355] United States v. Ashcraft, 732 F.3d 860 (8th Cir. 2013). *See generally* National Consumer Law Center, Collection Actions § 12.4.1.4.1 (3d ed. 2014), *updated at* www.nclc.org/library.

[356] United States v. France, 782 F.3d 820 (7th Cir. 2015).

ings" protected by the CCPA.[357] The Supreme Court then vacated the Seventh Circuit's judgment and remanded the case for further consideration in light of the Solicitor General's confession of error.[358] The application of the CCPA to retirement benefits is discussed in more detail in § 6.5.4, *infra*.

6.5.3. Federal and State Public Benefits and Tax Refunds

The federal statutory scheme regarding enforcement of federal fines and restitution incorporates by reference most of the exemptions available against tax collection under the Internal Revenue Code.[359] Under this regime, Railroad Retirement Board pensions, unemployment insurance benefits, workmen's compensation, and service-connected Veterans' Benefits remain wholly exempt from involuntary collection of federal criminal justice debt, regardless of the particular type of debt (fines, restitution, etc).[360]

The statute does not incorporate the Internal Revenue Code's protection of wages, TANF, SSD, SSI, the debtor's homestead,[361]or any state issued needs-based public assistance.[362] The statute does, however, provide that the CCPA's protections for wages apply to federal criminal justice debt.[363] Since the CCPA defines wages to include "periodic payments pursuant to a pension or retirement program,[364] it appears that the CCPA's limits on garnishment (allowing garnishment of no more than 25% of disposable earnings, and requiring that the debtor be left with at least thirty times the minimum wage) operate as a limit on garnishment of Social Security benefits. The Social Security Administration Program Operations Manual (SSAPOMS) is consistent with this view, indicating that the agency's interpretation is that the CCPA limits apply to garnishment of Social Security benefits for federal criminal justice debt.[365]

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[357] Brief of United States of Am., United States v. France, No. 15-24 (Nov. 6, 2015).

[358] France v. United States, ___ U.S. ___, 136 S. Ct. 583, 193 L. Ed. 2d 465 (2015).

[359] 18 U.S.C. § 3613 (incorporating 26 U.S.C. § 6334(a)(1) to (8), (10), and (12) by reference).

[360] 26 U.S.C. § 6334.

[361] 18 U.S.C. § 3613(a)(1) (incorporating a number of sections of 26 U.S.C. § 6334, but not § 6334(a)(13), which provides a protection for the debtor's home).

[362] 18 U.S.C. § 3613(a)(1).

[363] 18 U.S.C. § 3613(a)(3).

[364] 15 U.S.C. § 1672(a). *See* National Consumer Law Center, Collection Actions § 12.4.1.4.1 (3d ed. 2014), *updated at* www.nclc.org/library.

[365] Social Security Admin., Program Operations Manual Sys. GN 02410.223 Garnishment for Court Ordered Victim Restitution, *available at* https://secure.ssa.gov/poms.nsf/lnx/0202410223. While the interpretation of the limiting effect of the CCPA is positive to criminal justice debtors, this POMS section is problematic in that it does not clearly delineate between federal criminal justice debt, which can reach social security benefits to some extent, and state criminal justice debt, for which social security benefits are wholly unavailable. *See* Bennett v. Arkansas, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988).

Other federal payments, such as tax refunds, vendor payments, and the like are theoretically available for administrative offset in their entirety, and therefore no exemptions protect these funds from offset.[366]

6.5.4. Retirement Benefits

Normally, benefits covered by the federal Employee Retirement Income Security Act (ERISA) are protected in their entirety from civil post-judgment remedies prior to distribution,[367] as are section 401k retirement savings plans.[368] In 1990, the Supreme Court gave the anti-alienation provision in ERISA a broad reading, finding that the provision completely protected benefits covered by ERISA in connection with proceedings to collect restitution.[369] *Guidry* is still good law in regard to state criminal justice debt,[370] but has since been superseded by statute in regard to *federal* debts for fines and restitution.[371]

Although ERISA does not protect these retirement plans from garnishment, the CCPA's protections do apply.[372] As a result, garnishment of retirement plan payments is limited to 25%, and the debtor must be left with at least thirty times the minimum wage. Since this limit is found in the CCPA, not ERISA, it applies to all "periodic payments purusant to a pension or retirement program,"[373] not just those that fall within ERISA's scope.

However, a number of courts have held that the debtor's right to receive a lump-sum pension distribution, as opposed to periodic payments, is not protected, and can be seized to pay a federal debt for a fine or restitution.[374] The federal government can, however, "only reach a [debtor's] present rights." [375] Consequently, if a pension or retirement fund is not available to the debtor as a lump sum, both the corpus and a minimum of 75% of each periodic payment will be exempt.

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[366] 31 U.S.C. § 3716.

[367] 29 U.S.C. § 1056(d).

[368] 26 U.S.C. § 401(a)(13)

[369] Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990)

[370] *See* § 6.6.4, *infra*.

[371] 18 U.S.C. § 3613(a) (allowing enforcement of federal fines and restitution "[n]otwithstanding any other Federal law"). *See* United States v. Irving, 452 F.3d 110, 126 (2d Cir. 2006).

[372] United States v. DeCay, 620 F.3d 534 (5th Cir. 2010).

[373] 15 U.S.C. § 1672(a).

[374] United States v. Ashcraft, 732 F.3d 860 (8th Cir. 2013); United States v. Lee, 659 F.3d 619, 622 (7th Cir. 2011); United States v. DeCay, 620 F.3d 534 (5th Cir. 2010); United States v. Beulke, 892 F. Supp. 1176 (D.S.D. 2012); United States v. Cunningham, 866 F. Supp. 1050 (S.D. Iowa 2012).

[375] *See* United States v. Novak, 476 F.3d 1041 (9th Cir. 2007).

6.5.5. Bank Accounts

The operative factual question for determining the extent to which a deposit account is exempt is the character of the underlying funds. The operative legal question is under what circumstances the exempt nature of the funds changes after deposit—i.e., how a debtor might use the deposited funds to remove the exemption. The answer to this second question varies considerably from jurisdiction to jurisdiction, with some states providing that the act of deposit removes the exemption automatically,[376] while others allow for a reasonable period of time to actually use the funds before the exemption expires.[377] Key federally connected benefits, such as Social Security and Veteran's Administration benefits, retain their exemption upon deposit into a bank account,[378] and a federal regulation requires banks to give automatic protection to certain of these benefits for 60 days as long as they are not transferred to a new account.[379]

6.6. Federal Exemptions Applicable to State and Municipal Criminal Justice Debt Collection

6.6.1. Introduction

The application of exemptions to state and municipal criminal justice debt generally is explored below. Some states are silent to the application of exemptions to criminal justice debt, or explicitly allow their application. However, a significant number of state laws restrict or even fully abolish the general application of any debtor's exemptions to collection of criminal justice debts,[380] without distinguishing between those exemptions established by federal law versus those established under state law. These statutes are enacted notwithstanding the fact that such blanket prohibitions on the use of exemptions are preempted in regard to exemptions based in federal law—states cannot abrogate those protections.[381] Courts have rejected the argument that concerns of federalism bar application of federal exemptions to state collection actions.[382]

Furthermore, in regard to certain types of criminal justice debt connected specifically to indigence, such as indigent defense fees, states or municipalities might violate the

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[376] Frazer v. Smith, 907 P.2d 1384 (Ariz. 1995).

[377] Midamerican Sav. Bank v. Miehe, 438 N.W.2d 837 (Iowa 1989). *See generally* National Consumer Law Center, Collection Actions § 12.6.2 (3d ed. 2014), *updated at* www.nclc.org/library.

[378] *See* National Consumer Law Center, Collection Actions § 12.6.2.2 (3d ed. 2014), *updated at* www.nclc.org/library.

[379] 31 C.F.R. pt. 212. *See* National Consumer Law Center, Collection Actions § 12.6.3.1 (3d ed. 2014), *updated at* www.nclc.org/library.

[380] *See* § 6.3, *supra*.

[381] Bennett v. Arkansas, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988).

[382] Pomeranke v. Williamson, 478 N.W.2d 800 (Mn. Ct. App. 1991)

Equal Protection clause if they employ debt collection strategies not available to private creditors. Denial of debtor's exemptions to indigent defense fee debtors is the very heart of *James v. Strange*.[383] As a result, even when the statute is silent, many states will read the applicability of federal exemptions into an indigent defense fee recovery statute in order to preserve the statute's constitutionality.[384]

6.6.2. Earnings

The application of the federal limitation on garnishment of wages in the CCPA to state and municipal criminal justice debt can be tricky. The general rule is that the CCPA preempts state law to the extent that the state law is less protective of earnings.[385] However, some state courts have held that the CCPA does not apply to state criminal justice debt at all. One court's rationale for non-application was the broad notion that the CCPA is confined to garnishment by consumer finance lenders[386]—a position inconsistent with the CCPA's explicit application to child support garnishment[387] and its provision singling out debts for state or federal taxes for exclusion.[388] Another court reasoned that prisoners do not have to provide for basic household needs in the same way as a debtor who is not incarcerated, thus obviating the need to protect income.[389] This rationale does not hold up under scrutiny either, as prisons often charge prisoners for a host of items, including telephone calls. A prisoner also has a particularly acute need to protect funds necessary for a successful reentry.

6.6.3. Benefits

The clearest case for universal application of federal debtor's exemptions to state and municipal criminal justice debt is certain federal entitlement benefits—most notably SSI,[390] VA,[391] and Social Security.[392] These broadly written federal anti-alienation provisions provide that, except under extremely limited circumstances, these benefits cannot be garnished by the state at their source, including for criminal justice debt, and preempt state law to the contrary.[393]

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[383] James v. Strange, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972). *See* § 2.3, *supra*.
[384] *See* State v. Albert, 899 P.2d 103 (Alaska 1995); State v. Kottenbroch, 319 N.W.2d 465 (N.D. 1982); State v. Blank, 930 P.2d 1213 (Wash. 1997), *aff'd*, 930 P.2d 1213 (Wash. 1997).
[385] Marshal v. Safeway, Inc., 88 A.3d 735 (Md. 2014); Anderson v. Anderson, 404 A.2d 275 (Md. 1979).
[386] Carter v. State *ex rel.* Bullock County, 393 So. 2d 1368 (Ala. 1981).
[387] 15 U.S.C. § 1673(b)(1)(C).
[388] 15 U.S.C. § 1673(b)(2).
[389] State Treasurer v. Gardner, 583 N.W.2d 687 (Mich. 1998).
[390] 42 U.S.C. § 1383(d)(1).
[391] 38 U.S.C. § 5301(a)(1).
[392] 42 U.S.C. § 407.
[393] Bennett v. Arkansas, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988).

States can, under certain conditions, access federal payments for offset under the federal Treasury Offset Program by executing an agreement with the U.S. Department of Treasury's Bureau of Fiscal Service.[394] But in that case, the State must enact regulations that provide for certain due process protections. And even if such an agreement has been signed and the appropriate regulations enacted, the state has more limited access to federal funds than the federal government—notably, the states cannot offset Social Security or SSI.[395]

6.6.4. Retirement Benefits

ERISA's anti-alienation provision protects covered benefits from involuntary collection for state and municipal criminal justice debt.[396] ERISA's anti-alienation provision is broad, clear, and unambiguous,[397] as are the comparable statutory protections for most if not all types of non-ERISA retirement benefits.[398] The federal statute carving out federal criminal justice debt from these exemptions is not applicable to state and municipal criminal justice debt.[399] This means broad protection against involuntary collection, although the advocate should keep in mind that ERISA protections do not survive long past the date of disbursement, if at all.[400]

6.6.5. Student Loan Disbursements

Federal student loan proceeds, grants, and work assistance are protected by federal law from garnishment and attachment arising from state and municipal criminal justice debt.[401] This protection explicitly extends to property traceable to the proceeds of these exempt funds. There are few cases addressing this specific anti-alienation provision. However, it has been successfully used to protect funds traceable to federal student loans and grants from state criminal justice debt collection in an unreported case.[402]

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[394] 31 U.S.C. § 3716(h). It is unclear at the time of publication what states may have such reciprocal agreements that would cover criminal justice debt.

[395] 31 U.S.C. § 3716(h)(3).

[396] 29 U.S.C. § 1056(d)(1) (ERISA benefits); 26 U.S.C. § 401(a)(13) (§ 401k)

[397] *See* Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990).

[398] State *ex rel*. Nixon v. McClure, 969 S.W.2d 801 (Mo. Ct. App. 1998) (federal civil service retirement could not be reached to pay state court imposed costs for incarceration).

[399] *See* § 6.5.4, *supra*.

[400] *In re* Sinclair, 417 F.3d 527 (5th Cir. 2005) (the extent to which exempt income and assets maintain their exemption after disbursement and deposit is governed by state law).

[401] 20 U.S.C. § 1095a(d).

[402] Ashton v. Knepp, 2014 WL 3845117, at *14-15 (M.D. Pa. Aug. 5, 2014).

6.7. State Exemptions Applicable to State and Municipal Criminal Justice Debt Collection

6.7.1. State Exemptions Overview

State exemptions protect a whole host of personal property from involuntary collection, ranging from longstanding protections for a musket, the family bible, and the homestead, to more modern protections for insurance awards, retirement benefits, and public assistance. The application of state exemptions to criminal justice debt varies widely from state to state, and application of each state's system to criminal justice debt is often far from clear. It is more difficult to draw principles of general applicability from this varied field than in the comparatively simpler area of federal exemption and anti-alienation law in state criminal justice debt situations. What follows is a survey of some of the areas where exemption issues most often arise. As always, equal protection concerns under *James v. Strange* and *Fuller v. Oregon* may create opportunities to expand remedies to at least match those enjoyed by civil judgment debtors.[403]

As mentioned above, a number of states expressly provide that their exemptions do not apply to claims arising from certain kinds of criminal justice debt.[404] Even though states do not have the authority to abrogate federal exemptions, the applicability of state exemptions is a within a state's discretion, so these exclusions matter. By contrast, some statutes explicitly provide that exemptions apply in criminal justice debt situations.[405] Other statutes simply say that a criminal justice debt shall be collected as a civil judgment, without further specifying the availability or unavailability of exemptions.[406]

The attorney should also remember that the type of debt—fines, restitution, indigent defense fees, etc.—often affects the analysis. Fines, for example, are a subcategory of criminal justice debt that courts sometimes find not to be subject to state exemptions, on the ground that the nature of the debt is strictly penal.[407] A statute that makes state exemptions inapplicable to fines may not apply to restitution, however.[408] Most states are silent

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[403] See § 2.3, *supra*.

[404] *See* § 6.3, *supra*.

[405] *See, e.g.*, Fla. Stat. § 938.30(5); S.D. Codified Laws 43-45-10; Betterton v. O'Dwyer, 101 S.W. 628 (Mo. Ct. App. 1907); State v. Threatt, 108 Ohio St. 3d 277 (Ohio 2006); State v. White, 817 N.E.2d 393 (Ohio 2004).

[406] *See, e.g.*, Or. Rev. Stat. § 137.450; Iowa Code 910.7; Del. Code Ann. tit. 10, 8603; Ga. Code Ann. §§ 17-14-13 to 17-14-19.

[407] Newburn v. RFB Petroleum, Inc., 775 P.2d 93 (Co. Ct. App. 1989) (general exemptions not applicable to proceedings to collect fines). *See also* Enderman v. Alexander, 187 P. 729, 68 Colo. 110 (Colo. 1920).

[408] *Compare, e.g.*, Iowa Code 909.6 (fines) ("The law relating to judgment liens, executions, and other process available to creditors for the collection of debts shall be applicable to such judgments; provided, that no law exempting the personal property of the defendant from any lien or legal process shall be applicable to such judgments"), *with* Iowa Code 910.7A (other criminal justice debt) (lacking

with respect to certain user fees, like indigent defense fees,[409] although at least one state explicitly requires application of exemptions to collection of incarceration costs.[410] Even when the exemptions do not explicitly apply to these types of user fees, constitutional concerns suggest that user fees should be subject to exemption in the same manner as claims arising from private debts.[411] After all, even the narrowest reading of *James v. Strange* would require that debtor's exemptions apply to indigent defense fees.

The debtor's supervision status—probation, parole, work release, etc.—may also affect the available exemptions. For example, one state court held that workers compensation paid to an individual on work release was not subject to protection under state law. The Court concluded that a separate statute requiring inmates (including inmates on work release) to pay 40 percent of their earnings towards costs of incarceration preempted the general exemption for worker's compensation.[412] Under some statutes, the availability of exemptions depends on the length of the defendant's sentence.[413]

Alternative collection processes are yet another factor in the application of exemptions. Like the federal government, states often have a panoply of collection mechanisms in place that serve as an alternative to judicial garnishment, such as administrative garnishment and set-off of state benefits. As with collection of federal criminal justice debt, a situation that at first glance appears to offer no exemptions may in fact have exemptions tied to the process used, rather than the type of income.[414]

6.7.2. Homestead

One of the most important and venerable state exemptions is that which protects the home—the homestead exemption.[415] In general, homestead exemptions may protect at

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language denying exemptions).

[409] Fla. Stat. 938.29; S.D. Codified Laws § 23A-40-15.

[410] Conn. Gen. Stat. § 18-85a.

[411] *See* § 2.3, *supra*.

[412] Gober v. Alabama Dep't of Corrections, 871 So. 2d 838 (Ala. Civ. App. 2003).

[413] Neb. Rev. Stat. § 29-2407 (judgments for fines, costs, and forfeited recognizances; lien; exemptions; duration) (no exemptions except when person sentenced for over 2 years). *See* State v. Bundy, 549 N.W.2d 122 (Neb. 1996).

[414] *Compare* Iowa Code 421.17B (wage garnishment) ("The facility may receive assignment of up to one hundred percent of the obligor's disposable income, salary, or payment for any given period until the full obligation to the facility is paid in full"), *with* Iowa Administrative Code r. 11-40.2 ("some claims against public agencies on behalf of certain debtors are made from funds exempt from collection and are thus unavailable for offset"). *See also* Cal. Gov't Code § 12419.5 (West); Utah Code Ann. §§ 76-3-201.1, 63A-3-502 (West); Va. Code Ann. § 19.2-349.

[415] Commonwealth. v. Cassady, 169 S.W. 497 (Ky. 1914) (the homestead exemption "was designed to protect the family. The exemption is not for the benefit of the debtor; it is for the benefit of the family. It is to the interest of the state that children should be protected from want, and that families should be kept together."). *See generally* National Consumer Law Center, Collection Actions § 12.2.2 (3d ed.

least some of the value of a home, although most states have monetary caps on the value protected. In the civil world, homestead exemptions are subject to exceptions, which usually include enforcement of security interests and mortgages. The applicability of the homestead exemption to criminal justice debt is variable and does not always correspond to the general application of state exemptions.[416] Other states apply the homestead exemption selectively to some criminal justice debts but not others.[417]

6.7.3. Public Benefits and Tax Refunds

Many benefits that people depend on, such as unemployment insurance and workers' compensation, do not have a federal anti-alienation provision because they are distributed by the state (even if much of the funding derives from federal funding). State exemption laws generally protect these benefits.[418] In addition, some states have found workers compensation to be derived from earnings, and thus protected under the federal CCPA even though distributed by the state.[419] It may also be important to look at the nature of the process used. Many states collect against state benefits by an administrative offset process, which may trigger exemptions found in the statute and regulation underlying that process rather than in the general exemption law.[420]

In the context of private sector debt collection, about ten states have exemption statutes that specifically protect the earned income tax credit or certain child tax credits, but only a few have more broadly-applicable exemptions for tax refunds.[421] The Supreme Court has held that income tax refunds are not protected by the CCPA even when they

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2014), *updated at* www.nclc.org/library.

[416] *Compare* Haw. Rev. Stat. § 651-122 (no personal property exempt from a debt owed to the state), *with* Haw. Rev. Stat. § 651-92 (no corresponding limitation for homestead exemption), *and* Canada v. State, 26 N.W.2d 509 (Neb. 1947) (giving effect to state law preserving exemptions if sentence is for more than two years, and finding this statute not to conflict with statute providing generally that fine operates as judgment on defendant's property; convicted defendant is entitled to homestead exemption). *See also* Commonwealth v. Lay, 75 Ky. 283 (Ky. 1876); Commonwealth v. Cassady, 169 S.W. 497 (Ky. 1914).

[417] 735 Ill. Comp. Stat. 5/12-903.5 (exemption applies to all criminal matters except forfeiture); La. Rev. Stat. Ann. § 20:1(C)(8) (homestead exemption shall not apply to "any obligation arising from the conviction of a felony or misdemeanor which has the possibility of imprisonment of at least six months."); Tenn. Code Ann. § 26-2-306 (homestead exemption not available for fines and costs for certain voting, weapons, and election crimes); People v. McArdle, 430 N.E.2d 1309 (N.Y. 1981) (homestead exemption does not apply to restitution because restitution is not a civil judgment under New York law).

[418] *See generally* National Consumer Law Center, Collection Actions § 12.5, Appx. G (3d ed. 2014), *updated at* www.nclc.org/library.

[419] McNabb v. State *ex rel*. Rhodes, 890 So. 2d 1038 (Ala. Civ. App. Ala. 2003).

[420] *See* Smith-Porter v. Iowa Dep't of Human Servs., 590 N.W.2d 541 (Iowa 1999).

[421] *See* National Consumer Law Center, Collection Actions Appx. G (3d ed. 2014), *updated at* www.nclc.org/library.

are derived from earnings, because the connection to earnings is too attenuated.[422] However, some courts have found that certain tax credits, like the Earned Income Tax Credit[423] and Additional Child Tax Credit[424] are exempt under a state's general public assistance exemption.

6.7.4. Retirement Benefits

Those who depend on retirement plans such as state employee pensions that are not covered by ERISA cannot invoke ERISA's broad anti-alienation provisions to protect this income. But some states explicitly exempt these non-ERISA retirement payments.[425] In other states, courts may hold that these non-ERISA pension payments are earnings for the purposes of CCPA protections.[426]

6.8. Concurrent Garnishments of Earnings

Many criminal justice debtors also owe child support, tax, and consumer debt. In a situation involving multiple wage garnishments, the operative legal question is whether the competing garnishments have to proceed consecutively, according to some rule of priority, or whether they can be active concurrently, even if they ultimately reduce the debtor's income to zero.

Generally, outside of the criminal justice debt context, courts have held that all creditors share the same amount of disposable income for possible garnishments.[427] In other words, garnishments cannot be stacked on top of each other. However, if an exemption for wages is inapplicable to criminal justice debt in the first place, it is possible that a court might allow a garnishment for a criminal justice debt to run concurrently with a garnishment for another type of debt. Advocates may also face this problem when there are multiple types of garnishments—for example, a judicial criminal justice debt garnishment from a federal court, plus an administrative federal student loan garnishment, plus a child support garnishment issuing from a state court.

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[422] Kokoszka v. Belford, 417 U.S. 642, 94 S. Ct. 2431, 41 L. Ed. 2d 374 (1974).

[423] *See* Flanery v. Mathison, 289 B.R. 624 (W.D. Ky. 2003); *In re* Longstreet, 246 B.R. 611 (Bankr. S.D. Iowa. 2000); *In re* Fish, 224 B.R. 82 (Bankr. S.D. Ill. 1998).

[424] *See In re* Hardy, 787 F.3d 1189 (8th Cir. 2015).

[425] Board of Retirement v. Superior Court, 124 Cal. Rptr. 2d 850 (Cal. Ct. App. 2002); Anthis v. Copland, 270 P.3d 574 (Wash. 2012). *But see* State Treasurer v. Schuster, 572 N.W.2d 628 (Mich. 1998).

[426] United States v. Lee, 659 F.3d 619 (7th Cir. 2011).

[427] Long Island Trust Co. v. United States Postal Serv., 647 F.2d 336 (2d Cir. 1981); Voss Prods. v. Carlton, 147 F. Supp. 2d 892 (E.D. Tenn. 2001); Marshall v. Dist. Court for Forty-First-b Judicial Dist. of Michigan, Mount Clemens Div., 444 F. Supp. 1110 (E.D. Mich. 1978); Koethe v. Johnson, 328 N.W.2d 293 (Iowa 1982).

There does not appear to be a case that examines this exact issue in relation with criminal justice debt, but there are some cases that examine the interplay between the CCPA and federal administrative garnishment for defaulted student loans which may be analogous. Borrowers who owe defaulted, federally-connected student loan debt are subject to an administrative garnishment procedure under the Higher Education Act. Up to 15 percent (formerly 10 percent) of their wages are subject to this garnishment. Courts have taken several approaches, however, as to how multiple garnishments under administrative processes interact. For example, in *Halperin v. Regional Adjustment Bureau*, a debtor contested three concurrent garnishments, at 10 percent each, for three different student loans. The Court found that, while the 10% limitation applied to each lender and not in the aggregate, the CCPA ultimately limited the *total* garnishment to 25 percent of wages, even though the garnishment was brought under the HEA outside of the CCPA.[428]

6.9. Manner of Raising Exemptions, Due Process and Equal Protection

Even when it is clear that exemptions apply to criminal justice debt, issues of due process and equal protection will often arise in regard to the manner in which these exemptions can be raised. In the world of private sector civil judgments, there are usually well established processes with judicial oversight that allow for debtors to raise exemptions and preserve assets and income. However, for a variety of reasons, due process problems are likely in the involuntary collection of criminal justice debt. Criminal judges and practitioners are often not conversant in the complex law involving civil post-judgment collection procedures. Alternative and automatic collection processes are used that remove these matters from the courts entirely.

Some states have even gone so far as to require that judicial garnishment notices contain mandatory language incorrectly informing debtors that no exemptions apply to the collection of criminal justice debt, adding a new dimension to the constitutional infirmity of the underlying blanket prohibition. For example, in Iowa, the statute covering judicial garnishment notices provides that no exemptions shall apply to fines.[429] The provision ignores the fact that federal exemption law, such as the CCPA and the anti-alienation provisions of ERISA, SSI, and Social Security, preempts any contrary state law that purports to undercut those exemptions.

Other problems arise from automatic processes without the assessment of ability to pay at the time of collection. Tax refund offsets, benefits offsets, and administrative garnishments may not give the opportunity to raise ability to pay arguments at the

[428] Halperin v. Reg'l Adjustment Bureau, Inc., 206 F.3d 1063 (11th Cir. 2000).
[429] Iowa Code § 642.14A.

collection stage, since they occur wholly outside of the courts. In addition to these due process concerns, equal protection principles may require the application of exemptions to debts that arise due to indigence rather than culpability. For example, in the case of indigent defense fees, any differences in the process for raising exemptions will raise equal protection concerns.[430] Automatic procedures such as tax refund offsets may be void on both equal protection and due process grounds if they do not give the debtor the opportunity to establish reasonable ability to pay at time of collection.[431]

6.10. Checklist for Representation of Clients Seeking Relief from Criminal Justice Debt and Collection Actions

Sections 4–6 in this guide discuss different ways individuals who owe criminal justice debt may be able to obtain relief from the debt or from some of the oppressive collection practices that may be used to enforce the debt, including incarceration for nonpayment and garnishment. Below is a brief checklist that may guide attorneys in identifying potential options that may be available to provide relief for a client facing criminal justice debt collection, along with cross references to the sections in this guide that discuss each issue.

- What type of debt is at issue?
  - State, municipal, or federal?
  - Criminal, civil, or juvenile?
  - Fine, restitution, indigent defense attorney fee, bail bond, statutory surcharge, or "user fee" (such as testing fees, prosecution fees, prison fees, supervision fees), interest, collection costs, other? *(see 1.1, 5.3.2)*
- Who is the debtor's criminal defense attorney(s), if any, and would the debtor benefit from representation or sharing of information by a criminal defense attorney and/or consumer attorney? Does the debtor have the right to counsel?
  - Do not assume that individuals with court debt will be appointed counsel. *(see 4.2)*
  - Attorneys funded through the Legal Services Corporation may represent clients in many types of criminal justice debt proceedings. *(see 4.2)*
- Is the client on a payment plan he or she can afford, and what is the payment status?
  - Missed payments may trigger a range of draconian consequences. *(see 4.1)*
  - Possible avenues to relief include seeking modification of a payment plan or cancellation of the debt when an individual is unable to pay due to financial hardship. *(see 4.3)*

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[430] *See* § 2.3, *supra*.

[431] State v. Tennin, 674 N.W.2d 403 (Minn. 2004). *But see* Brown v. Lobdell, 585 P.2d 4 (Or. Ct. App. 1978).

- Is the client on probation or parole, and if so, would missing payments violate the terms of supervision?
  - Violation of probation or parole terms may result in revocation and incarceration. *(see 4.1)*
  - Individuals should not be incarcerated if their nonpayment is due to inability to pay. *(see 4.4)*
- Is the client otherwise at risk of incarceration for nonpayment or failure to appear at hearings related to a debt?
  - Nonpayment or failure to appear at a debt-related hearing may be punishable by incarceration. *(see 4.1)*
  - Individuals should not be incarcerated if their nonpayment is due to inability to pay. *(see 4.4)*
  - Additional federal and state constitutional protections may also provide defenses against incarceration. (*see 4.5–4.6*)
- Is the client facing negative consequences of the debt other than incarceration or garnishment?
  - Clients may face other harmful penalties for nonpayment—including drivers' license suspension and limitations on expungement—in addition to traditional collection actions. *(see 4.1)*
  - Options for relief may include seeking remission of the debt *(see 4.3)*, as well as potential defenses related to constitutional defenses *(see 4.5–4.6)*, and statutes of limitation. *(see 4.7)*
- Is an old debt still collectible?
  - Statute of limitations or repose may protect against enforcement of old debts. *(see 4.7)*
- Would bankruptcy be a good option for the client?
  - Assess whether bankruptcy would discharge the types of debt the client is liable for through either Chapter 7 *(see 5.3.2)* or Chapter 13 *(see 5.4.2)*.
  - Assess whether bankruptcy is appropriate in light of the client's complete financial situation. *(see 5.1)*
- Are the client's wages, benefits, or taxes being garnished or offset, or has there been notice of such action?
  - Exemptions may be available to protect against such involuntary collection practices, and vary depending on whether the debt is owed to the federal *(see 6.5)* vs. state or municipal government *(see 6.6–6.7)*

7. AFFIRMATIVE PROTECTIONS, CLAIMS, AND COUNTERCLAIMS RELATING TO METHODS AND TERMS OF COLLECTION

7.1. Why Consider Affirmative Litigation

Often, the first step in representing a client facing court fines and fees issues will be to resolve the debt or defend against detention or the collection of money or assets. These are likely to be the client's most immediate priorities. In addition to the "defensive" tools described above, however, advocates may consider the applicability of "affirmative" tools. Suing the perpetrator of an injustice related to court fines and fees—whether a state, county, court, or private actor—may allow clients to obtain redress for the harms caused them and, just as importantly, halt ongoing illegal conduct. Furthermore, by stepping into the role of revenue generator, actors in the criminal and civil justice systems engage in market participant conduct that our system regulates in part through private, affirmative civil litigation. Policing the court fee and fine system through this mechanism is thus critical in filling the current regulatory void.

Affirmative litigation may also allow victims of unjust court fines and fee practice to access remedies that might not be available through defensive litigation. In some ways, court fines and fees create a unique potential for affirmative litigation. On the one hand, to some extent, criminal justice debtors are, like other debtors, protected from unfair, discriminatory, deceptive, and abusive practices with respect to the methods and terms of fee and fine imposition and collection. In this way, debtors who owe court fines and fees are protected by broad and powerful consumer protection statutes that yield important remedies, including injunctive relief and statutory damages. Unlike most other consumer cases, however, criminal justice debtors also might have constitutional claims that are not available in cases involving purely private actors. In these sense, the government's dual role in the court fees and fine context—both as a state actor involved in the administrative of public judicial and law enforcement functions and as a quasi-private actor seeking to raise and collect funds—subjects it to a unique array of potential claims, although these claims involve significant additional procedural complications.

None of this is to say that affirmative litigation against a governmental entity is in any way easy. Such litigation must take into account an array of procedural hurdles, and must be very carefully planned and executed. While this guide should give advocates the basic lay of the land in planning to meet the unique challenges inherent in this kind of action, this material is not intended to be a substitute for case-specific consultation with practitioners experienced with bringing cases in this area. Advocates should seek as much outside support as possible before making their first forays into the world of affirmative litigation against governmental entities.

7.2. Bars to Affirmative Litigation

7.2.1. Sovereign and Qualified Immunity

While the involvement of government officials in the collection of court fines and fees allows for constitutional claims, it also raises some complications. The question of sovereign immunity is often at issue. The Eleventh Amendment protects states from claims for monetary damages in federal court,[432] and even prevents Congress from subjecting state governments to suit in state court without their consent.[433] However, while these claims are not always easy to bring, the following avenues for litigation are not foreclosed by the Eleventh Amendment:

- Suits against state officials, rather than the states themselves, seeking injunctive and declaratory relief.[434]
- Suits against "municipalities and other local governments" that maintain "custom[s], polic[ies], or practices that violate[] federal law,"[435] provided that those entities are not considered an "arm of the state" rather than a true municipal body.[436]
- Suits against state officials in their individual capacities seeking damages to be paid by the official himself, subject to certain immunity doctrines.[437] Most government officials are subject to suit in their personal capacities subject to qualified immunity, which protects conduct within the discretion of a public official unless that conduct violates "clearly established" law.[438]

7.2.2. Judicial Immunity

7.2.2.1. Background Principles

In considering affirmative litigation against the actors who perpetuate unjust criminal justice debt policies and practices, advocates should be mindful of the possibility that some defendants might be protected by judicial immunity. Unlike qualified immunity, judicial immunity is absolute. This means that a state or local official who is covered by judicial immunity is completely immune from suit for damages, no matter how egregious the misconduct. Additionally, Section 1983 itself limits claims against judges for injunctive relief arising out of actions taken in their judicial capacity. Together, these

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[432] Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).
[433] U.S. Const. amend. XI. *See also* Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999);.
[434] *Ex parte* Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).
[435] Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).
[436] McMillian v. Monroe County, 520 U.S. 781, 785, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997).
[437] *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247–249, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).
[438] Reichle v. Howards, ___ U.S. ___, 132 S. Ct. 2088, 2093, 2088, 182 L. Ed. 2d 985 (2012).

two immunity doctrines can pose significant challenges to suing judges directly for their role in court debt collection schemes.

The purpose of judicial immunity is to ensure uninhibited judicial decision-making, without judges having to fear that incorrect decisions will subject them to litigation. The Supreme Court has explained:

> *[T]he nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have. . . . [T]his is the principal characteristic that adjudication has in common with legislation and with criminal prosecution, which are the two other areas in which absolute immunity has most generously been provided. If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits.*[439]

In deciding whether judicial immunity attaches to any particular act, courts are guided by the purposes of the doctrine, and "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those [judicial] functions."[440] When considering this question, courts consider the following factors, none of which is dispositive: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom;[441] (3) whether the controversy centered around a case pending before the court, and (4) whether the acts arose directly out of a visit to the judge in her official capacity.[442] Immunity "is justified and defined by the functions it protects and serves, not by the person to whom it attaches."[443]

The guiding principle in deciding any judicial immunity question is determining whether judicial discretion would be improperly chilled if the judicial actor were exposed to liability for the alleged conduct. This does not mean, however, that the doctrine only applies where judges exercise discretion in deciding cases, ruling on motions, or at sentencing. Courts have also concluded that judicial decisions to implement certain security requirements in a courtroom are covered by immunity because "it is the judge's responsibility to exercise control over the courtroom and take security precautions during a trial."[444] And they have concluded as well that courts are immune from liability when they resolve fee requests submitted by court-appointed counsel.[445] Like-

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[439] Forrester v. White, 484 U.S. 219, 226–227, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

[440] Forrester v. White, 484 U.S. 219, 224, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

[441] A judge's actions may be judicial in nature even though they occurred in the judge's chambers rather than in the courtroom. Ballard v. Wall, 413 F.3d 510, 515 (5th Cir. 2005).

[442] Mireles v. Waco, 502 U.S. 9, 12, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991).

[443] Forrester v. White, 484 U.S. 219, 227, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

[444] Martinez v. Winner, 771 F.2d 424, 434 (10th Cir. 1985).

[445] Bliven v. Hunt, 579 F.3d 204, 211 (2d Cir. 2009).

wise, judicial immunity sometimes attaches to actors who do not themselves exercise judicial discretion. When an official performs a function in the course of a particular judicial proceeding, and performs that function at the instance of the court, the official will generally be absolutely immune from damages suits.[446]

In distilling the doctrine, the Second Circuit has explained that "[t]he principal hallmark of the judicial function is a decision in relation to a particular case."[447] For example, in *Morrison v. Lipscomb*, the Sixth Circuit decided that a judge was not entitled to judicial immunity for his decision to issue a temporary ban on "writs of restitution." Even though "no one but a judge could issue such an order,"[448] the court's order was administrative, and not judicial, because it "was a general order, not connected to any particular litigation," and it could not be appealed.[449]

Furthermore, because judicial immunity is designed to protect judges against litigation that revisits the rationale for specific decisions made in a judicial function, as a general matter, it does not foreclose the pursue of prospective relief. In *Pulliam v. Allen*,[450] a magistrate who jailed indigents for non-jailable misdemeanors when they could not make bail was held to be subject to prospective injunctive and declaratory relief, as well as recovery of attorney fees and costs. In 1996, however, Congress legislatively restored complete judicial immunity in regard to prospective injunctive relief under section 1983 and eliminated the right to attorney's fees for injunctive relief against judicial officers.[451] So, in a section 1983 context, suits may still be maintained against judges in their individual capacity for declaratory relief, and outside of the section 1983 context, for example under the Equal Credit Opportunity Act (ECOA), injunctions and attorney's fees may still be available against judicial actors.

7.2.2.2. Specific Considerations for Criminal Justice Debt Litigation

To avoid running into judicial immunity problems in criminal justice debt litigation, advocates seeking to bring affirmative litigation should focus on identifying court practices that are the result of policies or widespread custom, and therefore are not simply the result of individual judges in individual cases. Suits based on these policies and

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[446] Dorman v. Higgins, 821 F.2d 133, 137 (2d Cir. 1987) ("The probation officer prepares the report at the instance of the court. Although a secondary use of the report is to provide information to the United States Parole Commission and the Bureau of Prisons for use in their release and confinement decisions, the presentence report is a court document and may not be disclosed to others without the permission of the court.").

[447] Bliven v. Hunt, 579 F.3d 204, 211 (2d Cir. 2009).

[448] Morrison v. Lipscomb, 877 F.2d 463, 466 (6th Cir. 1989).

[449] *Id.* at 466.

[450] 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984).

[451] 42 U.S.C. § 1988(b).

practices are unlikely to chill judicial actors from exercising their discretion in particular cases. However, in framing the policy at issue as administrative versus judicial, advocates should also be wary of running into "legislative immunity" bars. When courts promulgate official rules, and particularly where they do so pursuant to delegated legislative authority, they are likely immune from suit.[452] On the other end of the spectrum, it is probably not sufficient to allege merely that the judges engaged in an illegal unspoken pattern of misconduct related to criminal justice debt, such as imposing jail sentences on indigent people who owed fines and fees.[453] As opposed to a *pattern* of misconduct, which may appear too closely related to decision-making in individual cases, advocates should attempt to identify *policies* that apply across cases.

Second, advocates should consider bringing suit against non-judicial actors, such as municipalities, official capacity suits involving other state agencies, judicial administrative bodies, and private contractors. Although judicial immunity often stretches to cover court officers who are not judges, including probation officers and court clerks, it does not cover non-judicial entities who set policies for courts. Although sovereign immunity may shield states from liability, municipalities that run courts might (in some cases) be protected by neither judicial nor sovereign immunity.[454] Furthermore, although courts themselves may be shielded from liability, in many cases, they will rely on non-judicial actors to effectuate their judgments—for example, departments of motor vehicles to suspend drivers' licenses.[455]

Lastly, advocates should always consider declaratory, and in certain cases, particularly outside of the section 1983 context, injunctive relief. [456]

7.2.3. Abstention

7.2.3.1. Introduction

One of the many obstacles to bringing affirmative litigation to challenge criminal justice debt practices in federal court is "abstention," where federal courts abstain from exercising jurisdiction over a matter involving state law or adjudications. What follows is a brief list of abstention and related doctrines likely to confront advocates pursuing

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[452] Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980).

[453] Cain v. City of New Orleans, 2016 WL 1756537, at *8 (E.D. La. May 3, 2016).

[454] Rodriguez v. Providence Cmty. Corr., Inc., 2016 WL 3351944, at *4 (M.D. Tenn. June 9, 2016).

[455] Class Action Complaint, Stinnie v. Holcomb (W.D. Va. July 6, 2016), *available at* https://www.justice4all.org/wp-content/uploads/2016/07/Complaint-Drivers-License-Suspension-for-Court-Debt.pdf (describing how the DMV receives and processes instructions from courts to suspend drivers licenses for failure to pay criminal justice debt).

[456] Ward v. City of Norwalk, 640 Fed. Appx. 462, 468 (6th Cir. 2016); Cain v. City of New Orleans, 2016 WL 1756537, at *5 (E.D. La. May 3, 2016).

affirmative claims on behalf of criminal justice debtors. These doctrines have historically been used to bar litigation challenging the imposition and collection of court fine and fees, although more recent litigation has been able to surmount these challenges.

7.2.3.2. *Younger* Abstention

In some cases, *Younger* abstention prevents federal courts from intervening in ongoing state court proceedings.[457] *Younger* abstention applies only to (1) "ongoing state criminal prosecutions," (2) certain "civil enforcement proceedings" that are "akin to criminal prosecution in important respects," and (3) "pending civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions."[458] *Younger* abstention clearly applies to ongoing state criminal prosecutions.[459]

Younger abstention only prohibits interference with ongoing proceedings.[460] Criminal prosecutions cease to be "ongoing" once the defendant has exhausted his opportunities to appeal.[461] Also, *Younger* will generally not apply to illegal treatment of criminal defendants before *any* proceeding: "[W]hen it comes to the adequacy of the state court proceedings as an opportunity to address constitutional harms, the opportunity must be available before the harm is inflicted."[462] Finally, *Younger* abstention does not bar an attack on a matter collateral to a criminal prosecution.[463]

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[457] Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

[458] Sprint Communications, Inc. v. Jacobs, ___ U.S. ___, 134 S. Ct. 584, 591, 187 L. Ed. 2d 505 (2013).

[459] *Id.*

[460] Wooley v. Maynard, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977).

[461] *See generally* Steffel v. Thompson, 415 U.S. 452, 462, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) ("When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles."); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 369, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) ("[T]he proceeding is not complete until judicial review is concluded....For *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system. . . ."); Powers v. Hamilton Cnty. Pub. Def. Comm'n, 501 F.3d 592, 605–606 (6th Cir. 2007) (finding *Younger* inapplicable after state court revoked plaintiff's probation months before he filed suit because the "proceedings in state court have long since concluded"); Abusaid v. Hillsborough Cty. Bd. of Cnty. Comm'rs, 405 F.3d 1298, 1316 n.9 (11th Cir. 2005) (finding *Younger* abstention "clearly erroneous" when plaintiff "has already been tried and convicted . . . and none of the parties suggests that any charges remain pending against him"); Trombley v. Cnty. of Cascade, Mont., 879 F.2d 866 (9th Cir.1989) (finding no ongoing proceeding when plaintiff "has pleaded guilty and is currently out on parole"); Almodovar v. Reiner, 832 F.2d 1138, 1141 (9th Cir. 1987) ("Probation is not a pending criminal action for *Younger* purposes.").

[462] Rodriguez v. Providence Cmty. Corrections, Inc., 155 F. Supp. 3d 758 (M.D. Tenn. 2015) (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

[463] Parker v. Turner, 626 F.2d 1, 8 (6th Cir.1980).

Younger has been an obstacle in the past in regard to raising federal challenges involving incarceration for nonpayment of criminal justice debt. However, in a string of recent decisions, courts have rejected the application of *Younger* to bar challenges to post-conviction collection practices.[464] These courts have largely focused on the collateral nature of the action, and the lack of an ongoing state prosecution. This suggests that, despite the hurdle of *Younger*, well-crafted affirmative claims raised under consumer protection statutes may, as collateral actions, have a similar chance of success.

7.2.3.3. *Heck v. Humphrey*

A 1994 Supreme Court decision, *Heck v. Humphrey*, bars relief for allegedly unconstitutional convictions or imprisonment, or for other harm caused by state court actions whose unlawfulness would render a conviction or sentence invalid, unless the plaintiff proves that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus.[465] However, *Heck* does not apply to collateral actions that do not attack the validity of the underlying conviction or sentence.[466]

In a criminal justice debt context, courts have refused to apply *Heck* to bar challenges to post-conviction collection practices that do not directly attack the validity of the underlying conviction or sentence.[467]

7.2.3.4. *Rooker-Feldman*

The *Rooker-Feldman* doctrine, which is a matter of jurisdiction rather than abstention, bars federal district courts from modifying or reversing state court judgments.[468] A federal court lacks jurisdiction only when the losing party in a state court action seeks "what in substance would be appellate review of the state judgment[,]"[469] or when the plaintiff's injury was caused by the state court's ruling and the plaintiff must seeks relief that would undo that judgment.[470] *Rooker-Feldman* does not prohibit a federal

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[464] Cain v. City of New Orleans, 2016 WL 1598606 (E.D. La. Apr. 21, 2016); Buffin v. City & Cnty. of San Francisco, 2016 WL 374230 (N.D. Cal. Feb. 1, 2016); Rodriguez v. Providence Cmty. Corrections, 155 F. Supp. 3d 758 (M.D. Tenn. 2015); Ray v. Judicial Corrections Servs., 2013 WL 5428360 (N.D. Ala. Sept. 26, 2013).

[465] Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383, (1994).

[466] Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592 (6th Cir. 2007).

[467] *See* Fant v. City of Ferguson, 107 F. Supp. 3d 1016 (E.D. Mo. 2015); Cain v. City of New Orleans, 2016 WL 1598606 (E.D. La. Apr. 21, 2016).

[468] Rooker v. Fid. Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).

[469] Johnson v. De Grandy, 512 U.S. 997, 1005–1006, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994)

[470] Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 293 n.2, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005).

plaintiff from "present[ing] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party."[471]

In a criminal justice debt context, at least one recent decision has rejected the application of *Rooker-Feldman* to a challenge that focused on post-conviction collection practices rather than the validity of the underlying conviction.[472]

7.2.4. Arbitration

An additional potential impediment to bringing affirmative litigation based on criminal justice debt issues is the existence of arbitration agreements within contracts purportedly entered into by the criminal justice debtor with the entity imposing or collecting the debt. Arbitration agreements are familiar to many consumer and worker advocates,[473] but they are still a relative rarity in the criminal justice debt world. Nonetheless, perhaps in response to the flurry of recent litigation surrounding criminal justice debt issues, the typical defendants in these cases have started to add arbitration agreements to their form contracts.[474] Particularly because creditors and collectors of criminal justice debt are not covered by recent federal regulatory reforms that limit the enforceability of arbitration agreements and class waivers—including the CFPB's recent proposal to prohibit providers of consumer financial services and products from inserting class waivers into their contracts with consumers[475]—criminal justice debtors are likely to see the issue arise in an increasing number of cases going forward.

First, a note about what arbitration (sometimes called "forced arbitration") is: "Forced arbitration" clauses are fine-print terms included in contracts of adhesion that, in the criminal justice debt context, require the criminal justice debtor to give up her constitutional right to assert claims against the merchant or employer in court as a condition of receiving the services of the creditor or collector. Instead the arbitration agreement requires the criminal justice debtor to bring her claims in a private forum designated in the arbitration agreement. In the vast majority of cases, the arbitration agreement will also force the criminal justice debtor to bring her claims individually, *i.e.* without access to the class action procedures that are often critical in affirmative litigation.[476]

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[471] Exxon Mobil v. Saudi Basic Industries Corp., 544 U.S. 280, 293, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005).

[472] Cain v. City of New Orleans, 2016 WL 1598606 (E.D. La. Apr. 21, 2016); Fant v. City of Ferguson, 107 F. Supp. 3d 1016 (E.D. Mo. 2015)

[473] National Consumer Law Center, Consumer Arbitration Agreements (7th ed. 2015), updated at www.nclc.org/library.

[474] *See, e.g.*, Luse v. Sentinel Offender Servs, L.L.C., 2:16-mi-00030-UNA (N.D. Ga.) (private probation company); Breazeale v. Victims Servs., Inc., 14-cv-05266 (N.D. Cal.) (check diversion company).

[475] Bur. of Consumer Financial Protection, Proposed Rules, Arbitration Agreements, 81 Fed. Reg. 32,830 (May 24, 2016).

[476] National Consumer Law Center, Consumer Arbitration Agreements Ch. 1 (7th ed. 2015), updated at

In general, businesses are allowed to write their contracts with consumers, workers, and others this way because of the Supreme Court's interpretations of the Federal Arbitration Act (FAA).[477] A series of recent Supreme Court decisions has expanded the Act's reach to cover almost all employment and consumer contracts, and has allowed drafters to include so-called "class waivers" in their arbitration agreements to force individuals to give up their right to participate in class actions.[478]

In resisting the enforcement of arbitration agreements (and class waivers), criminal justice debtors should first look to the conventional bases for avoiding arbitration. First, arbitration is a creature of contract. And before a court can compel arbitration of any dispute it has to be assured that the parties have actually entered into an arbitration agreement.[479] Just because a consumer has not read or understood an arbitration agreement is not generally sufficient to establish that she has not entered into an agreement to arbitrate. But the coercive nature of many criminal justice debt cases likely undermines contract formation. For example, the criminal justice debtor unlikely entered into an arbitration agreement voluntarily if her entire relationship with the other party was based on the threat of criminal prosecution or even incarceration.

Second, criminal justice debtors should look for features of the arbitration agreement that might render it substantively unconscionable or unenforceable as a matter of federal law because it conflicts with the debtor's ability to vindicate her federal rights.[480] These include arbitration agreements that force the criminal justice debtor to waive her right to bring certain substantive claims or recover certain remedies otherwise available under the law, or terms that require her to pay excessive costs and fees.

Finally, if neither of these conventional arguments bears fruit, criminal justice debtors should consider constitutional arguments that may have traction in the criminal justice debt context. The constitutionality of private arbitration agreements has sometimes been called into doubt, but the Supreme Court on numerous occasions has upheld the

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www.nclc.org/library.

[477] 9 U.S.C. §§ 1–16.

[478] Am. Express Co. v. Italian Colors Rest., ___ U.S. ___, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013); AT&T Mobility L.L.C v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

[479] *See, e.g.*, Sgouros v. TransUnion Corp., 817 F.3d 1029, 1036 (7th Cir. 2016) ("That text distracted the purchaser from the Service Agreement by informing him that clicking served a particular purpose unrelated to the Agreement."); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014) ("[W]here a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice"); Schnabel v. Trilegiant Corp., 697 F.3d 110 (2d Cir. 2012).

[480] National Consumer Law Center, Consumer Arbitration Agreements Chs. 5, 6 (7th ed. 2015), *updated at* www.nclc.org/library.

legitimacy of arbitration agreements as a matter of federal law. The landscape is arguably different, however, in cases where the entity imposing the arbitration requirement is a state actor (e.g., a for-profit probation company enlisted by a municipality to collect fines and fees for the municipal court). There should be no question that the Constitution would apply to state legislation providing that any person who receives its services must use a special, private dispute resolution system for resolving disputes related to those serves.[481] And state actor defendants should not be able to avoid constitutional scrutiny by embedding such a rule within a purported agreement in an attempt to gain the FAA's protection.

If the potential defendant is a state actor, a contractual arbitration requirement potentially deprives the debtor of the constitutional right to access a public, judicial forum to bring her claims against public actors. That right is deeply embedded in our constitutional framework and potentially derives from a number of constitutional sources.[482] The Supreme Court has concluded in other contexts, for example, that "it would be destructive of rights . . . of petition [protected by the First Amendment] to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view."[483] In other words, the Constitution recognizes an interest in accessing a public judicial forum to air grievances against a public actor.[484]

An individual may, of course, contract with the government to surrender a constitutional right, including perhaps the right to access a public judicial forum, even if the government would otherwise have to comply with procedural due process to deprive her of that right unilaterally. But to ensure that state actors do not bypass procedural due process by forcing individuals to waive protected interests, the Constitution requires that the government obtain such waivers only through knowing, voluntary, and intelligent consent.[485] In other words, although the Constitution may not require courts

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[481] *See* Delaware Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013) (addressing constitutionality of Delaware statute providing for confidential arbitration forum for business parties).

[482] *See, e.g.*, Christopher v. Harbury, 536 U.S. 403, 415 n.12, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002) (collecting cases locating the right of access to courts within the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and Due Process Clauses).

[483] California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510–511, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

[484] *See* Hudson v. Palmer, 468 U.S. 517, 523, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) ("[L]ike others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.").

[485] *See* Boykin v. Alabama, 395 U.S. 238, 242, 243 n.5, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (guilty plea must be "intelligent and voluntary"; "[I]f a defendant's guilty plea is not equally voluntary and

to apply a "knowing and voluntary" standard to determine whether private parties have entered into an arbitration agreement, when one of those parties is a state actor, constitutional waiver principles apply.[486] In most criminal justice debt cases, even if the criminal justice debtor did assent to the arbitration agreement on normal contract law principles, defendants will have a difficult time showing that her assent meets the higher constitutional standard for a knowing, voluntary, and intelligent waiver.

7.3. Affirmative Constitutional Claims

7.3.1. Constitutional Principles

7.3.1.1. Types of Constitutional Claims

As discussed in Section 2, constitutional rights founded in the Fourteenth Amendment Due Process and Equal Protection clauses underpin the most fundamental legal protections for indigent people with criminal justice debt. These rights may give rise to a variety of claims challenging criminal justice debt practices. Additionally, criminal justice debt practices may implicate the Sixth Amendment right to counsel and the Eighth Amendment Excessive Fines clause. These various constitutional protections may be asserted in defending against incarceration for nonpayment of criminal justice debt, as discussed in Sections 4.4 and 4.5, or raised in a habeas petition by a defendant being held for nonpayment, as in *Tate v. Short*.[487] They may also be raised in affirmative litigation, which may provide counsel more time to fully develop evidence and arguments in support—as compared to often rushed or informal defensive proceedings on criminal justice debt—and may allow opportunity to seek systemic as well as individual relief.

While there is potential for a wide variety of constitutional claims attacking criminal justice debt practices, these claims generally fall into some combination of four different legal rubrics: due process-based claims, equal protection-based claims, structural claims, and substantive claims. Very often claims fall into two or more of the categories. The discussion below highlights some potential claims stemming from each category, but is by no means exhaustive.

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knowing, it has been obtained in violation of due process."). *See also* Wellness Int'l Network, Ltd. v. Sharif, ___ U.S. ___, 135 S. Ct. 1932, 1948, 191 L. Ed. 2d 911 (2015); Godinez v. Moran, 509 U.S. 389, 400, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (waiver of right to counsel must be intelligent and voluntary).

[486] *See, e.g.*, Leonard v. Clark, 12 F.3d 885, 890 (9th Cir. 1993) (concluding that fire fighter union had voluntarily, knowingly, and intelligently waived its First Amendment rights in collective bargaining agreement with city).

[487] 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971).

7.3.1.2. Process-based Claims

Most process-based claims turn on the failure to conduct an adequate ability to pay determination. As explained above,[488] pursuant to *Turner v. Rogers*, before imprisoning someone for failure to make a payment, a court must provide the defendant with due process, including a meaningful assessment of ability to pay.[489] Ensuring that the assessment is meaningful may require appointment of counsel and other procedural protections generally afforded to criminal defendants. In the alternative, procedural safeguards that the Court recognized as appropriate in some civil contempt proceedings may be sufficient: "(1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay."[490]

Similarly, depending on the procedural posture and other due process safeguards provided, indigent criminal justice debtors may have a Sixth or Fourteenth Amendment right to appointed counsel to represent them in proceedings, including ability to pay hearings, that result in incarceration.[491] Thus a jurisdiction's practices for provision of indigent defense counsel for criminal justice debt-related proceedings at which incarceration may be ordered may be susceptible to challenge under the Sixth or Fourteenth Amendment to the extent the practices prevent indigent defendants from exercising their right to effective counsel in criminal proceedings or to due process in all proceedings that may result in deprivation of liberty.[492]

Counsel costs may also be problematic. As discussed in *Confronting Criminal Justice Debt: A Guide for Policy Reform* at 19-20 (2016), requiring indigent defendants to pay unaffordable indigent defense counsel costs and other court-related costs that mount precipitously if a defendant goes to trial burdens the exercise of indigent defendants' Sixth Amendment rights to counsel and trial. While the Supreme Court, in *Fuller v. Oregon*,

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[488] *See* §§ 2.2, 2.4, 4.4, *supra*.

[489] 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011).

[490] Turner v. Rogers, 131 S. Ct. 2507, 2511 (2011) *See generally* § 2.4, *supra*.

[491] Argersinger v. Hamlin, 407 U.S. 25, 27, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); see § 4.2, *supra,* for a discussion and references regarding the right to appointed counsel in the various types of criminal justice debt proceedings that may result in incarceration.

[492] *See, e.g.*, Fant v. City of Ferguson, 107 F. Supp. 3d 1016, 1034 (E.D. Mo. 2015) ("Plaintiffs have stated a plausible claim that the City's failure to appoint counsel or obtain waivers thereof violated Plaintiffs' due process rights, particularly in light of their allegations that they were also not also not afforded any hearing, inquiry into ability to pay, or alternative procedural safeguards in connection with their incarceration.").

rejected this argument as applied to an Oregon's statute imposing indigent defense counsel costs on convicted defendants, it found that the challenged statute only imposed costs on those defendants who were indigent at the time but subsequently gained the ability to pay such costs.[493] Laws or procedures that impose indigent defense counsel costs on individuals even without subsequent ability to pay may be subject to constitutional challenge.

7.3.1.3. Equal Protection Claims

Equal protection-based claims often turn on allegations that criminal justice debtors are treated differently (and more harshly) than other civil judgment debtors under the reasoning of *James v. Strange*.[494] For example, a criminal justice debtor who has been incarcerated, been subject to an arrest warrant, been denied garnishment or bankruptcy protections, or suffered a driver's license suspension as a consequence of failing to pay criminal justice debt may have an equal protection claim on the basis that other judgment debtors would not face these same consequences for failure to pay civil judgments.[495] However, as noted above in the discussion of *James*, advocates should be aware that some courts have read *James v. Strange* narrowly in considering application to criminal justice debts beyond indigent defense fees.[496]

Challenges to criminal justice debt schemes that irrationally discriminate on the basis of wealth, or that discriminatorily infringe on a fundamental right or interest of the poor, may also be viable under the Equal Protection Clause.[497] For example, a district court recently allowed a claim to move forward based on the differing probation treatment of individuals who were able to pay their fines and costs immediately, versus those who were unable to pay. As the court explained in finding the allegations sufficient to state a claim:

> *Plaintiffs are similarly situated to those offenders who escape [the private probation company's] clutches in all respects but one: wealth. They have pleaded or been found guilty of the same offenses and sentenced to the same fines. Because Plaintiffs, who are indigent, cannot afford to*

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[493] Fuller v. Oregon, 417 U.S. 40, 47, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). *See generally* § 2.3, *supra* (additional discussion of *Fuller*).

[494] James v. Strange, 407 U.S. 128, 129, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972). *See generally* § 2.3, *supra*.

[495] *See supra* nn.72-73.

[496] *See id.*. *See also* United States v. Cunningham, 866 F. Supp. 2d 1050, 1058 (S.D. Iowa 2012) (holding that *James* did not bar discrimination against debtor who owed criminal restitution, in part based on the court's assertion that restitution is "penal in nature").

[497] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980) (noting that "poverty, standing alone is not a suspect classification" and assessing equal protection claim in abortion funding restriction case under rational basis standard); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17–30, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (discussing standards applicable to assessing claims of wealth discrimination under the Equal Protection Claus).

> *pay their fines and costs immediately, they are subject to supervised probation and its attendant terms, conditions, and consequences while those who can pay receive only unsupervised probation. The rationality of this wealth-based distinction is called into question by the fact that the County has alternative mechanisms for collecting outstanding fines and costs, namely, court-administered payment plans.*[498]

This type of challenge may similarly apply to systems that require supervision until criminal justice debts are paid off in full.

7.3.1.4. Structural Claims

Structural claims attacking inherently prejudicial mechanisms for assessing and collecting court fines and fees may also be founded in the Due Process Clause. The Due Process Clause prohibits judicial officers from having a personal, financial stake in the outcome of a case.[499] This protection may be compromised when a court or a private probation company it contracts with benefits financially from judicial decisions in which they are involved about imposition or collection of criminal justice debts. For example, in a recent case brought by criminal justice debtors against, among others, a private probation company and Rutherford County, Tennessee, the plaintiffs allege that the private probation company serves a key role in administering probation while simultaneously collecting its revenue from user fees that it was responsible for imposing on and extracting from those it was supervising.[500] Plaintiffs alleged defendants violated due process by making the plaintiffs' criminal proceedings "contingent on the demands, advice, recommendations, discretionary decisions, enforcement actions, testimony, and representations" of a private entity with a direct financial stake in each plaintiff's case.[501]

7.3.1.5. Substantive Claims Challenging Excessive Fines

Finally, the Eighth Amendment's Excessive Fines Clause is, on its face, directly applicable to government-imposed fines. Although most doctrine interpreting the clause has narrowly limited its application to punitive fines that are grossly disproportionate to the offense, some scholars have posited that the historical record supports a broader reading that would assess the full costs imposed and the excessive impact of those costs

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[498] Rodriguez v. Providence Cmty. Corr., Inc., 2016 WL 3351944, at *13 (M.D. Tenn. June 9, 2016).

[499] *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 870, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

[500] Rodriguez v. Providence Cmty. Corr., Inc., 2016 WL 3351944, at *4 (M.D. Tenn. June 9, 2016).

[501] Complaint, Rodriguez v. Providence Cmty. Corr., Inc., No. 3:15-CV-01048, at ¶ 283 (M.D. Tenn.) (class action), *available at* http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/10/complaint_file_stamped.pdf.

on indigent defendants.[502] Some state courts have considered defendants' financial status part of the Eighth Amendment inquiry.[503]

7.3.2. Examples of Affirmative Constitutional Claims in Criminal Justice Debt Cases

Notwithstanding the foundational criminal justice debt cases of the 1970s, this area of constitutional law is still very much developing. The growing use of onerous fines, fees, and costs in recent years, along with increased attention to the harms they impose, has contributed to a new wave of litigation.[504]

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[502] *See* Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1636–1637 (2015) (discussing recent Excessive Fines clause literature and its application to criminal justice fines and fees). *See also* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277 (2014) (analyzing the historical record and arguing that the Excessive Fines Clause of the Eighth Amendment should be interpreted to provide greater individual protections); 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 (2014)* (arguing that user fees charged to prison inmates may violate the Excessive Fines Clause of the Eighth Amendment, and recommending litigation strategies); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 893–894 (2013) (arguing that a narrow interpretation of the Excessive Fines clause is not compelled by Supreme Court jurisprudence, and that historical tradition supports consideration of defendant's ability to pay).

[503] *See, e.g.*, State v. Wise, 795 P.2d 217 (Ariz. 1990) (ability to pay is one factor in the analysis of whether a fine is excessive, but is not dispositive); People v. Malone, 923 P.2d 163 (Colo. App. 1995) (under Eighth Amendment, in determining appropriate level of fine, court must consider particular financial circumstances of defendant). *See also* United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) (question of whether trial court should consider defendant's financial status unresolved).

[504] This includes recent cases challenging constitutionality of criminal justice debt-related practices in Alabama, Georgia, Louisiana, Mississippi, Missouri, Tennessee, Washington, and Virginia, some of which have already settled with agreements for significant injunctive reforms. *See* Foster v. City of Alexander, 3:15-cv-647-WKW (M.D. Ala. Sept. 8, 201); Settlement Agreement, Mitchell v. The City of Montgomery, 14-cv-00186 (M.D. Ala. May 1, 2014), *available at* **http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Final-Settlement-Agreement.pdf**; *Edwards v. Red Hills Cmty. Probation, L.L.C., et al.,* No. 1:15-cv-67-LJA (M.D. Ga. Apr. 10, 2015); Settlement Agreement, Thompson v. DeKalb County, 1:15-cv-00280 (N.D. Ga. Jan.29, 2015), *available at* **https://www.aclu.org/files/assets/thompson_v_dekalb_county_settlement_agreement_03182015.pdf**; Cain v. City of New Orleans, 2:15-cv-04479-SSV-JCW (E.D. La. Sept. 21, 2015); Kennedy v. City of Biloxi, 1:15-cv-348-HSO-JCG (S.D. Miss. Oct. 21, 2015); Fant v. The City of Ferguson, 4:15-cv-00253 (E.D. Mo. Feb. 18, 2015); Rodriguez v. Providence Cmty. Corr., Inc., 2016 WL 3351944, at *4 (M.D. Tenn. June 9, 2016); Fuentes v. Benton County (Wash. Super. Ct. Yakima Cnty. Oct. 6, 2015); Class Action Complaint, Stinnie v. Holcomb (E.D. Va. July 6, 2016), *available at* **https://www.justice4all.org/wp-content/uploads/2016/07/Complaint-Drivers-License-Suspension-for-Court-Debt.pdf**. *See also* Complaint, United States v. Ferguson, 4:16-cv-00180 (E.D. Mo. Feb. 10, 2015) (complaint by United States against City of Ferguson challenging, among other things, Ferguson's practice of "prosecuting and resolving municipal charges in a manner that violates the due process and equal protection clauses of the Fourteenth Amendment").

As just one example of recent litigation that effectively pursued Fourteenth Amendment claims affirmatively to attain both individual and systemic injunctive relief, criminal justice debtors brought a class action against Montgomery, Alabama for operating what amounted to a debtors' prison. Count I of the complaint alleged that the City had violated the Fourteenth Amendment's Due Process and Equal Protection clauses by imprisoning them "without conducting any inquiry into their ability to pay and without conducting any inquiry into alternatives to imprisonment as required by the United States Constitution," and by failing to provide required notice and opportunity to plaintiffs to present evidence of inability to pay.[505] The district court granted plaintiffs' motion for preliminary injunction enjoining the city from collecting or attempting to collect the plaintiffs' outstanding criminal justice debt, concluding that:

> *Plaintiffs have a substantial likelihood of success on the merits of its claim that Defendant City of Montgomery ("the City") violated their Fourteenth Amendment due process and equal protection rights as outlined in Bearden v. Georgia, 461 U.S. 660 (1983), by imprisoning them, and by threatening to imprison them, for failing to pay the balance on outstanding fines, fees, and costs associated with traffic tickets they incurred without first conducting a meaningful inquiry into the reasons for their failure to pay, including their potential status as indigents, and without considering alternatives to imprisonment.*[506]

The court further ordered the city to submit "a comprehensive plan listing the current or proposed policies and procedures the City follows or intends to follow" in making future determinations as to ability to pay, "which shall comply with all applicable federal and state laws and the Alabama Rules of Criminal Procedure."[507] The parties shortly thereafter entered a settlement agreement providing for injunctive relief, including requirements to follow—and document compliance with—a set of written procedures for assessing ability to pay, providing defense counsel for ability-to-pay hearings, barring incarceration based on inability to pay, and providing indigent defendants (defined as those below 125% of the federal poverty level without substantial liquid

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[505] Complaint, Mitchell v. The City of Montgomery, 14-cv-00186 (M.D. Ala. May 23, 2014) (Dkt. 26) (first am. class compl.), *available at* http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Complaint.pdf. The complaint also alleged that the City violated the Sixth and Fourteenth Amendments through its practice of not providing indigent debtors with counsel at proceedings in imprisonment was ordered; violated the Due Process clause by involving a financially self-interested private probation company in decisions impacting debtors; violated the Equal Protection Clause by imposing unduly harsh collection methods on indigent debtors who owe money to the government compared to those who owe such debt to private creditors; violated the Equal Protection Clause by placing people on probation based on their wealth status and thus inability to pay a debt immediately; and violated the Thirteenth Amendment and federal statute by imprisoning debtors for longer if they did not perform labor to work off the debt while imprisoned.

[506] Mitchell v. The City of Montgomery, 14-cv-00186 (M.D. Ala. May 1, 2014) (Dkt. 18).

[507] *Id.*

assets) the options of either paying $25 per month with no additional payment plan fees or performing community service.[508]

Advocates are also looking to the Fourteenth Amendment to challenge harmful practices beyond incarceration that unduly punish criminal justice debtors for being poor. For example, in July 2016 the Legal Aid Justice Center filed a class action complaint against the commissioner of the Virginia DMV on behalf of a putative class of Virginia residents whose driver's licenses are suspended due to unpaid criminal justice debt and who were not able to pay the debt at the time of the suspension.[509] The complaint alleges that nearly one million people in Virginia currently have suspended licenses due to nonpayment of criminal justice debt,[510] and that Virginia's practice of automatically suspending licenses for nonpayment of court costs, without any inquiry into ability to pay, notice and hearing, or alternatives to suspension, violates both the Due Process Clause and the Equal Protection Clause. Plaintiffs emphasize that a license to drive is often essential to pursuit of a livelihood, especially outside of major cities, and is an important property interest that may not be taken without due process. Plaintiffs also argue that there is no rational basis for suspending licenses of those unable to pay because the practice cannot coerce those who cannot pay to pay and, once imposed, creates a barrier to obtaining or maintaining employment that makes it much less likely that debtors will be able to repay. Finally, suspension of licenses for nonpayment of non-punitive court costs is an unduly harsh and discriminatory mechanism for collecting against the indigent that is not available to private creditors.[511]

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[508] *See* Agreement to Settle Injunctive and Declaratory Relief Claims, Mitchell v. The City of Montgomery, *available at* http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Final-Settlement-Agreement.pdf (judicial procedures included at 11–21). *See also* Judgment Granting Final Declaratory and Injunctive Relief, Mitchell v. The City of Montgomery, 14-cv-00186 (M.D. Ala. Nov. 17, 2014) (Dkt. 51).

The Montgomery settlement also provided for public defender and prosecutor training on *Bearden* and on ability-to-pay rights and responsibilities, amnesty days on which debtors with outstanding warrants for nonpayment may clear their warrants and set hearing dates, and a temporary ban on city use of private probation companies or other companies profiting from criminal justice debt payment plans.

Notably, the parties and Montgomery municipal court judges agreed to stipulate to joinder of the judges, in their official capacities, for purposes of including them in the settlement and providing the district court jurisdiction over them relative to the settlement agreement, though the judges did not waive any claim to judicial immunity. *See* Dkt. 46 (motion), Dkt. 49 (order granting joinder).

[509] *See* Class Action Complaint, Stinnie v. Holcomb (W.D. Va. July 6, 2016), *available at* https://www.justice4all.org/wp-content/uploads/2016/07/Complaint-Drivers-License-Suspension-for-Court-Debt.pdf.

[510] *Id.* ¶¶ 33, 377.

[511] *See id.* ¶¶ 399–450.

7.4. Claims Under Federal and State Debt Collection Practices Statutes

7.4.1. Introduction

Many of the most unfair and oppressive practices related to court fines and fees arise in the *collection* of criminal justice debt. Although federal fair debt collection protections have never been found to apply to the collection of court debt, the question has normally arisen in the context of restitution and punitive fines. Two features of today's court debt landscape, however, suggest that fair debt protections might apply to some number of court debtors. First, like other creditors, municipalities and courts are increasingly relying on private debt collectors to collect debts. [512] Second, courts and governments increasingly impose user fees for services like indigent defense that court debtors could theoretically have accessed in the private marketplace.

In other words, although federal debt collection protections likely do not apply in cases where the government seeks to collect its own debt or where the underlying financial obligation serves restitutionary or punitive ends, where private collectors seek to collect user fees on behalf of the government, advocates should consider whether their clients may benefit from fair debt laws. These laws would provide court debtors with important protections against harassing or deceptive communications from collectors, including where (in what anecdotally seems like a fairly common practice in the court debt world) debt collectors suggest to debtors that they will be imprisoned if they do not pay their debts on time.

The outsourcing of government debt collection creates unique injustices, generally unknown in the private debt collection world. For example, some states expressly allow for additional fees and costs that can be collected by the debt collector on top of the principal owed. In Florida, municipal debt collectors may add a 40 percent surcharge to debts collected on behalf of local courts.[513] This means, for example, that if a debtor in Florida has a $1,000 debt to a local court, and that court hires a private debt collector to collect the debt, then the debt collector can theoretically collect $1,400, with a $400 going to the collector. This not only adds to the costs of these fees and fines but incentivizes aggressive debt collection techniques.

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[512] Blake Ellis & Melanie Hicken, *The Secret World of Government Debt Collection*, CNNMoney, Feb. 17, 2015, *available at* http://money.cnn.com/interactive/pf/debt-collector/government-agencies/.

[513] Fla. Stat. § 28.246 ("The collection fee, including any reasonable attorney's fee, paid to any attorney or collection agent retained by the clerk may be added to the balance owed in an amount not to exceed 40 percent of the amount owed at the time the account is referred to the attorney or agent for collection.").

7.4.2. Applicability of Federal and State Debt Collection Protections to Criminal Justice Debt

7.4.2.1. Introduction

The Fair Debt Collection Practices Act (FDCPA)[514]—debtors' usual federal protection against unfair debt collection practices—has limited application in the government fine and fee collection context. However, in certain spheres, particularly in the increasing number of cases where courts and municipalities contract with outside, private debt collectors to collect fines and fees, debt collection laws may provide a powerful tool for debtors and advocates. When determining whether the FDCPA applies to a court fees and fines case, advocates should consider (1) whether the collection activity was undertaken by the government or a government official, and (2) whether the underlying obligation is a "debt."

7.4.2.2. Actors Covered by the FDCPA

The FDCPA does not apply to original creditors or to "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties."[515] The Act does, however, apply to private, outside debt collectors, even where expressly authorized to serve as debt collectors by law.

The Sixth Circuit adopted a variation of this analysis in *Gillie v. Law Office of Eric A. Jones, L.L.C.*[516] There, it deemed "special counsel" contracted by the State of Ohio to perform debt collection activities to fall outside the exemption for public officers acting within their official duties," in that they were in the nature of private contractors rather than public officers.[517] On *certiorari*, the Supreme Court reversed the Sixth Circuit on different grounds, and did not reach the question whether private contract counsel are "officers."

7.4.2.3. Monetary Obligations Covered by the FDCPA

The most difficult obstacle for debtors to overcome in arguing for coverage under the FDCPA in most fees and fines cases will likely be the requirement that the underlying monetary obligation constitute a "debt."[518] In general, in the government debt context, courts have given the term "debt" a narrow reading, concluding that it covers only consensual *quid pro quo* exchanges with governments for services, for example, sewer

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[514] 15 U.S.C. §§ 1692–1692p.
[515] 15 U.S.C. § 1692a.
[516] 785 F.3d 1091 (6th Cir. 2015), *rev'd* ___U.S. ___, 136 S. Ct. 1594, 194 L. Ed. 2d 625 (2016).
[517] 785 F.3d at 1099.
[518] 15 U.S.C. § 1692a.

and water services,[519] but not "involuntary" debts arising from tickets, fines,[520] or the nonconsensual imposition of a monetary penalty.[521] The conclusion is the same even in cases where the debt obligation arises from a fine relating to a debtor's failure to pay a different obligation to the government.[522] For example, courts have concluded that a parking ticket fine for a failure to pay the fee for using a municipal parking lot is not a debt under the FDCPA, even though the underlying decision to use the parking lot was consensual.[523]

However, particularly in light of the expanded imposition of "user fees" in the criminal and civil justice systems, advocates should consider FDCPA protections in appropriate cases. As an initial matter, there is a reasonable basis for arguing that the Act should apply even where there has not been an express *quid pro quo* between the creditor (in this case the government agency) and the debtor. The primary function of the term "debt" in the FDCPA, after all, was to exclude business transactions, not to insulate government debt collectors.[524] To accomplish this end, the Act specifies that it applies only to personal expenses, but it uses an exceptionally broad term to describe the form of the relationship between the creditor and the consumer. The word "transaction"—used in 15 U.S.C. § 1692a—is widely used in other statutes and case law involving evidentiary "dead man's" statutes, criminal law, venue statutes, joinder of claims, and *res judicata*. Given the possibilities for broad or narrow construction of the word "transaction," and hence the term "debt," the proper question is what reading of the term best corresponds with congressional purposes in enacting the FDCPA. In light of the remedial purposes of the FDCPA and its focus on the nature as opposed to the form of the transaction between the consumer and creditor, the choice of a narrow meaning for the term "debt" is likely incorrect.[525]

Even if a debt need not arise from an express *qui pro quo*, however, it must still have arisen from a consensual transaction. For this reason, in deciding whether to pursue the FDCPA claims, advocates should consider whether their clients could have opted

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[519] *See, e.g.*, Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 407 (3d Cir. 2000).

[520] Stubbs v. City of Ctr. Point, Ala., 988 F. Supp. 2d 1270, 1276 (N.D. Ala. 2013) ("[A] traffic ticket does not constitute a 'debt' under the FDCPA.").

[521] Gulley v. Markoff & Krasny, 664 F.3d 1073, 1074 (7th Cir. 2011);

[522] *See, e.g.*, Yazo v. Law Enforcement Sys., Inc., 2008 WL 4852965, at *3 (C.D. Cal. Nov. 7, 2008) (holding that use of a toll road without paying is not a consensual transaction).

[523] Franklin v. Parking Revenue Recovery Servs., Inc., 2014 WL 6685472, at *4 (N.D. Ill. Nov. 25, 2014).

[524] S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 ("[t]his bill applies only to debts contracted by consumers for personal, family, or household purposes, it has no application to the collection of commercial accounts"). *See also* 123 Cong. Rec. S4888 (daily ed. Mar. 25, 1977) (remarks of Sen. Garn).

[525] *See generally* National Consumer Law Center, Fair Debt Collection § 4.4.2.3 (8th ed. 2014), *updated at* www.nclc.org/library.

to avoid the debt obligation and whether that debt obligation can be framed as analogous to a private marketplace transaction. The more an obligation is consensual and the more similar it seems to a private marketplace transaction, the more likely it is that the FDCPA will apply. This is true not only because of the FDCPA's language and the definition of debt, but also because of the dictate from *James v. Strange* that court debtors not receive differential treatment from similarly-situated private judgment debtors. When the government acts as a market participant—as it frequently does—its creditors are not insulated from the FDCPA.

As an example of the types of debts that might give rise to FDCPA claims, advocates may have the most success with debts incurred as an alternative to incarceration. Probation fees, like those previously discussed, are arguably "voluntary" if they are incurred as a consequence of a debtor's decision to accept probation rather than incarceration. Furthermore (and perhaps more common), criminal-defense related fees might be "voluntary" if the debtor could have avoided those fees by representing herself *pro se*. In other words, although many fees imposed within the court-fee world may appear "involuntary," they appear that way because few rational actors would choose not to incur them. Particularly in light of the constitutional backdrop at stake in these cases, many of these fees might be debts within the FDCPA.

Finally, it should be noted that even if something is not a "debt" within the FDCPA, unfair practices relating to its collection may fall within state debt collection laws[526] or state unfair and deceptive acts and practices protections.[527] Depending on the protections available in the jurisdiction at issue, advocates should vigorously argue that the collection of court fines and fees by private collectors is subject to the FDCPA or state debt collection laws.

7.4.3. Application of Fair Debt Collection Practices Act to Criminal Justice Debt

In cases where advocates are able to convince courts to apply the FDCPA or other federal or state debt collection protections to the collection of court fines and fees, debtors are protected against a range of abusive and unfair practices set out in the statute. A few of those bear explicit mention here.

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[526] *See, e.g.*, People *ex rel.* Daley v. Datacom Sys. Corp., 585 N.E.2d 51, 57 (Ill. 1991) (finding that state debt collection law applied to municipal fines arising from, *inter alia*, parking violations). *See* National Consumer Law Center, Fair Debt Collection § 10.2 (discussing state debt collection statutes), Appx. D (state-by-state summaries of state debt collection statutes) (8th ed. 2014), *updated at* www.nclc.org/library.

[527] National Consumer Law Center, Fair Debt Collection § 10.3 (8th ed. 2014), *updated at* www.nclc.org/library.

First, a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."[528] Among such false, misleading, and deceptive practices, a debt collector may not "represent[] or impl[y] that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action."[529] Courts have found that collectors violate this provision when they threaten or suggest the possibility of action—like the initiation of criminal proceedings—when such action is not legally authorized.[530]

Second, a debt collector violates the statute by making a "[f]alse representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof."[531] Some courts have found this provision to apply to businesses that perform "check diversion" programs for state or local prosecutors and send debt collection notices on district attorney letterhead,[532] or private collection firms collecting criminal justice debt who otherwise suggest that they themselves are the government or that the government has sanctioned their specific debt collection practices.[533]

The validity of these decisions may have been called into question by the Supreme Court's decision in *Sheriff v. Gillie*.[534] In *Gillie*, the Court unanimously rejected a claim that the use of attorney general letterhead by statutorily appointed "special counsel" (private collection contractors) was misleading in such a way as to create liability under

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[528] 15 U.S.C. § 1692e(4). A debt collector violates this provision even when the debtor is not actually deceived. Instead, courts apply an "objective" test based on the "least sophisticated" or "unsophisticated" debtor standard. This standard serves the dual purpose of protecting all consumers, including the inexperienced, the untrained and the credulous, from deceptive debt collection practices, and protecting debt collectors against liability for bizarre or idiosyncratic consumer interpretations of collection materials." Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1236 (5th Cir. 1997). *See* National Consumer Law Center, Fair Debt Collection § 5.5.8.2 (8th ed. 2014), *updated at* www.nclc.org/library.

[529] 15 U.S.C. § 1692e(4).

[530] *See, e.g.*, Lensch v. Armada Corp., 795 F. Supp. 2d 1180, 1187 (W.D. Wash. 2011) (collector violated provision by suggesting possibility of criminal proceeding for bounced check when "[i]n fact, under Washington's bad check law, a person cannot be prosecuted for bouncing a check unless she had the specific intent to defraud the recipient")

[531] 15 U.S.C. § 1692e(1).

[532] Gradisher v. Check Enforcement Unit, Inc., 210 F. Supp. 2d 907, 910 (W.D. Mich. 2002). For a general overview of the issue, and a discussion of why "check diversion" companies are "debt collectors" within the meaning of the FDCPA, see generally Del Campo v. Mealing, 2013 WL 4764975, at *10 (N.D. Cal. Sept. 5, 2013); National Consumer Law Center, Fair Debt Collection § 1.5.8 (8th ed. 2014), *updated at* www.nclc.org/library.

[533] Gammon v. GC Servs. Ltd. P'ship, 27 F.3d 1254, 1255 (7th Cir. 1994).

[534] Sheriff v. Gillie, ___ U.S. ___, 136 S. Ct. 1594, 194 L. Ed. 2d 625 (2016).

this provision of the FDCPA. In reaching this conclusion, the Court reasoned that the letters did not imply a *false* association with a governmental entity, as the special counsel had in fact contracted with the State to carry out debt collection. The Court also indicated concerns of federalism, expressing reluctance to intervene in a state's collection of debt. Notably, the holding found relevant that the letter did not threaten prosecution, incarceration, or other criminal action. This leaves open the possibility that a communication falsely asserting that a private entity could invoke remedies reserved only to governmental actors is actionable under the FDCPA because it suggests a *false* association with governmental actors.

7.5. Fair Credit Reporting Act

The Fair Credit Reporting Act is a federal statute that regulates consumer reporting agencies (sometimes called "CRAs"), the entities that provide information to consumer credit reporting agencies (sometimes called "furnishers"), and the users of consumer credit reports. The FCRA applies to situations in which a person collects information on a "consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living"[535] and this information is used or intended to be used by a third party for certain purposes. These purposes include denying or increasing the charge for "credit or insurance to be used primarily for personal, family, or household purposes,"[536] employment opportunities, government benefits, or certain other business transactions.[537]

To ensure accurate and fair consumer reporting, the FCRA imposes various duties on furnishers, CRAs, and users of consumer reports. For example, furnishers must refrain from reporting information that they know or have reasonable cause to believe is inaccurate, and must investigate consumer disputes promptly. CRAs must follow reasonable procedures to ensure maximum possible accuracy and investigate consumer disputes. Certain CRAs have a duty to provide annual free credit reports. And users must use credit reports only for permissible purposes and must notify consumers if the user takes an adverse action based on a consumer report. Consumers can file suit for negligent violations of the FCRA and recover actual damages and attorney's fees; if the violation was willful, they can recover statutory or punitive damages.[538]

The Fair Credit Reporting Act does not include special provisions regarding court debt. However, courts have frequently considered the Act's application to governmental

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[535] 15 U.S.C. § 1681a(d)(1).
[536] 15 U.S.C. § 1681a(d)(a)(A).
[537] 15 U.S.C. § 1681(b).
[538] *See generally* National Consumer Law Center, Fair Credit Reporting (8th ed. 2013), *updated at* www.nclc.org/library Fair Credit Reporting.

agencies.[539] Although the definition of "consumer report agency" in the Act does not preclude its application to governmental agencies, the Federal Trade Commission[540] and most courts addressing the issue have concluded that neither federal[541] nor state and local agencies are CRAs under the FCRA.[542] When providing information to CRAs, however, these entities clearly act as "furnishers" under the FCRA, and they can also be "users" of consumer reports. They may therefore be susceptible to private litigation in this capacity, subject of course to the immunity constraints outlined above.[543]

A recent settlement between the three nationwide consumer credit reporting agencies (Equifax, Experian, and Transunion) and over thirty state attorneys general, and a nearly identical agreement entered into by New York State, substantially alters the reporting of court debts by consumer reporting agencies. Pursuant to the agreements, these credit reporting agencies are now required to "prohibit" "Collection Furnishers"—including "collection agencies and debt purchasers"—from "reporting debt that did not arise from any contract or agreement to pay (including, but not limited to, certain fines, tickets, and other assessments)."[544]

Questions remain about the actual effects of the settlement agreements. They would not apply to original creditors of court debts (the governmental entities themselves), because the agreements specifically only address the reporting of fines by debt collectors and debt buyers. There are also questions as to whether and how they apply to court debts relating to an ostensible, yet effectively coerced, agreement to pay, like some parole costs. However, the settlement agreement should be read broadly to cover the

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[539] *See* 15 U.S.C. § 1681a(b) (defining "person" for purposes of the FCRA to include "government or governmental subdisvison or agency").

[540] Fed. Trade Comm'n, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations, §§ V(A), 603(f), items 5A, 5B. *See also* 55 Fed. Reg. 18,804–18,806 (May 4, 1990) (see supplementary information published with the prior, rescinded Staff Commentary).

[541] Ollestad v. Kelley, 573 F.2d 1109 (9th Cir. 1978); Ricci v. Key Bancshares of Maine, Inc., 768 F.2d 456 (1st Cir. 1985).

[542] See generally National Consumer Law Center, Fair Credit Reporting §§ 2.5.7, 2.5.8 (8th ed. 2013), *updated at* www.nclc.org/library.

[543] *See generally* § §§ 7.2.1-7.2.2, *supra*. For a discussion of sovereign immunity specifically regarding the FCRA, see National Consumer Law Center, Fair Credit Reporting § 11.2.2.2 (8th ed. 2013), *updated at* www.nclc.org/library.

[544] Assurance of Voluntary Compliance/Assurance of Voluntary Discontinuance, *In the Matter of* Equifax Info. Serv. L.L.C., Experian Info. Sol., Inc., and TransUnion L.L.C., § IV(E)(1)(c) (May 20, 2015), *available at* http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Consumer-Protection/2015-05-20-CRAs-AVC.aspx. *See also* Executed Settlement Agreement, *In the Matter of* Investigation by Eric T. Schneiderman Attorney General of the State of New York, of Experian Information Solutions, Equifax Information Services, and TransUnion L.L.C. (Mar. 8, 2015), *available at* http://www.ag.ny.gov/pdfs/CRA%20Agreement%20Fully%20Executed%203.8.15.pdf.

majority of court fines and fees, which—particularly because they often sprout from municipalities' aggressive policing strategies and revenue-through-fine-and-fee policies—do not have any bearing on a consumer's creditworthiness.

Although the settlements affect CRA practices nationwide, the agreements are only enforceable by the states that are parties to the agreement.[545] Harmed consumers may wish to dispute the reported information and also alert a participating state attorney general's office and request enforcement.

State law may provide additional protections against the furnishing or reporting of court fine and fee information. For example, Texas state law prohibits a municipality or its contractors from providing information to credit reporting agencies about a civil penalty imposed as a result of a traffic violation detected by a photographic signal enforcement system.[546]

7.6. Equal Credit Opportunity Act

7.6.1. Application of the ECOA to Court Debt

Another tool that advocates might consider in addressing discriminatory court debt practices is the Equal Credit Opportunity Act (ECOA).[547] The ECOA provides, among other things, that

> *[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program.*[548]

At first blush, court fines and fees may not appear to fall within the ECOA's protections. Court debt, after all, does not look like the conventional credit transaction that normally is at issue in ECOA cases. And no court has addressed the issue, so advocates seeking to invoke ECOA face the difficult task of convincing a court to extend the statute to novel contexts. However, just as there may be room to expand the application of the FDCPA because of the increased use of court fines and fees as revenue generators, the

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[545] Assurance of Voluntary Compliance/Assurance of Voluntary Discontinuance, *In the Matter of* Equifax Info. Serv. L.L.C., Experian Info. Sol., Inc., and TransUnion L.L.C., § IX (May 20, 2015), *available at* http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Consumer-Protection/2015-05-20-CRAs-AVC.aspx.

[546] Tex. Transp. Code § 707.003(h) (West).

[547] 15 U.S.C. §§ 1691–1691f.

[548] 15 U.S.C. § 1691(a). *See generally* National Consumer Law Center, Credit Discrimination (6th ed. 2013), *updated at* www.nclc.org/library.

expanding use of user fees and payment plans (which should constitute credit under the ECOA) provide new opportunities to apply consumer protections in the court debt world.

Where it does apply, the ECOA may provide a powerful device for targeting systematically discriminatory court debt practices that relate to payment plans or deferrals of payment established for the repayment of court debt. Most importantly, unlike the other claims that court debtors might bring relating to discriminatory practices, the ECOA allows for "disparate impact" claims. This means that court debtors asserting ECOA claims might have an opportunity to challenge policies that result in significant racial disparities, even if those policies do not, on their face, concern race. Furthermore, because the ECOA covers every aspect of a credit transaction, it applies to both the terms of credit and, importantly in the court debt context, collection procedures.

In arguing that the ECOA applies to a case involving court debt, advocates should prepare to confront at least three threshold questions: (1) whether the defendant is a creditor; (2) whether the plaintiff is an applicant; and (3) whether the allegedly discriminatory policy relates to an "aspect of a credit transaction."

As for the first question, the definition of "creditor" expands broadly to include any "government or governmental subdivision,"[549] and should not pose problems for advocates seeking the protection of the ECOA. Indeed, courts have concluded that the ECOA so clearly applies to governmental agencies acting as creditors that it amounts to an explicit waiver of sovereign immunity with respect to claims brought under the ECOA against the federal government.[550]

The second question is closer. The ECOA defines as an applicant "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit."[551] Advocates should not, however, read the Act as applying only to formal, written applications for extensions of credit—which rarely arise in the court debt context, where debtors might obtain payment plans or deferrals of payment through informal and oral requests. An application for credit can take many forms—oral and written—as long as it is "in accordance with procedures used by a creditor for the type of credit requested."[552]

However, a more difficult question is posed by situations where the debtor has not made any request for credit. On the one hand, it is difficult to see how someone could be an

[549] 15 U.S.C. § 1691a(e)–(f).
[550] Moore v. U.S. Dep't of Agric. on Behalf of Farmers Home Admin., 55 F.3d 991, 994 (5th Cir. 1995).
[551] 15 U.S.C. § 1691a(b).
[552] 12 C.F.R. § 202.2(f).

applicant for credit without ever taking the affirmative step of applying for credit.[553] On the other hand, Regulation B, which implements the ECOA, defines "applicant" as "any person who requests *or who has received* an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit."[554] The definition promulgated under Regulation B has come under some scrutiny, but consistent with the salutary purposes of the ECOA, courts have relied on Regulation B in applying the ECOA to contexts where the plaintiff did not herself affirmatively apply for credit.[555]

Finally, advocates will have to establish that the discriminatory practices at issue relate to a credit transaction. Certainly not every fee or fine is credit, and therefore not every discriminatory court debt practice will trigger the ECOA. Rather, the ECOA defines "credit" as including "the right granted by a creditor to a debtor to defer payment of debt."[556] A Third Circuit decision construes identical language in the Truth in Lending Act as to a creditor that had purchased municipal water and sewer debts and then entered into payment plans with the debtors.[557] The court noted that, when the water and sewer service was originally provided, the bills were payable upon receipt.[558] At that point, there was no credit transaction, since the debtors did not have the right to defer payment of the debt or make installment payments. However, when it gave the debtors the right to defer payment of the debts and pay them off in installments, the debt buyer extended credit and was subject to the Truth in Lending Act. Applying this reasoning to the ECOA, court debt would not be credit when it was imposed, but if the creditor or a debt buyer subsequently gives the debtor a payment plan or otherwise gives the debtor the right to defer payment, that would be an extension of credit.

7.6.2. Planning a Case

7.6.2.1. Identifying a Defendant and a Policy

Courts assessing lending discrimination claims have generally adopted the burden shifting and evidentiary framework used in employment discrimination cases.[559] Thus

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[553] Mercado Garcia v. Ponce Fed. Bank, F.S.B., 779 F. Supp. 620, 628 (D. P.R. 1991), *aff'd on other grounds*, 979 F.2d 890 (1st Cir. 1992).

[554] 12 C.F.R. § 202.2 (emphasis added).

[555] *See, e.g.*, Estate of Davis v. Wells Fargo Bank, 633 F.3d 529, 538 (7th Cir. 2011); FirstMerit Bank, N.A. v. Ferrari, 71 F. Supp. 3d 751, 758 (N.D. Ill. 2014).

[556] 15 U.S.C. § 1691a(d).

[557] Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 409 (3d Cir. 2000)

[558] *Id.* at 401 ("the government entities did not extend homeowners any right to defer payment of their obligations").

[559] *See, e.g.*, Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 406 (6th Cir. 1998) (adapting the burden allocation framework and burden allocation system found in Title VII cases to claims under ECOA); Moore v. United States Dep't of Agric. *ex rel.* Farmers Home Admin., 55 F.3d 991, 995 (4th Cir. 1995)

to make out a *prima facie* case of disparate impact, an ECOA plaintiff must: (1) identify a specific, facially neutral policy or practice adopted by the defendant; (2) allege a disparate impact on a protected group; and (3) show a causal relationship between the challenged policy or practice and the alleged disparate impact.[560] If the plaintiff makes out a prima facie case, the burden shifts to the defendant to establish that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.[561]

The first step in setting out a disparate impact claim under the ECOA is identifying the actor and the policy that cause the discriminatory harm. "[I]dentifying the specific practice that caused the alleged discriminatory effect will depend on the facts of a particular situation and therefore must be determined on a case-by-case basis."[562] However, plaintiffs should take care to set out a discrete policy or practice as clearly as possible. After all, "it is not enough to simply allege that there is a disparate impact on [consumers], or point to a generalized policy that leads to such an impact. Rather, the [plaintiff] is responsible for isolating and identifying the specific . . . practices that are allegedly responsible for any observed statistical disparities."[563]

The main purpose of the ECOA "is to promote the availability of credit to all creditworthy applicants without regard" to protected characteristics.[564] However, ECOA claims are not limited to policies that bear on the mere availability of credit or even the terms on which that credit is extended. The ECOA protects against discrimination in all aspects of a "credit transaction," and regulations define that term to entail "every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing

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(noting that *McDonnell Douglas* applies to ECOA claims in the absence of direct evidence of discrimination); Chiang v. Schafer, 2008 WL 3925260, at *30 (D. V.I. Aug. 20, 2008) ("[I]t is appropriate to import the analysis from Title VII cases in analyzing a claim of discrimination brought under ECOA and . . . utilize Title VII employment discrimination case law as it may be appropriate in the context of credit transaction discrimination."), *aff'd sub nom.* Virgin Island Class Plaintiffs v. Vilsack, 362 Fed. Appx. 252 (3d Cir. 2010). *See also* National Consumer Law Center, Credit Discrimination § 4.3.2.2 (6th ed. 2013), *updated at* www.nclc.org/library (discussing legislative history and official interpretations of ECOA identifying the relevant framework as based on employment discrimination law).

[560] *See* Smith v. City of Jackson, 544 U.S. 228, 241, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005).

[561] *See* § 7.6.2.3, *infra*.

[562] Final Rule, Dep't of Hous. & Urban Dev., Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,469 (Feb. 15, 2013). *See also* Garcia v. Johanns, 444 F.3d 625, 635 (D.C. Cir. 2006).

[563] Smith v. City of Jackson, 544 U.S. 228, 241, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005).

[564] 12 C.F.R. § 202.1(b).

of credit information; revocation, alteration, or termination of credit; and collection procedures)."[565]

7.6.2.2. Establishing Causation

In addition to alleging a discrete policy or practice, an ECOA plaintiff alleging a disparate impact claim must allege that this policy or practice causes a significantly disproportionate impact on a protected class. In many disparate impact cases, it will be difficult to draw a clear and direct connection between the alleged practice and a discriminatory outcome. At the pleading stage, however, a plaintiff need only plausibly and specifically plead this causal connection.[566] And at the proof stage, a disparate impact that is substantial enough to raise an *inference* of discrimination should support a *prima facie* case.[567]

In developing a theory of discrimination, the plaintiff must also remain mindful, however, that the relevant comparison for determining disparate outcomes is not between members of the protected class and all other people potentially affected by the policy. Rather, the comparison must be between similarly situated people. [568] For example, consider a situation where a court has a policy of requiring some court debtors who are delinquent on their payment plans to accelerate their payments or face harsher sanctions than those who make on-time payments. In stating an ECOA claim based on this policy, an advocate will make out a more compelling case by comparing debtors who are delinquent and showing that the consequences of delinquency have a disparate impact on people of color relative to others who suffer from these same consequences. If the advocate wants to compare a protected class relative to all other recipients of the credit, it is better to frame the policy at a higher level of generality—*e.g.*, the creditor's policy for determining when someone is delinquent.

Of course, a challenge in every disparate impact case will be the compilation of data reflecting disparate outcomes and suggesting a causal link between the alleged policy and those outcomes. In establishing disparate outcomes, advocates will rarely be able to access "race coded" data—meaning data that identifies outputs of the criminal justice debt system by race. This means that that they will often have to use race proxies.

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[565] 12 C.F.R. § 202.2(m).

[566] *See* Ellis v. City of Minneapolis, 2016 WL 1222227, at *3 (D. Minn. Mar. 28, 2016).

[567] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1998) ("[S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation see."). *See also* Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011) (rejecting defendant's argument that, because 100% of minorities and 100% of non-minorities in a neighborhood slated for redevelopment would be treated the same way, there was no prima facie evidence of disparate impact and instead instructing district court to consider statistics that 22.54% of African-American and 32.31% of Hispanic households in township would be affected by demolition compared to only 2.73% of white households).

[568] *See, e.g.*, Boykin v. Bank of Am. Corp., 162 Fed. Appx. 837, 840 (11th Cir. 2005).

In performing its own disparate impact analyses, the CFPB has established race proxies based on consumers' surnames and geography.[569] Through public records requests, made even before filing a case, advocates may be able to compile sufficient data to perform their own proxy analysis.

7.6.2.3. Shifting the Burden

Once the plaintiff sets out a *prima facie* case, the burden shifts back to the defendant to establish that "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant."[570] The analogous test in the employment discrimination context requires that employers demonstrate both business necessity and job-relatedness.[571] In the ECOA context, then, creditors should have to demonstrate both necessity and a relationship to the creditor's legitimate goals. Thus, depending on the purpose of the aspect of the credit transaction at issue, only justifications related to the purpose of that part of the credit transaction should be relevant. Collections policies that have a disparate impact are justifiable only if they are necessary and effective as collections policies. In the court fines and fees arena, it is not enough for a defendant to argue that it has a right to suspend debtors' drivers' licenses, even if that practice has a disparate impact on people of color relative to other debtors, if suspending debtors' drivers' licenses is not actually an effective debt collection technique. In this way, the same concerns that drove the Court to determine that certain fines and fees practices failed to pass even the very lenient "reasonable basis" test in *Tate v. Short*,[572] *Bearden v. Georgia*,[573] and *James v. Strange*,[574] should also support ECOA claims related to court fines and fees practices that not only have a disparate impact but also are ineffective.

If, however, the creditor demonstrates a significant business justification, the plaintiff can still prove discrimination if another practice meeting the creditor's legitimate concerns would have less of a discriminatory impact.[575] As in employment law, in credit discrimination cases there is little guidance regarding the showing required to meet the burden of proving that a less discriminatory alternative exists. However, assuming that courts in credit discrimination cases will follow the employment standards, a plaintiff

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[569] CFPB, Using Publicly Available Data to Proxy for Race and Ethnicity (Summer 2014), *available at* http://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf.
[570] 24 C.F.R. § 100.500(c)(2).
[571] Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).
[572] 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971).
[573] 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).
[574] 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972).
[575] Official Interpretations of Reg. B, 12 C.F.R. pt. 1002, supp. I, § 1002.6(a)-2.

will need to show that a less discriminatory alternative would be "equally effective" in meeting the defendant's legitimate business objective.[576]

Although it is difficult to predict how and when a defendant might be able to satisfy its burden of establishing "legitimate, nondiscriminatory interests" in the court fines and fees context, even if it can, the opportunity to establish a less discriminatory alternative is a powerful tool for plaintiffs in this arena. When plaintiffs identify legitimate nondiscriminatory alternatives, they should argue that when ECOA defendants enter into credit transactions, punitiveness is *not* a legitimate interest.[577] In other words, although the imposition of a fine or fee may, of course, turn on some punitive considerations, the aspects of criminal justice debt that relate to the credit transaction *qua* credit transaction (e.g., interest rates, collection practices, etc.) should not hinge on punitive considerations—after all, once a creditor steps into its market participant role, it should be treated like private judgment creditor. Any alternative that is as effective as the status quo at fulfilling defendants' legitimate interests in collecting debts should meet the creditors' legitimate concerns. Although no court has yet addressed this theory in the ECOA context, and thus advocates should tread carefully when deciding when and how to invoke it, it is a potentially powerful tool in cases where the court debt creditor acts similarly to a private market creditor.

7.6.2.4. Potential Illustrations

The following are illustrations of the types of criminal justice debt policies or practices that might give rise to claims under the ECOA along with a brief sketch of how an advocate might develop a theory to challenge these policies. These three policies represent the types of policies that advocates might be able to attack, but as presented here, they are neither complete nor comprehensive. Much more work would need to be done to develop these cases, and there are many other types of cases that may be available. This discussion is intended as a blueprint for advocates who are issue-spotting criminal justice debt problems confronting their own clients.

Policies that require criminal justice debtors to demonstrate that they are earning wages before they can obtain favorable payment plans. Anecdotally, many advocates report that wage earners have an easier time accessing favorable payment plans and avoiding harsh collection tactics than do those whose earnings are derived primarily from public benefits. Some courts may even have policies that provide that debtors who

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[576] *See* Graoch Associates #33, Ltd. P'ship v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366 (6th Cir. 2007) (FHA case).

[577] *Cf.* Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 Cal. L. Rev. 669, 706 (2007) ("Exacting supra-competitive revenues from a class of consumers—not because they impose higher costs on the seller but merely because the seller has the power to do so—is not consistent with business necessity.").

are not earning a wage are not eligible for payment plans—even if they receive income from public benefits. These types of policies may be the easiest to attack under the ECOA. As explained above, public benefits recipients are a protected class under the ECOA, and if they are denied access to credit because they are not wage earners, they should have a fairly straightforward disparate treatment claim under the ECOA.[578]

Deprivation of public benefits that are disproportionately needed by a protected class. Advocates may also consider whether criminal justice debt collection techniques disproportionately harm people of color because they deprive delinquent debtors of a public benefit that is especially important to a protected class. Depending on the data, drivers' license suspension may be such a policy. To the extent protected groups live disproportionately in the exurbs where they do not have access to decent public transportation, the suspension of drivers' licenses as a debt collection technique may have a disparate impact on people of color even as compared to others whose drivers' licenses are also suspended. This case is made even stronger by the fact that debtors deprived of their drivers' licenses are *less* likely to pay off their debts than debtors who have the ability to drive to work. For this reason, it will be difficult for defendants of ECOA claims based on these practices to argue that the practice of depriving debtors of their drivers' licenses is necessary to the legitimate business purpose of collecting court debt.

The absence of a clear policy for determining payment plans or a pattern or practice of discrimination. The trickiest but most important policy to attack through the ECOA may be the discretion provided to many local officials to determine payment plans. Anecdotally, it is this discretion—untethered from an accurate picture of the debtor's financial situation—that leads to disparate outcomes at the state or county level because individual court officials may be swayed by implicit or explicit biases. Although it may be difficult to certify a class based on a policy involving the delegation of discretion,[579] delegation of discretion is still a policy under the ECOA.[580] And a plaintiff who is able to compile data to demonstrate disparate impacts might be able to make out an individual claim for injunctive relief.

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[578] Additionally, if they are treated less favorably because they receive Social Security disability benefits, they may have a claim under the Americans with Disabilities Act. 42 U.S.C. § 12132.

[579] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices.").

[580] Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 258 (D. Mass. 2008) ("Where the allocation of subjective decisionmaking authority is at issue, the 'practice' amounts to the absence of a policy, that allows racial bias to seep into the process. Allowing this 'practice' to escape scrutiny would enable companies responsible for complying with anti-discrimination laws to 'insulate' themselves by 'refrain[ing] from making standardized criteria absolutely determinative.'").

7.7. Title VI

Title VI of the Civil Rights Act of 1964[581] provides another tool for challenging racial discrimination in the context of criminal justice debts. Title VI prohibits discrimination on the basis of race, color, national origin, sex, and religion by recipients of financial assistance from the federal government. As the U.S. Department of Justice (DOJ) has recently noted, many state and local law enforcement agencies and courts receive federal funds, either directly or indirectly, and thus are subject to Title VI and its implementing regulations.[582]

Like the ECOA, Title VI and its implementing regulations[583] prohibit both intentional discrimination and facially neutral practices that have a discriminatory impact.[584] Also like the ECOA, Title VI has been interpreted to follow employment discrimination law's disparate impact standards of proof.[585] But Title VI departs from the ECOA in its scope of coverage and right of action.

With regard to scope, Title VI only applies to agencies or programs that receive some sort of federal assistance, directly or indirectly, and thus some courts or other actors in the criminal justice debt system may not be subject to its reach. But for those actors that are subject to Title VI, the scope of conduct regulated is significantly broader than under the ECOA: whereas the ECOA only precludes discrimination in the context of a credit relationship or payment plan, Title VI precludes any discrimination by an entity receiving federal assistance. It could thus potentially be applied to challenge a variety of law enforcement and criminal justice debt practices unrelated to payment plans, including, for example, policing practices that result in disparate ticketing or charging

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[581] 42 U.S.C. §§ 2000d to 2000d-7.

[582] *See, e.g.*, U.S. Dep't of Justice, Addressing Police Misconduct Laws Enforced by the Department of Justice, *available at* https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice (last visited June 24, 2016) ("Currently, most persons are served by a law enforcement agency that receives DOJ funds."). *See also* U.S. Department of Justice Guidance Letter to State Court Administrators on Nondiscrimination Against Individuals with Limited English Proficiency (Aug. 16, 2010) (explaining that all "court systems receiving federal financial assistance, either directly or indirectly," must comply with Title VI and its implementing regulations). The Department of Justice's Title VI Legal Manual (Jan. 11, 2001), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf, provides further detail on the application of Title VI to state and local governments, including summaries of case law.

[583] 28 C.F.R. §§ 42.401–42.415.

[584] *See* 28 C.F.R. § 42.104(b)(2) (explaining that no program receiving federal assistance from the Department of Justice may "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin").

[585] *See, e.g.*, Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1405 n.11, 1407 n.14 (11th Cir. 1993). *See also* U.S. Dep't of Justice, Title VI Legal Manual 2 (2001), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf.

of minorities;[586] court fee or supervision cost assessment practices that result in disparate adverse impact on minority defendants or supervisees;[587] or criminal justice debt collection practices that impose disparate adverse impact on debtors who are of color.

Title VI, however, lacks a private right of action to enforce its disparate impact regulations.[588] Individuals who wish to challenge criminal justice debt practices under a Title VI disparate impact theory may instead file an administrative complaint with the Civil Rights Division of the Department of Justice,[589] which may then investigate and seek voluntary compliance, and if necessary may pursue enforcement through judicial action or administrative fund suspension.[590] There is some indication that the Department of Justice Civil Rights Division may currently be interested in using Title VI to address discriminatory criminal justice debt practices. In early 2016, the Department of Justice included Title VI discrimination claims (raising both disparate impact and disparate treatment theories) in its lawsuit against the City of Ferguson following its investigation into allegations of discriminatory law enforcement practices and court fine and fee practices.[591] Shortly thereafter, the Department published a "Dear Colleague" guidance letter on state and local court fine and fee practices, and specifically noted that "[i]n court systems receiving federal funds, these practices may also violate Title VI of the Civil Rights Act of 1964,[592] when they unnecessarily impose disparate harm on the basis of race or national origin."[593]

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[586] *See, e.g.*, Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 1139 (N.D. Cal. 2000) (holding plaintiffs adequately plead disparate treatment and disparate impact claims under Title VI based on allegations that law enforcement agency received federal assistance and engaged in racial discrimination by stopping, detaining, interrogating and searching motorists on the basis of race, and utilized drug interdiction tactics that had a discriminatory impact on motorists of color that were largely unsuccessful and therefore not justified).

[587] *See, e.g.*, United States v. City of Ferguson, No 4:16-cv-00180 (E.D. Mo.) (complaint filed Feb. 10, 2016), *available at* https://www.justice.gov/crt/file/832451/download (alleging that Ferguson's law enforcement is racially discriminatory and that disparities occur at a number of inflection points, and further noting that "Analysis of the municipal court's fines and fees data suggests racial disparities in the court's fine assessment practices that consistently disfavor African Americans").

[588] The Supreme Court resolved a split among the federal circuits on this issue in Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[589] Information about how to file a complaint, along with an optional complaint form, are available on the DOJ Civil Rights Division webpage at https://www.justice.gov/crt/how-file-complaint.

[590] *See* U.S. Dep't of Justice, Title VI Legal Manual 82–83 (2001), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf.

[591] Complaint, United States v. City of Ferguson, No 4:16-cv-00180 (E.D. Mo.) (Feb. 10, 2016), *available at* https://www.justice.gov/crt/file/832451/download.

[592] 42 U.S.C. § 2000d.

[593] Dep't of Justice Civil Rights Div., Dear Colleague Letter Regarding Law Enforcement Fees and Fines 2 (Mar. 14, 2016), *available at* https://www.justice.gov/crt/file/832461/download.

Finally, individuals do have a private right of action in the federal courts to enforce Title VI's prohibition against intentional discrimination.[594] Individuals may seek both injunctive relief and damages in court pursuant to Title VI, and states' sovereign immunity is abrogated with respect to such claims.[595]

7.8. Checklist to Begin Consideration of Affirmative Claims Challenging Criminal Justice Debt Practices

After addressing a client's immediate needs, clients and their counsel may wish to consider the viability of potential affirmative claims. For convenience, a brief checklist of general initial considerations relevant to the viability and types of claims that may be available is included below, along with the relevant sections in which each topic is addressed.

- Who would be the defendant, and are there barriers to obtaining relief from that defendant?
  - For government defendants—are there immunity problems? (*see 7.2.1, 7.2.2*). For any statutory claims, does the relevant statute apply to government entities? *(see 7.4-7.7)*
  - For private defendants—is the actor susceptible to constitutional claims? *(see 7.3)*
- What is the nature of the concern? More than one may apply.
  - Unfair process (e.g., absence of ability-to-pay determination*) (see 7.3.1.2)*
  - Imprisonment for nonpayment without an adequate determination that the defendant is able to pay (*see 7.3, see also 2.2, 4.4*)
  - Excessive fines *(see 7.3.1.5)*
  - Unfair or abusive collection practices *(see 7.3-7.4)*
  - Credit reporting issues *(see 7.5)*
  - Discrimination on the basis of race or receipt of public benefits, including practices causing systemic disparities *(see 7.6–7.7)*

Clients and their counsel should also evaluate whether they have, or can join forces with others who have, the resources available to pursue the claims effectively.

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[594] *See* Alexander v. Sandoval, 532 U.S. 275, 279–281, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).
[595] *See id.* at 279–280.

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NATIONAL CONSUMER LAW CENTER®

Boston Headquarters:
7 Winthrop Square
Boston, MA 02110-1245
Phone: 617/542-8010
Fax: 617/542-8028
www.nclc.org

Washington Office:
1001 Connecticut Ave, NW
Suite 510
Washington, DC, 20036
Phone: 202/452-6252
Fax: 202/463-9462