

CONFRONTING CRIMINAL JUSTICE DEBT

THE URGENT
NEED FOR
COMPREHENSIVE
REFORM

September 2016

CRIMINAL JUSTICE
POLICY PROGRAM

HARVARD LAW SCHOOL

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The Criminal Justice Policy Program (CJPP) at Harvard Law School conducts research and advocacy to support criminal justice reform. It generates legal and policy analysis designed to serve advocates and policymakers throughout the country, convenes diverse stakeholders to diagnose problems and chart concrete reforms, and collaborates with government agencies to pilot and implement policy initiatives.

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).

For more information, please visit:

Criminal Justice Policy Program at Harvard Law School at: <http://cjpp.law.harvard.edu>

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CONFRONTING CRIMINAL JUSTICE DEBT

THE URGENT NEED FOR COMPREHENSIVE REFORM

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1. A BRIEF INTRODUCTION TO CRIMINAL JUSTICE DEBT

In July 2016, Philando Castile, an African-American man, was shot and killed by a police officer in Minnesota after being stopped ostensibly for driving with a cracked taillight. The shooting spurred investigation into prior interactions the police had with Castile, as well as the broader links between traffic stops, race, and fines and fees. Castile was stopped by police while he was driving at least 29 times during a six-year period between 2006 and 2012.¹ In 24 of those stops, Castile was charged with driving with a suspended or revoked license, where his underlying license suspensions appear to be based on unpaid fines. Along with license suspensions or revocations, most of these stops resulted in additional fines for Castile—adding up to nearly \$6,000 during the six-year period.

Castile's death has become emblematic of a broader crisis of racially disparate policing practices. As President Obama explained about the deaths of Castile and other black men, these “are not isolated incidents. They're symptomatic of a broader set of racial disparities that exist in our criminal justice system.”² Castile's experience is also representative of the role that seemingly minor financial penalties can play in driving civilian-police encounters. In a recent Supreme Court decision, the Court concluded that evidence discovered after an illegal investigatory stop is admissible in court if, after he effects the stop, the officer later discovers a valid arrest warrant.³ As Justice Sotomayor recognized in dissent, for many people living in heavily policed areas, this rule makes nearly every police stop valid. After all, “[w]hen a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant.”⁴ She warned:

*We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, *The Miner's Canary* 274–283 (2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.*⁵

Castile's tragic death illustrates how criminal justice debt can subject individuals, and especially people of color, to increased interactions with police and with the criminal justice system. These debt-driven encounters have increasingly come to shape nearly every stage of the criminal justice system.

The focus of this project is the financial costs of the criminal justice system, which can have a devastating toll on individuals and their families, as well as on society more broadly. Increasingly, people who interact with the courts come away with significant, sometimes crippling debts. For example, defendants charged with low-level misdemeanors or infractions, including traffic offenses, may find themselves burdened with

crushing fines, surcharges, and “user fees” related to the costs of policing and adjudicating the offenses. The persistence of that debt can deepen a person’s exposure to the criminal justice system, in some cases leading to incarceration. Other defendants may find, after serving a sentence of incarceration, that accumulated court-imposed debt, often including the costs of their own incarceration, hinders their ability to reenter society successfully. These debts can sap resources needed to build a stable life, prolong judicial supervision,⁶ preclude voting,⁷ and lead to stints of re-incarceration based entirely on non-payment.⁸

TALKING ABOUT CRIMINAL JUSTICE DEBT

The broad category of “criminal justice debt” encompasses many forms of financial obligations. Scholars and advocates have also referred to these obligations as “legal financial obligations,”⁹ “monetary sanctions,”¹⁰ or just “fines and fees.”¹¹ Some advocates refer to the practice of arresting and jailing people for nonpayment of these fines and fees as maintaining “debtors’ prisons” or “modern-day debtors’ prisons.”¹² Generally, criminal justice debt includes fines imposed as a penalty for a criminal conviction; fees or costs connected to specific costs to criminal justice institutions (such as courts or jails); surcharges imposed as a flat amount or percentage added to a fine to fund a particular government function or a general fund; interest, collection costs, and penalties that accrue based on late payment or non-payment of criminal justice debt; and restitution, which requires people convicted of crimes to make payments to specific victims affected by their conduct.

These spiraling harms are rooted in a shift in the criminal justice system that has changed the way its institutions relate to the communities they serve. For many reasons, some police, courts, jails and prisons, and probation departments have had their essential functions distorted by the perceived need to raise revenue through the criminal justice system. To raise money, they impose heavy fines and fees. And to collect that money, they rely on draconian collection practices that can be far more coercive and harmful than those employed by private debt collectors. The targets of such fines and fees, and ultimately of collection, are often the local residents with the least ability to pay for the system. In sum, these criminal justice practices have resulted in the monetization of the relationship between the justice system and the people it is supposed to serve.

2. THE LINK BETWEEN CRIMINAL JUSTICE DEBT, POLICING PRACTICES, POVERTY, AND RACIAL JUSTICE

Advocates across the country have focused on the harms of excessive fines and fees in the criminal justice system, and in particular, on the disproportionate impact that these costs have on the poor and people of color. Numerous reports by advocacy groups, research by scholars, and lawsuits by civil rights plaintiffs have revealed the stark injustices that result from the improper imposition and collection of criminal justice debt.¹³

They have documented how the poorest criminal defendants suffer the harshest consequences. This can include spiraling cycles of debt and incarceration, where individuals lose their freedom simply because they lack the means to pay court debt. In Colorado, for example, a homeless man was charged \$165 in fines and fees after making an illegal left turn.¹⁴ Since he had lost his job following a workplace injury, he was unable to pay the court costs and was subsequently jailed for ten days. In Georgia, a woman was fined \$135 for failing to come to a complete stop at a stop sign.¹⁵ Because she was unemployed and unable to pay the fine immediately, she was sentenced to three months of probation and charged \$105 in probation supervision fees and \$27 for the Georgia Crime Victims Emergency Fund. The day that her case was adjudicated, she was jailed until her fiancé pawned her engagement ring in order to make a \$50 payment towards the debt. These examples can be easily multiplied, and illustrate the deep unfairness and counter-productivity of policies that have the effect of criminalizing poverty.

The challenges of criminal justice debt are deeply linked to policing practices.¹⁶ Communities that are heavily policed, particularly communities of color, often pay the highest costs. When protests erupted in Ferguson, Missouri, after a police officer shot and killed Michael Brown, a black unarmed 18-year-old stopped for walking in the street, the Department of Justice's investigation revealed troubling practices by local authorities. The Justice Department's findings focused on abusive criminal justice debt practices, which the nonprofit legal group ArchCity Defenders had also documented.¹⁷ The Justice Department's Ferguson Report described in vivid detail how the municipality used its court system to generate revenue in a way that disproportionately burdened African-Americans. Not only were African-Americans stopped and searched by police at a higher rate than other residents, but they were also more likely to be issued multiple citations, have their cases persist for longer, face more mandatory court appearances, and have warrants issued for failing to meet court-ordered obligations.¹⁸

Ferguson has generated sustained national attention on the ways that criminal justice debt exacerbates racial inequality in the criminal justice system, but it is not unique. Similar disparities are seen around the country.¹⁹ Indeed, data from the United States Census suggests that there may be a correlation between the cities that are most

dependent on fines and fees for revenue and high African-American populations.²⁰ Further compounding the impact of heavy fines and fees on African-Americans is the longstanding and well-documented racial wealth gap, caused by deeply entrenched public and private discrimination, including ongoing discrimination in the housing and labor markets.²¹ The lack of assets available for many African-American families to draw on means that an unexpected court debt may produce more extreme economic shocks,²² and inability to pay the debt immediately may result in significant harms, from suspension of a driver’s license to incarceration for nonpayment.

The challenges of criminal justice debt are systemic. By making courts, police departments, and other government agencies dependent on revenue derived from criminal defendants, criminal justice debt incentivizes actors throughout the system to prioritize revenue-generating enforcement.²³ Even more fundamentally, it distorts the larger operation of the criminal justice system. Outsized reliance on revenue obtained through fees and surcharges allows jurisdictions to fund their systems on the back of a subset of the population: disproportionately poor people and people of color. This is a regressive system of taxation that obscures broader considerations—including the full array of costs and benefits—that would ordinarily inform the policymaking and budget-setting processes.

3. CONFRONTING JUSTICE DEBT: COMPLEMENTARY STRATEGIES FOR REFORM

Criminal justice debt raises a host of urgent issues that affect huge numbers of individual court cases and implicates broad policy considerations. To help advocates tackle these problems in both the litigation and policy arenas, the National Consumer Law Center (NCLC) and Harvard Law School’s Criminal Justice Policy Program (CJPP) have collaborated on a joint initiative, *Confronting Criminal Justice Debt: A Comprehensive Project for Reform*. The aim of this joint project is to equip advocates to meet the urgent challenges posed by criminal justice debt.

To do so, we believe that those working on criminal justice and civil justice issues will need to work together. The problems of criminal justice debt lie at the intersection of criminal and consumer law. Government actors impose fees for “use” of the criminal justice system and then collect on the resulting debts using tools common in the civil debt collection sphere along with more severe threats to liberty and livelihood rooted in the criminal system. Indeed, in many jurisdictions, court officials, police, and probation officers have become de facto debt collectors. By working together, criminal justice advocates and consumer advocates—as well as others who work on issues of civil rights, poverty law, and social justice regardless of the civil or criminal designations—can bring

the depth of their respective expertise and breadth of their communities of support to bear in confronting these problems.

Thus a secondary aim of this project, and of the collaboration between CJPP and NCLC (and its team of contributing authors), is to foster communication and cooperation between advocates who work in both the criminal and civil spheres, including those with consumer law backgrounds. Through such communication, advocates in both arenas may deepen their understanding of the role each community can play in addressing criminal justice debt problems, from identifying sources of existing law that may provide debtors with legal remedies, to providing urgently needed representation during the various proceedings related to criminal justice debt, to developing critical policy reforms that address the full-spectrum of problems that arise from current criminal justice debt practices.

Recognizing the broad set of challenges relating to criminal justice debt, this joint initiative has generated a pair of guides intended for advocates working on many dimensions of the problem.

NCLC has assembled a guide for litigators who represent clients in criminal justice debt matters. As criminal justice debt issues may arise in a variety of criminal and civil proceedings—as well as in proceedings such as contempt that may straddle the usual criminal-civil divide—the Litigation Guide covers a wide expanse of potential litigation postures and arguments. Because the laws and practices governing criminal justice debt vary among states and from jurisdiction to jurisdiction, the guide does not attempt to provide an exhaustive treatment of the specific laws applicable in each jurisdiction. Instead, it identifies a range of potential tools based in constitutional, criminal, and consumer protection law that attorneys may use to protect their clients from the harms and injustices they may experience as a result of criminal justice debt practices.

To complement that focus on client representation, CJPP has assembled a guide for policy reform. It proceeds from the premise that a complex set of policies have given rise to harmful practices in this area. The Policy Reform Guide seeks to highlight the different areas of law that spawn abusive practices and outlines a wide array of policy levers that advocates and policymakers might consider in seeking to constrain and eventually eradicate those practices.

The Litigation Guide

Confronting Criminal Justice Debt: A Guide for Litigation is organized by the types of representation attorneys may provide clients dealing with criminal justice debt issues, including the different types of legal proceedings and postures in which criminal justice debt issues arise. For each, the Litigation Guide provides a brief introduction to the issues and identifies key legal principles, defenses, and claims that may be asserted

on behalf of a client who faces imposition of or owes criminal justice debt, while also noting potential barriers and limitations. The types of representation addressed in the guide are:

- **Defending against imposition of criminal justice debt.** Fines, fees, and surcharges are often imposed on criminal defendants at sentencing. While, for good reason, limiting

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or preventing incarceration is often the paramount concern of defendants and their counsel at this time, limiting or preventing imposition of criminal justice debts—and counseling clients on these debts—is now also acutely important in light of the rise of these debts and the devastating and long-lasting impact they can have on individuals, their families, and their communities. The Litigation Guide provides an overview of some of the main issues counsel may face at sentencing or other proceeding where criminal justice debts may be imposed and possible strategies for limiting or preventing imposition of debt. This includes representation in ability-to-pay determinations in jurisdictions that require or allow such determinations prior to imposition, as well as criminal justice debt considerations in plea bargaining.

- **Defending against collection of criminal justice debt, including defending against sanctions or incarceration for nonpayment.** In at least 44 states and the District of Columbia, individuals may be incarcerated for “willful” nonpayment of criminal justice debts.²⁴ Additionally, in many jurisdictions, nonpayment or extended payment timelines may result in other severe sanctions and delays in restoration of key rights, including suspension of driver’s licenses and restrictions on expungement relief and the right to vote. Therefore, the most urgent legal need of those who owe criminal justice debt will often be to find ways to defend against incarceration or loss of an essential right for nonpayment or to quickly reduce the risk of negative consequences through modification of the debt or payment plan. The Litigation Guide addresses several potential grounds for defending against incarceration and other collection actions related to criminal justice debts. Specifically, the guide focuses 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.
- **Seeking discharge of criminal justice debts through bankruptcy.** Bankruptcy is a potentially powerful tool for criminal justice debtors to discharge their debts and move forward with life, but is fraught with caveats and complications. Whether criminal justice debt is dischargeable through bankruptcy depends on a number of variables, including the type of debt, the type of bankruptcy (Chapter 7 vs. Chapter 13), and

sometimes the jurisdiction. The Litigation Guide provides the first in-depth discussion of how criminal justice debt is treated in bankruptcy and how the tool may be leveraged to protect clients.

- **Protecting assets, wages, and benefits from involuntary collection of criminal justice debts.** In addition to threatening incarceration or sanctions for nonpayment, governmental actors are often able to simply take a debtor’s wages, benefits, tax refunds, or other assets through involuntary or coercive collection practices. As a practical matter, these types of practices often create the crises that will drive many clients to contact an attorney in order to seek relief. The Litigation Guide addresses strategies specific to the context of involuntary debt collection, focusing on the application of state and federal exemptions to criminal justice debt collection. It also highlights the susceptibility of involuntary collection practices—which require notice and opportunity to be heard—to due process violations, and thus to procedural challenge.
- **Asserting affirmative claims and counterclaims relating to criminal justice debts.** In addition to the “defensive” tools described above, advocates should also consider the applicability of “affirmative” tools. Suing a state, county, court, or private actor responsible for improper imposition or enforcement of court debt may allow clients to obtain redress for the harms caused them and, just as importantly, halt ongoing illegal conduct. The Litigation Guide addresses potential claims founded in the U.S. Constitution, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and Title VI of the Civil Rights Act of 1964, as well as potential bars to affirmative litigation of criminal justice debt cases, including immunity issues.

Additionally, the Litigation Guide includes checklists of key factual and legal issues for attorneys to consider when representing clients with respect to criminal justice debt, and a discussion of the underlying constitutional principles that animate much of the law in this area.

The Policy Reform Guide

Confronting Criminal Justice Debt: A Guide for Policy Reform is organized around four overarching areas of potential reform. For each area, it provides an overview of the issue as well as several reform strategies that might be implemented through legislation, court rules, or executive action. The four areas are:

- **Conflicts of interest:** One of the most unsettling revelations in the Justice Department’s Ferguson investigation was the deep and pervasive conflicts of interest facing actors throughout that city’s criminal justice system. Simply put, jailing people paid, which drove the entire system’s approach to law enforcement. These conflicts of interest are not unique to Ferguson. Throughout the country, courts and other

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government actors face pressure to bring revenue into their own operating budgets through the imposition and enforcement of criminal justice debt. These incentives distort outcomes and undermine the public's faith in the system. The Policy Reform Guide outlines several approaches for ameliorating those conflicts of interest.

- **Poverty traps and poverty penalties:** Criminal justice debt, and the elaborate enforcement machinery often used to collect it, can have spiraling consequences for the most economically marginalized defendants. In some instances, enforcement of these obligations has the paradoxical effect of constraining an individual's ability to earn a living, thus undercutting the person's ability to pay court costs while trapping her and her family in a cycle of poverty and indebtedness. Other policies attach cascading costs and penalties to the collection practices geared toward indigent defendants, creating a situation where the poor pay more simply due to their poverty. The Policy Reform Guide provides guidance on how to identify policies that operate as poverty traps or poverty penalties and proposes reforms that would reverse those effects.
- **The ability-to-pay determination:** Too often, courts impose financial obligations that are simply beyond a defendant's capacity to ever meet. Constitutional law prohibits courts from jailing indigent defendants for non-payment of debts they cannot afford, which means courts must make an inquiry into a person's ability to pay before depriving them of liberty for non-payment. Beyond those baseline constitutional requirements, sound policy considerations counsel in favor of robust procedures for conducting such determinations, not only at the enforcement stage but also when financial obligations are imposed. The Policy Reform Guide outlines the minimum constitutional requirements and describes several best practices for ensuring such determinations are efficient and fair.
- **Transparency and accountability:** All of the reform strategies outlined in the Policy Reform Guide will benefit from robust transparency measures that allow policy-makers, advocates, researchers, journalists, and individual criminal defendants to understand exactly how criminal justice debt operates. Transparency in this context means laws designed to ensure collection of data about the functioning of court debt (including its racial impact), analysis and disclosure of system-wide practices, and opportunities for individuals to request and receive documents reflecting policies and practices relating to criminal justice debt.

There is a historic opportunity for police, courts, municipalities, and state government to reconsider the role that criminal justice debt plays as a regressive tax in funding basic services while exposing the poor and people of color to greater criminal justice system involvement. This momentum will be lost, however, unless litigators challenge criminal justice debt in the courts and advocates and policymakers seek system-wide reform. The Confronting Criminal Justice Debt project equips advocates around the country to seize this moment of reform.

ENDNOTES

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7. See Allyson Fredricksen & Linnea Lassiter, Alliance for a Just Society, Disenfranchised by Debt: Millions Impoverished by Prison, Blocked from Voting (Mar. 2016), available at <http://allianceforajustsociety.org/2016/03/disenfranchised-by-debt> (showing how outstanding criminal justice debt prevents many formerly incarcerated people from voting).
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To date, litigation challenging debtors’ prisons has been filed in at least Alabama, Georgia, Louisiana, Mississippi, Missouri, and Washington. See, e.g., *Kennedy v. City of Biloxi*, No. 1:15-cv-348-HSO-JCG (S.D. Miss. Oct. 21, 2015); *Cain v. City of New Orleans*, No. 2:15-cv-04479-SSV-JCW (E.D. La. Sept. 21, 2015); *Foster v. City of Alexander City*, No. 3:15-cv-647-WKW (M.D. Ala. Sept. 8, 2015); *Edwards v. Red Hills Cmty. Probation, L.L.C.*, No. 1:15-cv-67-LJA (M.D. Ga. Apr. 10,

- 2015); *Fant v. The City of Ferguson*, No. 4:15-cv-00253 (E.D. Mo. Feb. 18, 2015); *Fuentes v. Benton Cnty.* (Wash. Super. Ct. Yakima Cnty. Oct. 6, 2015).
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 23. See, e.g., Conf. of State Court Administrators, *2011–2012 Policy Paper: Courts Are Not Revenue Centers* (2012), available at <https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf>.
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