



AMERICAN **BAR** ASSOCIATION™

# Privatization of Services in the Criminal Justice System

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**American Bar Association  
Working Group on  
Building Public Trust in the  
American Justice System**

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# PRIVATIZATION OF SERVICES IN THE CRIMINAL JUSTICE SYSTEM

A REPORT OF  
THE AMERICAN BAR ASSOCIATION  
WORKING GROUP ON BUILDING PUBLIC TRUST IN THE AMERICAN JUSTICE SYSTEM  
June 2020

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The Working Group on Building Public Trust in the American Justice System took on this project as its logical next step after producing the *Ten Guidelines on Court Fines and Fees*, to continue its efforts to ensure that the treatment of individuals subject to the criminal justice system does not depend on their ability to pay. The indispensable contributor to those efforts is its ABA Staff member, Malia Brink. She is the driving force behind all that the Working Group has accomplished.

### **Rob Weiner**

*Chair, American Bar Association's Working Group on Building Public Trust in the American Justice System*



## II. INTRODUCTION

In July 2016, in the face of increasing racial tensions, retaliatory violence against police officers, and a growing sense of public distrust in our nation's justice system, the ABA created the Task Force on Building Public Trust in the American Justice System. The Task Force prepared a report, which the ABA Board of Governors received in February 2017, calling on the ABA and state and local bar entities to: (1) encourage the adoption of best practices for reforming the criminal justice system; (2) build consensus about needed reforms and work to carry them out; and (3) educate the public about how the criminal justice system works.<sup>1</sup> In August 2017, incoming ABA President Hilarie Bass appointed a Working Group on Building Public Trust in the American Justice System to continue the work of the Task Force. In that initial year, the Working Group chose to focus on one issue causing distrust of the justice system: the imposition and enforcement of excessive fines and fees. The Working Group chose this topic because criminal justice fines and fees adversely affect millions of Americans and have fueled negative public perceptions of the justice system. After a year of study and broad-based consultation within and outside the ABA, the Working Group proposed *The Ten Guidelines on Court Fines and Fees*, which the ABA House of Delegates adopted in August 2018.<sup>2</sup>

The Guidelines acknowledge the significant increase in the imposition of fines and fees in the criminal justice system and how those fines and fees can effectively criminalize poverty. The Guidelines provide practical direction for government officials, policymakers and others charged with developing, reforming and administering court fines and fees to ensure that these fines and fees are fairly imposed. For example, the guidelines require that use of fees be strictly limited and recommends that they “never be greater than an individual’s ability to pay.” (Guideline 1). The Guidelines call on courts to hold ability-to-pay hearings before any sanction for failure to pay is imposed. (Guidelines 4). And the Guidelines set forth the fundamental principle that inability to pay fines and fees should never result in incarceration or other disproportionate sanctions, such as revocation or extension of parole or probation, driver’s license suspensions or loss of child custody. (Guideline 3).

In studying the impact of fines and fees, the Working Group noticed that, increasingly, those entangled in the criminal justice system pay fees not only to the courts, but to private entities that have contracted with the courts or other governmental bodies to provide core services. Rather than the governmental entity paying for the services provided under the contract, the courts often impose or permit imposition of a “broad range of ‘user fees’ on criminal defendants, ranging from supervision fees to drug testing fees. . . . These surcharges, assessments, court costs, and user fees . . . have proliferated to the point where they can eclipse the fines imposed in low-level offenses.”<sup>3</sup> Observing this trend, then-incoming ABA President Bob Carlson continued the Working Group and suggested that it focus on developing a better understanding of this phenomenon with regard to bail and other features of the criminal justice system. The following year, ABA President Judy Perry Martinez urged the Working Group to continue this work. This report reflects the initial product of that effort and will be a platform for the next stage of the Working Group’s assessment and proposals.

The report summarizes research done by other entities, academics, journalists, and

activists on specific aspects of privatization throughout the criminal justice system and provides an overview of the ways in which private companies are playing an increased role in all aspects of the system.

The organization of the report tracks the sequence of a typical accused individual's experiences in the criminal justice system following arrest:

- Determination of bail and conditions of pretrial release;
- Trial or plea bargain, where the defendant might receive diversion or probation;
- Services in jails and prisons;<sup>4</sup> and
- Collection of the fines and fees accrued.

The report acknowledges that courts and other government entities sometimes need to import expertise they lack and to finance services they must provide but cannot finance. In considering privatized responses to those problems, however, governments must recognize how low-income individuals too often can be relentlessly ensnared in the criminal justice system, not because they engage in ongoing criminal activity, but because they cannot pay the debts imposed by the system itself. Some governmental bodies and their private partners are sensitive to these concerns and address them responsibly. But too often, by hiring private companies to handle what were previously governmental functions in the criminal justice system, government agencies exacerbate the cycle of mandatory fees, nonpayment, and consequent additional fees. Far too frequently, government authorities allow private companies to operate in the criminal justice system with little or no oversight and to charge fees untethered to actual costs. Absent appropriate contractual and legal limits, closely monitored by government officials, private companies can have economic incentives to engage in practices that extend individuals' involvement in the system and that extract as much money as possible, whether or not doing so serves the purposes of the criminal justice system or comports with due process.<sup>5</sup> The report concludes with recommendations for next steps to further the purposes of *The Ten Guidelines on Court Fines and Fees* and ensure that the criminal justice system serves its primary aim—public safety—and does not punish people because they are poor. The Working Group urges the relevant entities of the American Bar Association to consider these recommendations and to collaborate with the Working Group to develop policy guidelines for the involvement and use of private companies in the criminal justice system.



### III. CONDITIONS OF RELEASE

A person who is arrested and taken into custody should promptly come before a judge or judicial officer for an initial appearance. At this initial appearance, the judge decides what limitations, if any, to place on the accused individual to guarantee that he or she returns to court. Generally, there are three options:

- Release on one's own recognizance, which allows the person to be free pending trial upon a promise to return for future court appearances and not to engage in any illegal activity during that period.
- Release with conditions, where the judge releases the accused individual pending trial but imposes certain conditions, such as monetary bail or bond, reports to pretrial services, drug or alcohol testing, or a GPS monitor.
- Pretrial detention, where the person remains in jail until trial.

The law favors release of defendants pending trial.<sup>6</sup> The ABA Standards for Criminal Justice on Pretrial Release<sup>7</sup> and longstanding precedent<sup>8</sup> require that judges assign the least restrictive conditions of release that reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses, and others. Under these Standards and precedents, courts should presume that release on one's own recognizance is appropriate, and impose conditions only when necessary to ensure the defendant's return to court or to protect public safety.<sup>9</sup> Specifically, the Standards require courts to use pretrial detention sparingly and only after determining that an individual poses (1) a substantial risk of flight, (2) a threat to the safety of the community, victims, or witnesses, or (3) a threat to the integrity of the justice process.<sup>10</sup>

Although the ABA Standards urge release on recognizance for most accused individuals, judges frequently impose conditions of release enabling the courts to monitor defendants without incurring the cost of incarceration. Most individuals readily agree to the conditions to obtain release, as even a brief pretrial detention can significantly disrupt both home and work life. Additionally, research shows that accused individuals who are released rather than detained ultimately fare better at trial.<sup>11</sup>

The most commonly imposed condition of pretrial release is monetary bail, and private, for-profit companies have had a role in bail for decades. Increasingly, that role has expanded and now frequently affects the costs of other conditions of pretrial release imposed by the courts. For example, an accused individual may have to pay private companies for the equipment (such as a GPS monitor) or service (such as weekly drug testing) necessary to satisfy their conditions of release.

## A. BAIL

The most common and best known private, for-profit entities in the criminal justice system are those in the bail industry. Bail bonds agencies in the United States have served, and profited from, the criminal justice system for more than a century. Bail is cash paid by an individual charged with a crime to guarantee that he or she will return for future court proceedings. The individual is expected to deposit the full amount of the bail set with the clerk of court. If the accused shows up for court, the bail money is returned. If the individual does not show up, the bail is forfeited. Bail can range from a nominal amount up to hundreds of thousands of dollars or more, depending on the offense and the perceived flight risk.

For those with means, bail is usually just an inconvenience. They post bail and obtain release quickly. An individual who cannot afford the full bail amount set by the court must utilize a bail bond company—a private, for-profit entity—to meet bail and obtain release. The bail bond company agrees to post the full amount of the bail for the individual, keeping a percentage (usually 10%) as a nonrefundable fee.

Bail bond agents also may require “collateral” in the form of a car or other personal or real property. Many individuals do not have the funds or collateral to obtain a bond themselves and must ask family or friends to find resources and make sacrifices to obtain their loved one’s release. If the person does not appear in court, the bail bond company keeps not only the fee but also confiscates the property put up as collateral: “In addition to losing the money they’ve put down, bail bonds also often leave families paying loan installments and fees even after a case is resolved . . . [a]nd bail-bond agreements often include additional terms, which can bring on additional fees, surveillance, and/or property loss, if a house or other asset was put up as collateral.”<sup>12</sup>

Money bail has long been criticized for disproportionately affecting poor people and minorities, and civil rights, racial justice, and criminal justice reform advocates for years have worked to eliminate it.<sup>13</sup> In 2017, the ABA House of Delegates passed a resolution urging jurisdictions to permit cash bonds only after a court determines that it is the only way to assure appearance in court, further stating that pretrial detention should never occur solely because of the person’s inability to pay bail.<sup>14</sup>

Reform efforts across the country are ongoing and have had varied success. For example, this year Colorado prohibited money bail for many municipal-level offenses.<sup>15</sup> Other states are also pursuing significant reforms. But despite reform efforts in many states, and the well-documented problems with the bail bond system, bail—and private bail bond companies—are still the norm across much of the United States.

The bail industry is notoriously opaque, and researchers have had difficulty obtaining detailed financial information. However, research in the last few years has shed light on the substantial profits made by private bail bond companies.

- In 2018, The Marshall Project reported that 193 bail companies operating in Mississippi received \$43 million in fees over 18 months, 36% of that amount coming from “small” bonds. One company that operates in 11 Mississippi counties, took in \$2.6 million in fees during that same 18 months, with 46% coming from bonds of less than \$5,000.<sup>16</sup>





- A 2018 report from the New York City Comptroller's Office showed that private bail bonds accounted for more than half of all bail posted in the City's court system. In fiscal year 2017, the total bonds were valued at \$268 million, with an estimate of up to \$27 million paid in nonrefundable fees.<sup>17</sup>

The amount of money that families lose under the for-profit bail system is staggering. In Maryland, over five years, families of individuals accused, but ultimately cleared, of crimes paid almost \$75 million in non-refundable bail-bond payments.<sup>18</sup> In New Orleans, roughly 5,000 families paid \$4.7 million in non-refundable fees.<sup>19</sup>

Although bail bond services are often depicted as “mom and pop” storefront shops, studies show that global insurance companies operate many bail bond agencies: “Overall, the industry is a profitable and fairly concentrated one. Though there are more than 25,000 bail-bonds companies across the U.S., only about 10 insurers are responsible for underwriting the bulk of the \$14 billion in bonds that are issued each year. The industry brings in around \$2 billion in profit a year.”<sup>20</sup>

## B. Supervised Release

In addition to or in lieu of, bail, courts frequently impose a range of pretrial release conditions on individuals charged with crimes. Increasingly, private, for-profit companies implement these conditions.<sup>21</sup>

**Pretrial Supervision** – In many jurisdictions, judges require individuals awaiting trial to report to pretrial supervision, even if they have posted bail. In some places, a probation or pretrial services agency provides this supervision at no cost. However, an increasing number of jurisdictions contract with private, for-profit companies to provide pretrial supervision. Frequently, the contract does not require payment by the jurisdiction, but rather enables the company to collect supervision and other fees from the accused individuals who are subject to supervision. Because supervision is a condition of release, individuals are under immense pressure to pay the fees required, and non-payment can often result in re-incarceration.

- A court last year ordered a St. Louis woman, Jocelyn G., to report monthly to a private, for-profit company after she posted bail and was waiting for her trial: “Her name is called, and an office worker jots down her personal information and asks if she’s staying out of trouble. The visits take less than five minutes and cost her \$30.” She was told that if she missed a payment an arrest warrant would be issued. Ms. G stated that, “People say you’re innocent until proven guilty, but really you’re guilty until proven innocent, because I’m the one paying to keep my freedom every month.”<sup>22</sup>
- In Oklahoma, a private, for-profit company that lists itself online as a “title company” charges \$40 to \$300 per month for pretrial supervision.<sup>23</sup> The company is one of a growing number of private, for-profit companies that have entered the pretrial services industry and charge individuals for community-based supervision.

It is not uncommon for an individual to wait six months to a year before trial, even on a minor charge. Monthly supervision fees during this time can easily reach hundreds or even thousands of dollars depending on the monthly fee.

**Drug and Alcohol Testing** – Another common condition of release is regular drug or alcohol testing. In some jurisdictions, judges also require individuals released with electronic monitoring devices to submit to drug testing to keep them “from committing property crimes to support their habit while they are awaiting trial.”<sup>24</sup>

When a jurisdiction has a pretrial services agency, drug testing is usually that agency’s responsibility. However, the existence and administration of pretrial services varies across the country.<sup>25</sup> A variety of entities run pretrial services: courts, probation agencies, departments of corrections, nonprofits, and, as noted above, increasingly, private, for-profit companies. Jurisdictions that do *not* have pretrial services agencies generally contract out drug testing. And some jurisdictions offer defendants the choice of doing the testing in-house or through a private or nonprofit entity.

Drug tests are rarely free, regardless of who runs the pretrial services program. The charges vary, generally \$15 to \$40 per test to cover costs, with the in-house programs usually costing less. Lab confirmed tests can cost more than \$80. Some pretrial services agencies still provide drug testing for free or at a reduced cost.

- In Santa Clara County (California), the court can order mandatory random drug/alcohol testing as a condition of “supervised own recognizance.”<sup>26</sup> The county does the testing through an in-house program, with the cost to the defendant of \$15 per test.
- The Conyers, Georgia Municipal Court recently decided to contract out their drug tests, at a cost of \$32 per test, believing that an outside lab would provide more accurate results.<sup>27</sup>
- St. Clair County (Illinois) contracts with a for-profit company to administer its pretrial diversion programs, with drug tests costing \$35 each.<sup>28</sup>
- In Virginia localities with pretrial services programs, drug testing is available at no cost. Those counties *without* pretrial services charge individuals \$25 for drug testing as a condition of pretrial release, with some defendants required to take multiple drug tests per week until their cases are heard.<sup>29</sup>

**Electronic Monitoring** – Electronic monitors are essentially GPS tracking devices, generally worn in ankle bracelets. When required as a pretrial condition, an individual must wear the monitor at all times. If the court requires the person to stay away from a particular place, such as an accusing victim’s home, the monitor will document any violation. Similarly, the monitor will show if the accused individual violates a requirement to stay in the jurisdiction. In some cases, the monitor enforces an “exclusion zone,” notifying the monitoring agency if the person goes in or near a restricted area. The electronic monitor also allows courts to enforce home confinements and curfews.



As efforts to reduce the numbers of pretrial detainees have increased, electronic monitoring has become an appealing alternative for courts. Use of electronic monitors for this purpose, as well as for community supervision after incarceration, has more than doubled in the last 10 years.<sup>30</sup> Electronic monitors permit individuals who otherwise would be detained before trial to continue working and meeting family obligations. However, an increasing number of judges are ordering pretrial electronic monitoring for people accused of nonviolent crimes, for others determined to be “low-risk,” and as a condition of initial release (rather than after an initial violation of a release condition).

Courts and local governments usually do not pay for the electronic monitors; the costs are passed on to the accused.<sup>31</sup> These costs can be significant. Usually there is a set-up or installation fee, ranging up to \$200, and then a daily fee, ranging from \$5 to \$30.<sup>32</sup> In many states, individuals who wear an electronic monitor also must have a house phone (*i.e.*, a “landline” telephone), which increases the cost for those who otherwise would rely solely on cell phones. Additional charges apply for loss of or damage to the tracking component. For example, in Iowa, users must pay \$55 to replace a power cord and \$795 to replace a device.<sup>33</sup>

These costs can mount quickly and cause serious financial hardship. With an installation charge of \$75 and a daily fee of \$9, an accused individual whose trial occurs six months after arrest will owe \$1,695 in monitoring costs. At minimum wage, that individual would have to work more than 230 hours—close to *six weeks full-time*—to earn that amount.

- In 2015, police pulled South Carolina resident Antonio G. over for failing to use a turn signal, arrested him, and took him to the local jail. The next day his mother posted the \$2,100 bail and the judge ordered, as a condition of Mr. G’s release on bail, that he wear and pay for an electronic monitoring device. The for-profit company that provided the monitor charged Mr. G a monitor set-up fee of \$179.50 and \$9.25 per day—almost \$300 per month. After nine months of wearing the device, and still waiting for his trial, Mr. G had paid over \$2,500 for his monitor. “I gave up...I was falling apart. It felt like being on a chain gang. Those bills were getting out of hand. I said, ‘They’re just going to have to lock me up.’” On August 4, 2015, Green turned himself in. He’d simply run out of money.”<sup>34</sup>

- In Oakland, California, one individual released pretrial reported that paying for the device, which costs \$30 per day (at least \$840 per month), had left him homeless and sleeping in his vehicle.<sup>35</sup>

**Alcohol and Drug Monitoring Devices** – Courts also can employ several types of devices to monitor and/or control alcohol and drug use as a condition of pretrial release. The two most common ones are monitoring bracelets and automobile interlock devices.

- *Secure Continuous Remote Alcohol Monitoring (SCRAM)* devices/bracelets detect and report an individual’s alcohol consumption. The SCRAM device determines the level of alcohol, if any, in a person’s body by monitoring the wearer’s perspiration every 30 minutes. The initial installation fee ranges from \$50 to \$100. The average monitoring fee is \$10 to \$15 per day, up to \$450 per month.<sup>36</sup>

- An *ignition interlock* device is basically a breathalyzer installed inside a car, directly connected to the ignition system. Users must blow into a mouthpiece on the device before starting or continuing to operate a vehicle. If the breath-alcohol concentration exceeds the programmed amount, the device prevents the engine from starting. To prevent someone other than the driver from providing a breath sample, devices require another breath sample at random times after the engine has started. The cost varies from state to state, but most companies charge \$100 to \$150 to install the device and roughly \$60 to \$90 per month for monitoring and calibration.<sup>37</sup> Some ignition interlock devices have a small camera that takes a picture each time the device is used. The interlock cameras generally entail an additional charge. At these prices, installation and six months of pretrial release with an ignition interlock would cost \$460 to \$690.

As with pretrial release, the costs of these conditions will not burden defendants with substantial means. But for most individuals, these charges, which can easily run into the thousands of dollars during a 6-or 12-month pretrial release, are a substantial financial burden. Inability to pay to satisfy these conditions may prevent the individual from leaving jail, cause a remand back into custody while awaiting trial, and, if viewed as a violation, result in the forfeiture of any bond posted to obtain release. In addition to being unfair to those incarcerated simply because they are too poor to afford the fees, this approach is expensive for the jurisdictions, which pay the costs of incarceration. A cost-benefit analysis prepared for the Sheriff's Office in Broward County, Florida, showed that pretrial detention was over 70 times more expensive than pretrial supervision.<sup>38</sup>



## IV. DIVERSION PROGRAMS

Some courts offer individuals charged with crimes the option to enter private diversion programs. Often used to address minor crimes such as writing bad checks, minor drug crimes, first-time DUI offenses, or mental health related crimes, these programs sometimes result in the dismissal of charges once the individual successfully completes the programs, allowing the person to avoid a criminal record. In other instances, these programs simply allow a person to avoid a trial and potential incarceration or probation.

These private diversion programs can be expensive, putting many of them beyond the reach of low-income individuals.<sup>39</sup> Some individuals go into debt to pay the requisite fees. People who enter a program and then cannot complete necessary payments may face punishment for the failure to pay, as well as reinstatement of criminal charges and ultimately a conviction and sentence.

In some jurisdictions, for-profit programs give a percentage of their fees to the prosecutor's office, making referrals to the private programs a source of revenue for those offices. For example, Maricopa County, Arizona runs a "marijuana diversion" program. To participate, individuals must pay fees for admittance, drug tests, and diversion classes. The prosecutor's office receives a portion of these fees; according to one recent report, almost \$2 million dollars a year were received from this single diversion program.<sup>40</sup>

**Diversion Programs: "Minor" Crimes** – Diversion programs are frequently available to first-time offenders facing minor criminal charges. For example, in Miami-Dade County, a first-time offender charged with a misdemeanor can accept a diversion program that requires five to eight classes. The County drops the charges if the offender successfully completes the classes, but the cost to participate is \$300.

Some programs do not establish specific requirements in advance. Instead, they conduct a needs assessment upon admittance and base the requirements for the individual's diversion program on that assessment. The requirements might include regular "check-in" monitoring or supervision, drug/alcohol testing, counseling, or classes. Each such requirement can involve a separate fee. For-profit companies thus can have a financial incentive to require accused individuals to participate in more program requirements and for longer periods of time.

- Arizona resident Aaron R. was charged with possessing \$10 worth of marijuana in 2014. The court offered him the option of enrolling in a diversion program run by a private, for-profit company. The program offered to Mr. R included community service, group classes, and individual counseling—for a fee of \$715. The company also routinely adds extra fees for drug testing, class rescheduling, payment plans, late payments, underpayments, and even overpayments. Mr. R's counseling sessions were with a "case manager" who was a former police officer, not a trained professional. Mr. R reported that the primary topic discussed in these sessions was whether he was making his payments.<sup>41</sup>

**Bad Check Diversion** – In some jurisdictions, the state or district attorney operates an in-house bad check diversion program, either as an alternative to prosecution or simply to provide restitution and generate enough income to cover the program. When prosecutors have in-house programs, the fees are generally minimal, and the focus is on providing restitution to the merchant.<sup>42</sup>

Many jurisdictions, however, contract with private companies to perform this function. Private companies running for-profit bad check diversion programs often add significant fees beyond the amount needed for restitution, and then retain most of those fees. In some counties, the companies give the jurisdiction a percentage of the fees they collect.

- In Illinois, almost 40 counties contract with one of only two companies. In addition to restitution for the check, individuals ordered to these programs must pay an administrative fee of \$25 to \$35 and a fee of \$125 to \$175 for a “financial accountability” class. In addition, there are fees for enrolling in a payment plan or rescheduling a missed class. As a result, someone who bounced a check for as little as \$5 can end up paying as much as \$300.<sup>43</sup>
- In California, Julie O. bounced a \$91 check at a grocery store. After finding out the check had bounced, she contacted the store to make restitution. She was told they had already placed her “in collection.” A few weeks later she received a letter appearing to be from the District Attorney’s office, but which was actually from a private, for-profit company operating a bad check diversion program.<sup>44</sup> The letter accused her of intent to commit fraud and said that to avoid jail she must pay \$333.51: restitution for the \$91 check, \$175 for a financial accountability class, and the balance for “administrative” fees.<sup>45</sup>



## V. COMMUNITY SUPERVISION

If an individual is not eligible for or declines diversion, he or she will either plead guilty or go to trial. If an individual either pleads or is found guilty, he or she may receive a sentence of community supervision in lieu of, or in addition to, incarceration. During this time, the person lives in the community but is subject to certain restrictions or requirements designed to prevent additional offenses and to ensure the appropriate treatment or training needed for rehabilitation. The most common types of community supervision are probation and parole. Traditionally, government agencies, such as probation and parole departments, administer the restrictions and requirements of community supervision. Increasingly, however, government agencies contract with private companies to perform this role, particularly regarding lower level offenses.

The compensation for private companies often comes *not* through a contract price paid by the courts, but from user-fees, effectively shifting the cost of probation and parole from the government that has ordered the supervision to the individual subject to it. Companies typically charge the individuals a monthly monitoring fee. Although the amount varies by state, county, and even individual, the range is generally between \$30 and \$60 each month, and payment is a condition of the supervision.<sup>46</sup> In Florida, the monthly fee for supervision in a misdemeanor case is at least \$40 per month.<sup>47</sup> In Georgia, Human Rights Watch estimates that supervision fees average \$35 per month.<sup>48</sup> In Montana, the monthly supervision fee is hundreds of dollars per month.<sup>49</sup> Individuals who cannot afford the supervision fee often are permitted to enter into a payment plan, but doing so can cost additional money in the form of interest, fees, and/or surcharges.<sup>50</sup>

### A. Costs of Additional Conditions

In addition to supervision, private companies often assess the supervised individuals to determine what other services they need. As with pretrial supervision, such services can include drug or alcohol testing, counseling, regular background checks, courses and/or electronic monitoring. Each of these requirements entails an additional fee or fees “for enrollment, reinstatement, records, and late or partial payment[.]”<sup>51</sup>

- In Kentucky, one probation company charged supervised individuals \$20 for each periodic criminal background check. Another charged \$35.<sup>52</sup>
- Drug tests can cost as little as \$12 or as much as \$80 or more for lab-confirmed results.<sup>53</sup> At \$25 per test, an individual ordered to test once a week during a twelve-month term of probation will incur costs of over \$1,250 for drug tests alone.
- In DUI, substance abuse, and assault or domestic violence cases, the charged individual often must take classes. These courses often have mandatory registration fees, payable either before the course begins or before the individual can receive a certificate of completion.

- In Florida, a DUI course costs \$284 for the first-time offender and \$430 for a second.<sup>54</sup>
- In Missouri, the Substance Abuse Traffic Offender Program (SATOP) fee is \$375.<sup>55</sup>
- One company offers a course in “Moral Reconciliation Therapy,” a course designed to reduce recidivism by teaching moral reasoning. It costs \$325.<sup>56</sup>

Individuals under supervision can also be ordered to use expensive devices and monitoring services, such as GPS, SCRAM, or Ignition Interlock devices, previously discussed in the context of pretrial supervision. These devices easily can cost several hundred dollars a month and can be the most expensive aspect of probation. Aside from the installation fee and any maintenance or loss charges, a GPS device can cost the charged individual \$10 per day. For a 12-month term of probation, the total cost would be \$3,650, just in daily monitoring fees.

In some jurisdictions private companies assess the defendants' needs and conditions during the probation period. In such circumstances, because the companies receive compensation for supervision and the various other requirements they mandate, they have a financial incentive to impose additional probationary requirements and continue a person's supervision for as long as possible. For example, companies often order regular drug and alcohol testing for people whose crimes did not involve substance abuse:

- Tennessee resident Cindy R. was on probation for almost 12 months under the supervision of a private company that oversees misdemeanor probationers. In addition to paying the monthly supervision fee, she had to pay \$20 for each random drug test that the company ordered, even though she had not been charged with a drug-related crime.<sup>57</sup>
- Oklahoma City resident Jeremy B. was ordered to a probation program run by a for-profit program and subjected to \$25 drug tests even though his original charge was not drug related.<sup>58</sup>

An individual's inability to pay for their probation supervision or mandatory conditions can result in extended probation, mounting debt, and even jail time.

- Thomas B. from Georgia,<sup>59</sup> who pleaded guilty to shoplifting a \$2 can of beer, was jailed for not being able to pay \$1,000 in fees to his probation company.<sup>60</sup>
- Elvis M. from Alabama, convicted of misdemeanor offenses, was on probation for more than 7 years and accumulated almost \$9,000 in fines and costs.<sup>61</sup>



Sign in Miami Courtroom shows DUI court fines and fees of \$1,225.25, but does not disclose costs of requires treatment courses, victim impact panel or vehicle impoundment.





## B. Consequences of Nonpayment

After interviewing numerous participants in private probation programs, Human Rights Watch concluded that probationers often fear “reporting to probation without enough money in hand” and therefore stop reporting.<sup>62</sup> Failure to report can result in charges for violations of probation, which can extend the probation period and magnify the problem. It can also result in incarceration.

Jason D. in Florida:<sup>63</sup>

Jason D. was charged with DUI and accepted a plea deal for 12 months supervised probation. He incurred the following costs

Probation Fee: \$50/month

DUI School: \$430

Victim Impact Panel: \$50

10 days Vehicle Immobilization (Impound): \$100

6 Months Ignition Interlock (approx. \$600)

Random urine and breath tests

\$1,550 in court fines and costs

TOTAL COST: More than \$3,300

Each time Jason appeared for probation, he was admonished for nonpayment. As a result, “he stopped reporting entirely” and the court issued a warrant for his arrest. His probation was revoked, and he was sentenced to 120 days in jail.

## VI. PUBLIC PRISONS AND JAILS

A person convicted of a crime may be sentenced to incarceration in either prison or jail.<sup>64</sup> In either setting, the individual in custody incurs fees, as do his or her friends and family for a variety of services ranging from telephone calls to health care. Although government agencies previously provided these services to people in custody, today the government increasingly outsources them to private for-profit companies that typically negotiate exclusive contracts. These companies are rarely subject to consumer protection laws and operate with little oversight, either with respect to the quality of services provided or the amounts charged for them.<sup>65</sup> In addition, many of these companies give goods or money to government agencies as an incentive for an exclusive contract.<sup>66</sup> These legal kickbacks increase the costs of services for people in custody and their families.

### A. Telephone Fees

In 2019, New York City became the first jurisdiction in the country to provide free phone calls from its jails. The City and County of San Francisco soon followed. But everywhere else in the country, phone calls to and from prison or jail cost an inmate or their families money. In addition to the cost of a call, there are often fees for creating a phone call account, depositing money into the account and/or receiving a refund from the account when the person is released.

- Kellie P. spent between \$40 and \$100 on phone charges each month to accept calls from her fiancé, Michael R., who ultimately took his own life while incarcerated in a Massachusetts jail. Prior to his death in 2017, Mr. R called regularly to speak to Ms. P and their daughter, a star on her school's track team whom he typically called before her meets. The high cost of phone calls strained Ms. P's finances, forcing her to make difficult decisions between paying to receive calls and making payments on other bills and expenses. In total, Ms. P spent around \$2,000 on phone charges over the nearly two years in which her fiancé was incarcerated.<sup>67</sup>
- In Illinois jails, a typical 15-minute call home costs \$7.00. A call from a Michigan jail costs about \$12 on average and can reach \$22 for 15 minutes.<sup>68</sup>
- Site commissions or kickbacks to jurisdictions for exclusive telecommunications contracts often result in higher prices to people in custody and their families. In a lawsuit filed against the Florida Department of Corrections, a company that provides jail phone communication services recently asserted that “[w]ithout having to pay commissions, vendors can provide lower inmate telephone call rates to inmates’ families and friends.”<sup>69</sup>
- Several states, including California, Michigan, Nebraska, New Mexico, New York, Rhode Island, and South Carolina, have taken steps to ban the practice of collecting “site commissions” for prison phone calls. After making this reform, these states saw immediate and drastic price decreases with no impacts on service availability. For example, prior to banning commissions in 2001, New Mexico charged \$10.50 for a 15-minute collect interstate call. But 12 years after the state eliminated site commissions, its rate for the same type of call had fallen to 65 cents—a 94% decrease.



- In addition to the cost per call, many vendors charge for opening, maintaining and even closing phone call accounts. According to the Prison Policy Initiative, these additional fees generate up to \$386 million per year for phone vendors.<sup>70</sup>

## B. Electronic Communication

Written correspondence to and from people in prison, such as sending letters, birthday and anniversary cards, and photographs of children, friends, and family, is a critical way to let people in custody know they are still loved and valued, to keep them connected to their communities, and to reassure family and friends that the incarcerated person is coping. Today, mailing a birthday card to prisons has been privatized, and it can cost far more than a postage stamp.

- In 2018, Diane J. bought a birthday card for her son who was serving a 30-year sentence for an armed robbery he committed when he was 17. After she, her daughter, and granddaughters signed the card, she dropped it in the mail. She was surprised when a few days later it was returned. When she contacted the prison, she learned that if she wanted to send her son a card, she had to do so electronically through a private company that would charge her \$0.40 per page and additional charges for attachments like photographs.
- In 2014, more than 14.2 million e-messages were sent through prison email services. With many prisons reaping a roughly \$0.05 commission per message, prison systems that use private, for-profit electronic communication systems stand to collect \$710,000 on e-messages alone. As use of e-messaging increases, these numbers will likely increase. In Michigan, for example, imprisoned users send 800,000 to one million messages through the private e-communications system each month.
- In some states, a private e-communication company offers free tablets that allow prisoners to skip kiosk lines—and encourage the use of its product. In Missouri, a company is scheduled to give each of the state’s more than 33,000 prisoners their own tablet. In February, it announced it will do the same for New York state’s 51,000 prisoners. “The vendor charges fees to inmate and inmate family/friends for using the services,” reads the contract between the New York State Department of Corrections and Community Supervision and the company.<sup>71</sup>

## C. Video Visitation

Some jails and prisons are also moving to limit in-person visitation and allow video or virtual visitation.<sup>72</sup> Such visitations can cost a fixed rate for a fixed session, e.g. \$10 for 30 minutes, or a minute-to-minute rate which can range from \$0.20 per minute to \$1.50 per minute.<sup>73</sup> A Prison Policy Initiative report notes that “74% of jails banned in-person visits when the implemented video visitation.”<sup>74</sup> It further noted that video visitation services are generally bundled with other communication and commissary contracts,<sup>75</sup> with the result that all communication costs with an inmate are likely set through a single contract with a private company.

## D. Health Care

Although the vast majority of people in jail and prison are poor (approximately 85% qualify for a public defender), Medicaid, the federal government's health insurance program for low-income people, does not cover people in custody. Thus, state and local governments must pay the healthcare costs of people in jails and prisons. It can be expensive, and increasingly governments contract with private companies to provide healthcare.

In 1997, 12 states had contracts with private firms to provide health care services to their entire inmate population, and another 20 states had contracted a portion of their health care system to private firms.<sup>76</sup> By 2014, private companies had contracts for almost one-third of health care spending for prisons and jails in the U.S., or roughly \$3 billion per year.<sup>77</sup> Federal spending on private healthcare in its prisons increased by 24% between 2010 and 2014. Increasingly, government agencies are at least partially passing this cost on to inmates through fees.

- Michigan passed the first correctional fee law in 1846 when it authorized counties to charge inmates for the cost of medical care.<sup>78</sup> Today, 42 states authorize some form of co-pay for non-emergency, patient-initiated visits with jail or prison medical staff.
- Fees in most states range between \$2 to \$8 per appointment. In Texas, inmates must pay \$100 per year for medical care. Federal prisons require a \$2 co-pay. Relative to the amount of money people earn in prison (as little as \$0.09 per hour),<sup>79</sup> those costs can be staggering.<sup>80</sup>
- In West Virginia, a single visit to the doctor would cost almost an entire month's pay for an incarcerated person who makes \$6 per month. For someone earning the state minimum wage, an equivalent co-pay would be \$1,093. In Michigan, it would take over a week to earn enough for a single \$5 co-pay, making it the equivalent of over \$300 for a minimum wage worker.<sup>81</sup>

## E. Financial Services

In recent years, prison and jail facilities have also outsourced payment and money transfer systems to private companies that charge prisoners and their loved ones a range of high fees, including for financial services traditionally provided by the correctional facilities at no cost. Fees are imposed for accessing money earned while in custody, for money deposited by friends and family for a person to use to make phone calls or buy necessities at a commissary, or even to access one's own money at release.

Historically, families could send money to an incarcerated relative's account by simply mailing a money order. In 2016, friends and families transferred close to \$1 billion to loved ones in custody.<sup>82</sup> Private companies saw an opportunity to use these accounts as a potential source of profits.

- One company charges as much as \$11.95 to transfer money electronically into the account of an incarcerated person. In the 6 months ending March 31, 2019, the company collected fees from 123,431 deposits to commissary accounts of people incarcerated in New York City.<sup>83</sup>



- In an April 2015 presentation to potential lenders, the company stated that in 2014, it made \$53 million in fees on transfers of \$525 million, meaning its fees were roughly 10%.<sup>84</sup>
- There are often additional charges for setting up an account, maintenance, and transaction fees when a person makes a purchase using money in the account. Frequently, there are even charges for checking one's balance and for closing the account.
- People newly released from jails and prisons may get access to their funds only through a prepaid "debit release cards," rather than in cash. This includes money earned while in prison, money sent from family and friends, and any money a person had when booked into jail. The money on these cards is subject to steep usage and maintenance fees that eat into the balances. "Inmates are often given no choice about how to receive these funds and accordingly, no choice to opt out of the related fees that can have a devastating effect on their financial position...Gregg C., a former prisoner, attests to that: 'I left prison with \$120. Because of the fees I was only able to use about \$70 of it.'"<sup>85</sup>

## F. Commissary

Virtually every jail and prison operates a store—a canteen or commissary—where people in custody can buy everything from snacks to soap to postage stamps. In Denver's jails, people must buy their own underwear. In Texas, state prisons require people to purchase their own toothpaste.

When for-profit companies run these stores, as they increasingly do, the mark-ups can be steep. In 2013, the Association of State Correctional Administrators (ASCA) surveyed prison commissaries and found that of the 34 state prison systems that responded, 12 reported some level of commissary privatization. Anecdotal evidence suggests that privatization is more common in county jails, which are smaller and thus lack the economies of scale of state prison systems.<sup>86</sup>

- A three-state study of prison commissaries found that per-person commissary sales amounted to \$947, well over the typical amount incarcerated people earn working regular prison jobs in these states (\$180 to \$660 per year).<sup>87</sup>
- The same study found that 75% of commissary spending is for food and beverages.<sup>88</sup> When the Ohio prison system outsourced its food services, commissary orders increased dramatically, as people bought food to supplement what they were served in the cafeteria.
- In Florida in 2018, the company that provides commissary services charged \$1.70 for a packet of four extra-strength Tylenol (which costs roughly \$0.60 on Amazon), \$4.02 for four tampons (the Department of Corrections only supplies sanitary napkins, usually about \$0.25 each, or \$1.00 for four in grocery store pricing), \$3.49 for a 4.2-ounce tube

of toothpaste (about \$2.50 usually), and \$4.60 for a 6-ounce tube of shaving cream (\$1.46 for a 6-ounce can of shaving cream at most drug stores).<sup>89</sup> The prices reflect markup of between 140% and 402% percent over regular retail prices.

- In 2014, a company submitted a bid to operate the commissary system for the West Virginia Division of Corrections. The bid included 2012 financial statements for the commissary subsidiary, reporting total sales of \$375 million, with a net profit of \$41 million. This equates to a 10.9% profit margin; Wal-Mart, by comparison, reports a profit margin of approximately 3%.<sup>90</sup>
- In Pennsylvania, a recent analysis of prices charged at 10 jails showed that “commissary items are consistently priced higher than what they would cost on the outside, despite county contracts that require jails to set prices at levels similar to those charged in regular stores.”<sup>91</sup> The analysis noted that tampons cost more than double what they cost in public stores.



## VII. COLLECTION OF CRIMINAL JUSTICE DEBT

When an individual fails to pay his or her criminal justice debt, it goes through a collections process. Prosecutors' offices, local courts, and other government authorities across the country often contract with private agencies to collect debts incurred in the criminal justice system.<sup>92</sup> In addition to gathering information about debtors, these agencies send collection letters, make phone calls, set up payment plans, garnish wages and bank accounts, and act as a "gatekeeper" to reinstatement of driver's licenses and other privileges.<sup>93</sup>

Private collection companies tasked with collecting funds owed as a result of involvement in the criminal justice system often do not receive payment from the government for their services, but rather make their money from all or part of the fees and/or surcharges paid by those from whom they collect. These arrangements create incentives for aggressive tactics.

### A. Collection Fees and Surcharges

In many jurisdictions, private agencies collecting criminal justice debt take their compensation in the form of fees they charge the debtors. A study by the Brennan Center for Justice found that nine of the 15 states surveyed authorized "exorbitant 'collection fees,' frequently payable to private debt collection firms."<sup>94</sup> In Florida, for example, agencies can charge up to 40% of the original fine or fee.<sup>95</sup> In Texas, agencies can impose a 30% fee.<sup>96</sup> Maricopa County, Arizona allows an 18% surcharge.<sup>97</sup> And in Pennsylvania, the fee can be as much as 25% of the amount collected.<sup>98</sup> In some instances, these surcharges exceed the limits that state usury laws impose on private financing companies.

As detailed in the previous sections of this report, the use of private agencies to collect criminal fines and fees generally occurs at the end of a process that often has already imposed disproportionate burdens on indigent defendants.<sup>99</sup> In many cases these fees and surcharges eclipse the fines and underlying fees imposed in low-level offenses. "Very small delinquent fines, sometimes as low as \$1, can balloon in size once collection is handed over to a private company."<sup>100</sup> Over just a few months, for example, a driver in Texas saw a \$7.50 unpaid toll balloon to \$157.50, including \$66 in governmental administrative fees and \$84 that the collection agency added.<sup>101</sup> The addition of collection fees, interest and surcharges on amounts effectively forces those who can afford to pay the least to pay the most.

### B. Commissions and Contingent Fees

In some jurisdictions, compensation for private collection agencies is calculated as a percentage of the amount collected; in essence, a contingent fee. In California, fees of some collection agencies are based on how long the debt has remained unpaid, with agencies receiving a commission of 12% to 18% for new debt, and from 14.9% to 24.8% for debt delinquent for more than five years.<sup>102</sup> A commission or contingent system provides incentives to collect aggressively, regardless of ability to pay and regardless of other limitations appropriate in the criminal justice system. Indeed, a report by *CNNMoney* found that in the

context of such debt collection, private agencies, “with the power of government agencies behind them, . . . are able to play by their own rules, in essence acting above the law.”<sup>103</sup> Direct threats of incarceration for nonpayment are commonplace, even where incarceration in fact is not a legal option.<sup>104</sup> This can result in people repaying debts they could successfully contest and/or accepting onerous or untenable payment plans.<sup>105</sup>

### C. Pay Only Probation

In still other jurisdictions, individuals who cannot pay their court fines and fees are placed on probation until the balance is paid.<sup>106</sup> This form of probation does not involve supervision in the traditional sense, but is exclusively a form of collection, as it focuses solely on collecting the court fines and fees owed. Nonetheless while on this form of probation, the individual incurs a “supervision fee,” which the private probation company generally keeps. As with other private probation fees, the supervision fee ranges from about \$30 to \$60 a month.

Pay only probation by its nature only applies to people who are low-income or indigent, and who cannot pay court fines and fees at the time they are assessed.<sup>107</sup> In pay only probation, the job of the probation officer is to collect money. Human Rights Watch noted that this form of probation is, in essence, a legal fiction that turns probation officers into “debt collectors who can have people put behind bars if they don’t pay.”<sup>108</sup>

In many places, the private probation company has discretion to determine how to allocate the incoming revenues between the fines and fees owed to the court and the probation fees owed to the private company. The company has an incentive to allocate as much as possible to supervision fees, as they go directly into its pocket. The longer the underlying court fines and fees remain unpaid, the longer the individual will remain on probation accruing supervision fees.

### D. Inapplicability of Federal Protections

Worsening the situation for those who owe criminal justice debt, private debt collectors can engage in conduct that would be illegal for other types of debt collection. The Fair Debt Collection Practices Act (FDCPA) generally prohibits coercive and dishonest practices in collecting consumer debts. However, courts have narrowly construed “debt” to include only financial obligations arising from a *quid pro quo* transaction, *i.e.*, a voluntary exchange in which the debtor receives some service or product.<sup>110</sup> Thus, fines and fees imposed in the criminal justice system are generally not covered. Without the constraint of the FDCPA, some collection agencies can, and do, engage in conduct the statute bars, including false threats of arrest for nonpayment, misrepresentations of the nature or amount of the debt, and violation of orders to cease and desist.<sup>111</sup>

In many circumstances, the FDCPA also bars debt collectors from conveying information to third parties, such as credit agencies, regarding non-payment of debt.<sup>112</sup> Private agencies collecting criminal justice debt are not subject to this provision either. Impairing individuals’ credit ratings through such reports can cause serious long-term harm, including undermining job opportunities and imposing obstacles to obtaining public or rental housing, where authorities often use credit scores to screen applicants.<sup>113</sup> Threats to report criminal justice debtors to credit agencies thus have coercive force. Yet this reporting often is an integral part





of the private collection efforts. Indeed, in some jurisdictions, the arrangements with private agencies collecting criminal system debt specifically contemplate such referrals.<sup>114</sup> Indigent individuals who genuinely cannot pay their criminal justice debt become stuck in a cycle where that debt continues to grow and they face incarceration for contempt. Even if the debt is eventually reduced by the courts due to inability to pay, or they somehow find the funds, their long-term economic situations have suffered irreparable harm.

## VIII. RECOMMENDATIONS AND CONCLUSION

An estimated 10 million Americans owe more than \$50 billion resulting from their involvement in the criminal justice system.<sup>115</sup> On one level, this figure is staggering; but on another, it is unsurprising given the increased prevalence of user fees throughout the criminal justice system and the degree to which those fees are charged by private companies with profit motives. These fees build upon each other. Court fines and fees are compounded by supervision fees if one accepts supervision to avoid jail time. Supervision fees balloon as private probation companies add revenue enhancing requirements such as courses, regular drug and alcohol testing, periodic background checks and electronic monitoring. Those incarcerated as punishment or for nonpayment of user fees then are charged for communicating with loved ones and receiving funds. Those unable to pay may incur additional collection fees and surcharges. Continued nonpayment may result in additional jail time.

As one person who had been caught in this system lamented,

[T]he system is set up for you to fail . . . Once you get in there, it's like a never-ending cycle. It just keeps going. Once you get on probation, especially, it's like one fee after another and if you can't pay them you go to jail, and once you're in jail and then you get out, you have more court fees and the[n] more fees, and more and more and more. It never ends, and that's why some people would just rather go to jail and just deal with it that way.

- Crystal B., who was put on probation after being charged with shoplifting a case of water<sup>116</sup>

While this report focuses on the adult criminal justice system, the same concerns arise, perhaps with even greater weight, in the juvenile justice system.<sup>117</sup> Juveniles are often charged fees by private companies that run supervision programs, diversion programs, and treatment programs, among others. A recent report on Alameda County, California, showed that total fees to families for juvenile involvement added up to approximately \$2,000 for an average case.<sup>118</sup>

There are constructive steps that can help end this cycle, avoid further entrenching poor people in poverty, and stop entangling people more and more intricately in the criminal justice system just because they are poor.

These steps should include: (1) reducing the fees charged in the criminal justice system and developing procedures to ensure that fines and fees are not imposed absent ability to pay determinations, with meaningful opportunities for individuals to seek reduction or waiver of fees; (2) improving oversight of private companies that provide services within the criminal justice system, including severely limiting or eliminating the ability of private companies to charge individuals directly for those services; and (3) increasing transparency by the private companies participating in the system, and the government agencies that hire them.



## A. Severely Limit the Use of Fees and Enforce Ability to Pay Requirements

In 2018, the American Bar Association House of Delegates adopted *Ten Guidelines on Court Fines and Fees* to “provide practical direction for government officials and policymakers . . . [and to ensure] that the justice system does not punish people for the ‘crime’ of being poor.” The Commentary to Guideline 1 addresses the various user-fees that have proliferated, charging individuals for participating in activities mandated by the criminal justice process, such as supervision and drug testing. The Commentary states, “All such fees should be eliminated because the justice system serves the entire public and should be entirely and sufficiently funded by general revenue.”<sup>119</sup> Where such fees are imposed, they must be “related to the justice system and the services provided to the individual.”<sup>120</sup> Moreover, the “amount imposed, if any, should never be greater than the ability to pay or more than the actual cost of the service provided.”<sup>121</sup> The Guidelines further state that when any fee is imposed or collected, ability to pay must be considered to ensure that nobody is denied access to services or punished solely for being poor.<sup>122</sup>

Many of the functions increasingly conducted by private companies could be conducted by the government, but the more critical requirement is that any individual charged a fee for any service imposed as part of the criminal justice system be evaluated for ability to pay, regardless of whether a public or private entity imposes the fee. “An individual’s ability to pay should be considered at each stage of the proceedings, including at the time the fees are imposed [as well as] before imposition of any sanction for nonpayment[.]”<sup>123</sup>

As this report shows, assessment of ability to pay is rare in situations involving private companies. In Tennessee, for example, judges are required to assess a felony defendant’s ability to pay before assessing supervision fees for governmental probation, but the same is not required in misdemeanor cases where individuals are supervised by a private company.<sup>124</sup> Similarly, some private companies have procedures to allow an individual to request fee reduction or waiver, but research has shown that they are rarely, if ever, granted.<sup>125</sup> A judge should always be required to assess ability to pay and “should always be permitted to waive or reduce any fee if an individual is unable to pay.”<sup>126</sup>

Future policy development by the ABA should include guidelines on ensuring that ability to pay procedures apply to criminal justice fees imposed through or by private companies.

## B. Increased Regulation and Supervision of Private Companies

When private companies are engaged to take on certain aspects of the criminal justice system, government officials must supervise the private agencies acting on behalf of the government. Maintaining and effectuating ability to pay hearings is just the start. Contracts with private companies to provide services should, among other things: (1) strictly limit, if not eliminate, the degree to which the private company may directly charge the individual; (2) establish procedures regarding allegations of noncompliance, nonpayment, and collection; (3)

provide clear guidance on how the private company will represent itself to the individuals and distinguish itself from a governmental entity; and (4) establish a procedure for receiving and addressing concerns and complaints regarding the private company.

### 1. Supervising Costs

If a governmental entity wishes to contract with a private company to provide court-ordered services, that entity should pay the private provider's fees or other charges. If participants incur any fees, those fees should be charged by the court and the cost should be "commensurate with the service they cover, and consistent with the financial circumstances of the individual ordered to pay."<sup>127</sup> In other words, private companies should be limited in their ability to charge fees directly to or collect fees directly from individuals. This structure is the only way to fully preserve the ability of the individual to seek reduction or waiver of costs due to inability to pay. Determinations regarding ability to pay, reduction and waiver should be made and implemented by the courts.<sup>128</sup>

### 2. Procedures on Non-Compliance and Collection

When a court orders a fine or fee, the procedure for alleging non-compliance or non-payment, and the procedures and permissible methods for collecting funds should be set forth in detail and explained to the individual subject to the fine or fee. Only the court should be able to sanction an individual for nonpayment or non-compliance. Currently, in many private arrangements, not only are private companies given complete freedom over methods to address non-payment and collections, but they also control decisions affecting critically important rights of individual debtors—e.g., suspension or reinstatement of drivers' licenses, the right to vote, and even incarceration. In Iowa, for example, private debt collectors have the apparent power to determine when an individual is in default and what payment will suffice to release a hold on licensing.<sup>129</sup> Only through direct court administration can the court ensure that "[a] person's inability to pay . . . never result in incarceration or other disproportionate sanctions," including driver's license suspensions.<sup>130</sup>

### 3. Representation Requirements

In some instances, private agencies have been empowered to present themselves as government officials. In 2012, for example, the *New York Times* reported that more than 300 district attorneys' offices allowed private collection agencies to send letters on the district attorney's letterhead to individuals accused of writing bad checks, requiring them to make payments and to take other steps or else face incarceration.<sup>131</sup> In one San Francisco courthouse, a bank of telephones connects directly to the private debt collection agency retained by the jurisdiction.<sup>132</sup>

Private companies operating within the criminal justice system should never be permitted to suggest that they are a governmental agency or hold governmental authority. Allowing private agencies to impersonate government officials, or otherwise to imply they are invested with governmental power to prosecute and incarcerate individuals, is a troubling departure from accountability, not to mention due process. In 2014, the ABA Center on Professional



Responsibility issued Formal Ethics Opinion 469 deeming it a violation of Model Rules 8.4(c) and 5.5(a) for a prosecutor to provide official letterhead to private companies that threaten prosecution for any type of debt collection “when no lawyer from the prosecutor’s office reviews the case file to determine whether a crime has been committed and prosecution is warranted.”<sup>133</sup> In 2016, the U.S. Department of Justice wrote to state chief justices and court administrators advising them of their responsibilities regarding collection of criminal justice debt. Among other things, the letter stressed the need to exercise oversight and control over potentially unconstitutional acts by private companies operating with delegated authority.<sup>134</sup> With the change in the Administration, however, the new leadership of the Department withdrew this guidance.<sup>135</sup> Future guidance from the ABA should include requirements on how agents of a private company operating within the framework of the criminal justice system will describe their role, including an explicit duty to differentiate themselves from governmental entities.

## C. Transparency

The ABA’s *Ten Guidelines on Court Fines and Fees* stressed the importance of transparency in the imposition and administration of court fines and fees, urging that “[i]nformation concerning fines and fees, including financial and demographic data,” be publicly available.<sup>136</sup> The only way to ensure full transparency is for the court to retain discretion and to administer all fines and fees charged to an individual. Right now, courts across the country cannot determine or report the full costs paid by an individual as a result of a criminal charge because private companies impose and collect so many of the fees/costs without any court involvement. Courts should have full reports on and knowledge of the cost of the criminal justice process.

Transparency also demands that information concerning private companies operating as part of the criminal justice system be available to the public. Selection of a company should be made through a transparent and competitive process. The terms of operation should be available to the public, as should the operations themselves, including the number of individuals involved, the length of time the individual is involved with the private company program and the services used. Finally, the terms of the contract should require the company to disclose, in detail, the financial terms of the contract, the company’s operational budget, the actual operating costs, and the profits garnered.

## D. Conclusion and Next Steps

The *ABA Criminal Justice Standards on the Treatment of Prisoners*, in addressing the use of private prisons and jails, provides a potential model for ABA standards or policy regarding other areas of privatization in the criminal justice system.<sup>137</sup> For example, Standard 23-10.5(a), which suggests that contracts with private entities for the operation of secure correctional facilities should be disfavored, perhaps articulates an overarching principle to adopt for the areas of privatization discussed in this report. Similarly, the Standard provides that jurisdictions should maintain the ability to fulfill the privatized functions should the contract be terminated

for noncompliance (Standard 23-10.5(c)), that certain decisions affecting the rights of inmates should never be delegated to private parties (Standard 23-10.5(e)), and that the contract should spell out in detail the contractor's authority and responsibility, and specify procedures for monitoring compliance. (Standard 23-10.5(f), (g)). The principles reflected in these standards may be a useful predicate for policies to govern the privatization of specific functions in the criminal justice system.

Drawing on this model and the recommendations in this report, among other sources, the ABA should develop a policy within the coming year to give guidance to state and local governments contract with or seek to contract with private companies for services within the criminal justice system.



## ENDNOTES

- <sup>1</sup> *Report of the Task Force on Building Public Trust in the American Justice System* (January 2017), available at [https://www.americanbar.org/content/dam/aba/administrative/office\\_president/2\\_8\\_task\\_force\\_on\\_building\\_trust\\_in\\_american\\_justice\\_system\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/office_president/2_8_task_force_on_building_trust_in_american_justice_system_authcheckdam.pdf). Following issuance of the report, the Task Force focused on creating dialogue around the issues of distrust in the justice system, developing the *ABA Toolkit on Building Public Trust in the American Justice System* to provide guidance on holding forums on safety and justice. The toolkit is available at [https://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/publictrust.html](https://www.americanbar.org/groups/leadership/office_of_the_president/publictrust.html).
- <sup>2</sup> See American Bar Association Resolution 114, available at <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/114.pdf>.
- <sup>3</sup> American Bar Association, *Ten Guidelines on Court Fines and Fees*, Commentary to Guideline 1 (August 2018), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_ind\\_10\\_guidelines\\_court\\_fines.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf).
- <sup>4</sup> This report does not touch on private prisons, which have been the subject of significant research and reporting. For an example of such reporting, see The Sentencing Project, *Private Prisons in the United States*, (August 2, 2018), available at <https://www.sentencingproject.org/publications/private-prisons-united-states/>.
- <sup>5</sup> In referring throughout this discussion to the incentives for private companies to engage in such conduct, this report does not suggest that all private companies allow such incentives to dictate their conduct or otherwise act inappropriately. However, many do act in accordance with the economic incentives, and as a matter of good public policy, governments should structure their arrangements with contractors to discourage or prohibit conduct that does not further the objectives of the criminal justice system and that fails to comply with the legal and custodial obligations inherent in the operation of that system.
- <sup>6</sup> *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (Before overriding a defendant’s “strong interest in liberty,” jurisdictions must recognize the “importance and fundamental nature” of the right to pretrial release and must carefully consider whether the government has advanced “sufficiently weighty” interests to the contrary).
- <sup>7</sup> *ABA Criminal Justice Standards: Pretrial Release* (2007), Standard 10-1.2 (Deprivation of liberty pending trial is harsh and oppressive.), available at [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pretrial\\_release.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf).
- <sup>8</sup> See, e.g., *United States v. Salerno*, 481 U.S. 739, 750-51 (1987).
- <sup>9</sup> *ABA Criminal Justice Standards: Pretrial Release* (2007), Standard 10-1.4(a) (2007), available at [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pretrial\\_release.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf).
- <sup>10</sup> *Id.* at Standard 10-1.6.
- <sup>11</sup> Christopher Campbell and Ryan Labrecque, *Effect of Pretrial Detention in Oregon*, Oregon Criminal Justice Commission (May 23, 2019), available at <https://www.oregon.gov/cjc/CJC%20Document%20Library/EffectofPretrialDetention.pdf> (Detained defendants are more than twice as likely to receive a sentence of incarceration when compared to those released before trial.); Sukey Lewis, “Electronic Monitoring of Defendants is Increasing, But at What Price?” *KQED San Francisco* (Aug. 2, 2017), available at <https://www.kqed.org/news/11604250/electronic-monitoring-of-defendants-is-increasing-but-at-what-price> (“[The defense attorney] says he’s got a better chance of winning a case if his client can walk freely into court in a coat and tie rather than under guard or in an orange jumpsuit...Research by the Arnold Foundation backs up Mitchell’s claim. A 2013 report found that defendants who are in jail before trial plead guilty more often and get tougher sentences.”).
- <sup>12</sup> ACLU and Color of Change, *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System* (May 2017), available at <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system>.
- <sup>13</sup> See Rachel Smith, “Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed,” *Georgetown Journal on Poverty Law and Policy* (Spring 2018), available at <https://www.law.georgetown.edu/poverty-journal/wp-content/uploads/sites/25/2019/02/25-3-Condemned-to-Repeat-History.pdf>; Alexa Van Brunt and Locke E. Bowman, “Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next,” *Journal of Criminal Law and Criminology* (Fall 2018), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7640&context=jclc>; P.R. Lockhart, “A multibillion-dollar toll: how cash bail hits poor people of color the hardest,” *Vox* (Dec. 6, 2017), <https://www.vox.com/identities/2017/12/6/16739622/ucla-report-bail-low-income-race>; and Sadhbh Walshe, “America’s bail system: one law for the rich, another for poor,” *The Guardian* (Feb. 14, 2013), available at <https://www.theguardian.com/commentisfree/2013/feb/14/america-bail-system-law-rich-poor>.
- <sup>14</sup> ABA Resolution 112C, available at <https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/112C.pdf>. See Debra Cassens Weiss, “ABA House supports money bail system reform, ban on solitary confinement for juveniles,” *ABA Journal* (Aug. 14, 2017), available at [http://www.abajournal.com/news/article/aba\\_house\\_supports\\_bail\\_reform\\_other\\_criminal\\_justice\\_measures](http://www.abajournal.com/news/article/aba_house_supports_bail_reform_other_criminal_justice_measures). Most indigent individuals do not have and cannot borrow the funds or collateral required to post bond. As a result, many remain in jail, even though a judge set bail.
- <sup>15</sup> Jesse Paul, *Colorado jails can’t hold people accused of low-level crimes in lieu of bail anymore. And that means current inmates could be released*, *Colorado Sun* (April 25, 2019), available at <https://coloradosun.com/2019/04/25/house-bill-1125-cash-bail-colorado/>.
- <sup>16</sup> Joseph Neff, *Petty Charges, Princely Profits*, The Marshall Project (July 2018), available at <https://www.themarshallproject.org/2018/07/13/petty-charges-princely-profits>.
- <sup>17</sup> Clarissa Sosin, “NYC bail bond system under fire from activists,” *Brooklyn Daily Eagle* (Nov. 2, 2018), available at <https://brooklyneagle.com/articles/2018/11/02/nyc-bail-bond-system-under-fire-from-activists/>.
- <sup>18</sup> Maryland Office of the Public Defender, “The High Cost of Bail: How Maryland’s Reliance on Money Bail jails the Poor

- and Costs the Community Millions (November 2016), available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=01930f15-3fa7-a86b-cc16-4f86c0597da5&forceDialog=0>.
- <sup>19</sup> Gillian White, “Who Really Makes Money Off of Bail Bonds?” *The Atlantic* (May 12, 2017), available at <https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/>.
- <sup>20</sup> ACLU and Color of Change, *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System* (May 2017), available at <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system>.
- <sup>21</sup> See generally, Lauren Gill, “High cost of prison diversion programs leave ‘too many people’ imprisoned in Alabama,” *The Appeal* (Feb 28, 2020), available at <https://theappeal.org/high-cost-of-prison-diversion-programs-leaves-too-many-people-imprisoned-in-alabama/>.
- <sup>22</sup> Carolina Hidalgo, “With Little Oversight, a Private Company Collects Fees from People Awaiting Trial in St. Louis,” *St. Louis Public Radio* (Feb. 18, 2019), available at <https://news.stlpublicradio.org/post/little-oversight-private-company-collects-fees-people-awaiting-trial-st-louis#stream/0>.
- <sup>23</sup> Kira Lerner, “In Oklahoma, Private Companies Run Pretrial Services, Driving People into Debt,” *The Appeal* (June 26, 2019), available at <https://theappeal.org/in-oklahoma-private-companies-run-pretrial-services-driving-people-into-debt/>.
- <sup>24</sup> Phaedra Haywood, “Pretrial Supervision or Punishment,” *The New Mexican* (Oct. 14, 2017), available at [https://www.santafenewmexican.com/news/local\\_news/pretrial-supervision-or-punishment/article\\_bf60ac9f-0cf3-56f4-a04f-41695587569d.html](https://www.santafenewmexican.com/news/local_news/pretrial-supervision-or-punishment/article_bf60ac9f-0cf3-56f4-a04f-41695587569d.html).
- <sup>25</sup> See Pretrial Justice Institute, *The State of Pretrial Justice in America* (November 2017), available at [https://www.prisonpolicy.org/scans/pji/the\\_state\\_of\\_pretrial\\_in\\_america\\_pji\\_2017.pdf](https://www.prisonpolicy.org/scans/pji/the_state_of_pretrial_in_america_pji_2017.pdf).
- <sup>26</sup> Santa Clara County, Office of Pretrial Services, *Instructions for Random Drug Testing*, available at <https://www.sccgov.org/sites/pretrial/Services/Forms/Documents/Female%20Drug%20Test%20Instructions.pdf>.
- <sup>27</sup> Aimee Gartner, “Conyers Municipal Court to outsource drug testing,” *Rockdale Citizen* (May 25, 2019), available at [https://www.rockdaleneutroncitizen.com/news/conyers-municipal-court-to-outsource-drug-testing/article\\_6f6b3de2-7d6f-11e9-9bdc-4bdd0d10a6aa.html](https://www.rockdaleneutroncitizen.com/news/conyers-municipal-court-to-outsource-drug-testing/article_6f6b3de2-7d6f-11e9-9bdc-4bdd0d10a6aa.html).
- <sup>28</sup> Lee Romney, “Private diversion programs are failing those who need help the most,” *Reveal: The Center for Investigative Reporting*, (May 31, 2017), available at <https://www.revealnews.org/article/private-diversion-programs-are-failing-those-who-need-help-the-most/>.
- <sup>29</sup> Pretrial service agencies in Virginia are “locality” based, with 99 of Virginia’s 134 localities having pretrial agencies. For those localities with pretrial agencies, the Virginia Department of Criminal Justice Services’ “minimum standards for pretrial services” prohibits the collection of fees from defendants for pretrial services, including drug tests. See Virginia State Crime Commission, *Pretrial Services in Virginia* (Nov. 29, 2017), available at <http://vscc.virginia.gov/FINALPRETRIAL.pdf>.
- <sup>30</sup> Center for Media Justice, *Guidelines for Respecting the Rights of Individuals on Electronic Monitors* (March 2018), <https://centerformediajustice.org/resources/guidelines-for-respecting-the-rights-of-individuals-on-electronic-monitors/>; see also Pretrial Justice Institute, “Electronic Monitoring: Proceed with Caution,” *The Pretrial Blog* (Mar. 20, 2018), available at <https://www.pretrial.org/electronic-monitoring-proceed-caution/>.
- <sup>31</sup> As of 2014, every state except Hawaii allowed and/or required the cost of monitoring to be passed on to the individuals wearing them. NPR, *State-By-State Court Fees* (May 19, 2014), available at <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>. However, a court in Arizona recently ruled that, in certain circumstances, the court must pay for pretrial electronic monitoring. See Lauren Castle, “Criminal suspects can’t be force to pay for their own GPS monitoring, court rules,” *The Republic* (Oct 1, 2019), available at <https://www.azcentral.com/story/news/local/arizona/2019/10/01/arizona-suspects-cant-forced-pay-gps-monitoring-appeals-court-rules/2034335001/>.
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- <sup>34</sup> Eric Markowitz, “Chain Gang 2.0: If You Can’t Afford This GPS Ankle Bracelet, You Get Thrown In Jail,” *International Business Times* (Sept. 21, 2015), available at <https://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283>.
- <sup>35</sup> Olivia Solon, “‘Digital shackles’: the unexpected cruelty of ankle monitors,” *The Guardian* (Aug. 28, 2018), available at <https://www.theguardian.com/technology/2018/aug/28/digital-shackles-the-unexpected-cruelty-of-ankle-monitors>.
- <sup>36</sup> See, e.g., Kimberlee Speakman, “Prosecuting Attorney’s office looking to expand alcohol monitoring program.” *Khon2* (Jan 10, 2020), available at <https://www.khon2.com/local-news/prosecuting-attorneys-office-looking-to-expand-alcohol-detecting-ankle-monitors/>.
- <sup>37</sup> One company’s ignition interlock pricing page is available at <https://www.intoxalock.com/ignition-interlock-cost/>. See also MADD, “Ignition Interlocks,” <https://www.madd.org/the-solution/drunk-driving/ignition-interlocks/>.
- <sup>38</sup> Alex Piquero, *Cost-benefit Analysis for Jail Alternatives and Jail* (October 2010), available at <http://criminology.fsu.edu/wp-content/uploads/Cost-Benefit-Analysis-for-Jail-Alternatives-and-Jail.pdf>.
- <sup>39</sup> Alabama Appleseed Center for Law and Justice, *In Trouble: How the Promise of Diversion Clashes with the Reality of Poverty, Addiction and Structural Racism in Alabama’s Justice System* (2020), available at <https://www.alabamaappleseed.org/wp-content/uploads/2020/02/Alabama-Appleseed-Diversion-Report-2020-web.pdf>.
- <sup>40</sup> Roman Gressier, “Who Profits from Pay-for-Treatment Diversion,” *The Crime Report: Center on Media, Crime and Justice* (Mar. 11, 2019), available at <https://thecrimereport.org/2019/03/11/who-profits-from-pay-for-treatment-diversion-programs/>; see also Lee Romney, “Private diversion programs are failing those who need help the most,” *Reveal: The Center for Investigative Reporting* (May 31, 2017), available at <https://www.revealnews.org/article/private-diversion->





- [programs-are-failing-those-who-need-help-the-most/](#).
- <sup>41</sup> *Id.*
- <sup>42</sup> The in-house Check Enforcement Program run by the Commonwealth Attorney in Loudoun County, Virginia is available at <https://www.loudoun.gov/faq.aspx?qid=1271>, and the Bad Check Diversion Program run by the State Attorney for the 6th Judicial Circuit in Florida is available at [http://www.sao6.org/bad\\_checks.htm](http://www.sao6.org/bad_checks.htm).
- <sup>43</sup> Rebecca Burns, "Diversion programs say they offer a path away from court, but critics say the tolls are hefty," *Pro Publica Illinois* (Nov. 13, 2018), available at <https://www.propublica.org/article/diversion-programs-illinois-criminal-justice-system-bounceback-correctivesolutions>.
- <sup>44</sup> In 2014, the ABA Center on Professional Responsibility issued Formal Ethics Opinion 469 deeming it a violation of Model Rules 8.4(c) and 5.5(a) for a prosecutor to provide official letterhead to private companies that threaten prosecution for any type of debt collection "when no lawyer from the prosecutor's office reviews the case file to determine whether a crime has been committed and prosecution is warranted." ABA Standing Committee on Ethics and Personal Responsibility, *Formal Opinion 469: Prosecutors and Debt Collection Companies* (Nov. 12, 2014), available at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_opinion\\_469.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_469.authcheckdam.pdf).
- <sup>45</sup> Denise Grollmus, "Checkmate," *Dallas Observer* (Jan. 24, 2013), available at <https://www.dallasobserver.com/news/checkmate-6428748>.
- <sup>46</sup> Human Rights Watch, *Set Up to Fail* (Feb. 20, 2018), 40, available at [https://www.hrw.org/sites/default/files/report\\_pdf/usprobation0218\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/usprobation0218_web.pdf).
- <sup>47</sup> *Id.* at 18 [citing Florida Statutes §948.90(1)(b)].
- <sup>48</sup> Human Rights Watch, *Profiting from Probation: America's "Offender-Funded" Probation Industry* (2014), 18, available at [https://www.hrw.org/sites/default/files/reports/us0214\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf).
- <sup>49</sup> *Id.* at 24; Current costs per month range from \$120-\$360 see <https://cor.mt.gov/ProbationParole/RestitutionSupervisionFees>.
- <sup>50</sup> *Set Up to Fail*, supra n. 46, at 40-41.
- <sup>51</sup> *Id.* at 40.
- <sup>52</sup> *Id.* at 41.
- <sup>53</sup> *Id.* at 42.
- <sup>54</sup> *Id.*
- <sup>55</sup> *Id.* at 43.
- <sup>56</sup> *Profiting from Probation*, supra n. 48, at 37.
- <sup>57</sup> *Set Up to Fail*, supra n. 46, at 1.
- <sup>58</sup> Kira Lerner, "In Oklahoma, Private Companies Run Pretrial Services, Driving People into Debt," *The Appeal* (June 26, 2019), available at <https://theappeal.org/in-oklahoma-private-companies-run-pretrial-services-driving-people-into-debt/>.
- <sup>59</sup> An investigation by the Atlanta Journal Constitution concluded that the "34 probation companies that operate in Georgia supervised nearly 349,000 probations involving misdemeanor and traffic offenses over a period of two years." Rhonda Cook, "Spotlight falls on private probation companies over fees, supervision," *Atlanta Journal Constitution* (Jan 18, 2014), available at <https://www.ajc.com/news/crime--law/spotlight-falls-private-probation-companies-over-fees-supervision/RpFbLaD9tsQN9yp43xLWXN/>.
- <sup>60</sup> Solvej Schou, "Good News: You Got Probation, Not Jail. Bad News: You're Going to Jail Anyway," *Take Part* (Feb. 9, 2014), available at <http://www.takepart.com/article/2014/02/09/pro-profit-probation-violates-poor>.
- <sup>61</sup> *Profiting from Probation*, supra n. 48, at 2.
- <sup>62</sup> *Set Up to Fail*, supra n. 46, at 5.
- <sup>63</sup> *Id.* at 63.
- <sup>64</sup> Generally, jails are locally operated (city or county), short-term facilities that hold individuals awaiting trial or sentencing, and those serving sentences of less than one year; prisons are longer term facilities and typically hold people with sentences of more than one year, usually individuals convicted of felonies.
- <sup>65</sup> Brian Highsmith, *Commercialized (in)Justice*, National Consumer Law Center (March 2019), 13-15, available at <https://www.nclc.org/images/pdf/criminal-justice/report-commercialized-injustice-dec2018.pdf>.
- <sup>66</sup> *Id.* at 21-22; see also Zoe Greenberg, "Phone Calls From New York City Jails Will Soon Be Free," *New York Times* (Aug. 6, 2018), available at <https://www.nytimes.com/2018/08/06/nyregion/phone-calls-free-nyc-jails.html>.
- <sup>67</sup> Maria Cramer, "Lawsuit Challenges the High Cost of Calling From Jail," *The Boston Globe* (May 3, 2018), available at <https://www.bostonglobe.com/metro/2018/05/03/lawsuit-challenges-high-cost-calling-from-jail/q17v1CL0bZBhxOXd9qOBRP/story.html>.
- <sup>68</sup> Peter Wagner and Alexi Jones, "State of Phone Justice: Local Jails, state prisons and private phone providers," *Prison Policy Initiative* (Feb 2019), available at [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice.html](https://www.prisonpolicy.org/phones/state_of_phone_justice.html).
- <sup>69</sup> Ben Conarck, "Prison phone provider accuses Florida Dept. of Corrections of using inmates' families as a slush fund," *The Florida Times-Union* (Jan. 30, 2019), available at <https://www.jacksonville.com/news/20190130/prison-phone-provider-accuses-florida-dept-of-corrections-of-using-inmates-families-as-slush-fund>.
- <sup>70</sup> Drew Kukorowski, Peter Wagner and Leah Sakala, "Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry," *Prison Policy Initiative* (May 8, 2013), available at <https://www.prisonpolicy.org/phones/pleasedeposit.html>.
- <sup>71</sup> Victoria Law, "Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email," *Wired* (Aug. 3, 2108), available at <https://www.wired.com/story/jpay-securus-prison-email-charging-millions/?verso=true>.
- <sup>72</sup> The use of video visitation, as well as its positive and negative consequences, are detailed in a report by the Prison Policy

- Initiative. Bernadette Rabury and Peter Wagner, *Screening Out Family Time: The for-profit video visitation industry in prisons and jails*, Prison Policy Initiative (January 2005), available at <https://www.prisonpolicy.org/visitation/report.html>.
- <sup>73</sup> *Id.*
- <sup>74</sup> *Id.*
- <sup>75</sup> *Id.*
- <sup>76</sup> Erin Montague, *Prison Health Care: Healing a Sick System through Private Competition*, Washington Policy Center (August 2003), available at <https://www.washingtonpolicy.org/library/doclib/PN2003-08.pdf>.
- <sup>77</sup> Rupert Neate, "Welcome to Jail: How private companies make money off US prisons," *The Guardian* (June 17, 2016), available at <https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit>.
- <sup>78</sup> Lauren-Broke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Center for Justice (2015), available at <https://www.brennancenter.org/publication/charging-inmates-perpetuates-mass-incarceration>.
- <sup>79</sup> Wendy Sawyer, "How much do incarcerated people earn in each state?" *Prison Policy Initiative* (Apr. 10, 2017), available at <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.
- <sup>80</sup> Wendy Sawyer, "The steep cost of medical co-pays in prison puts health at risk," *Prison Policy Initiative* (Apr. 19, 2017), available at <https://www.prisonpolicy.org/blog/2017/04/19/co-pays/>.
- <sup>81</sup> *Id.*
- <sup>82</sup> Stephen Raher, "The multi-million dollar market of sending money to an incarcerated loved one," *Prison Policy Initiative Blog*, (Jan. 18, 2017), available at <https://www.prisonpolicy.org/blog/2017/01/18/money-transfer/>.
- <sup>83</sup> Kevin Deutsch, "Captive Market: Companies Earn Millions in Fees from NYC Prisoner's Families, Despite Law Limiting Surcharges," *Bronx Justice News* (July 19, 2019), available at <http://bronxjusticenews.com/captive-market-companies-earn-millions-in-fees-from-nyc-prisoners-families-despite-law-limiting-surcharges/>.
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- <sup>85</sup> Catherine E. Ankenhead, "How States Can Take a Stand Against Prison Banking Profiteers," *The George Washington Law Review* (July 2017), available at <https://www.gwlr.org/wp-content/uploads/2018/01/85-Geo.-Wash.-L.-Rev.-1224.pdf>.
- <sup>86</sup> Stephen Raher, "Paging anti-trust lawyers: Prison commissary giants prepare to merge," *Prison Policy Initiative* (July 5, 2016), available at <https://www.prisonpolicy.org/blog/2016/07/05/commissary-merger/>.
- <sup>87</sup> Stephen Raher, "The Company Store: A Deeper Look at Prison Commissaries," *Prison Policy Institute* (May 2018), available at <https://www.prisonpolicy.org/reports/commissary.html>.
- <sup>88</sup> *Id.*
- <sup>89</sup> Ben Conarck, "Florida prisons roll out more for-profit services while weighing visitation cuts," *The Florida Times-Union* (June 1, 2018), available at <https://www.jacksonville.com/news/20180601/florida-prisons-roll-out-more-for-profit-services-while-weighing-visitacion-cuts>.
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- <sup>91</sup> Joseph Darius Jaafari, "On Pa. jails, women are paying more than double for the same tampons they'd get on the outside," *PA Post* (Feb 5, 2020), available at <https://papost.org/2020/02/05/in-pa-jails-women-are-paying-more-than-double-for-the-same-tampons-theyd-get-on-the-outside/>.
- <sup>92</sup> Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez and Ted Mermin, *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 *Harvard Civil Rights-Civil Liberties Review* 107, 140 (2019) ("One of the most pervasive forms of privatization in the criminal legal system involves the outsourcing of criminal legal system debt collection to private contractors."), available at <https://harvardcrcl.org/wp-content/uploads/sites/10/2019/03/Crimsumerism.pdf>; *Unholy Alliance*, supra n. 92, at 3 (only two of 17 counties studied do not contract with private debt collectors); *ABA Ten Guidelines on Court Fines and Fees*, supra n. 3, Commentary to Guideline 10.
- <sup>93</sup> *Crimsumerism*, supra n. 92, at 141.
- <sup>94</sup> Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice (2010), 17, available at <https://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry>.
- <sup>95</sup> Florida Statutes, §§ 28.246(6) and 938.35.
- <sup>96</sup> Texas Code of Criminal Procedure, Article 103.0031(b). However, individuals who cannot afford to pay the underlying debt are exempt from the collection fee. *Id.* at Article 103.0031(d).
- <sup>97</sup> *Criminal Justice Debt*, supra n. 94, at 45.
- <sup>98</sup> 42 Pa. Cons. Stat. Ann. § 9730.1(b)(2). See also *Criminal Justice Debt*, supra n. 94, at 45.
- <sup>99</sup> Even when collected as incurred, there are often fees and surcharges related to payment. In New York, for example, an individual must pay a supervision fee for each month on probation through an online collection platform that charges an additional \$1.99 fee on each payment.
- <sup>100</sup> In the Public Interest, *How Privatization Increases Inequality*, (September 2016), 7, available at [https://www.inthepublicinterest.org/wp-content/uploads/InthePublicInterest\\_Inequality\\_Sec1\\_Sept2016.pdf](https://www.inthepublicinterest.org/wp-content/uploads/InthePublicInterest_Inequality_Sec1_Sept2016.pdf).
- <sup>101</sup> *Id.*
- <sup>102</sup> *Unholy Alliance*, supra n. 92, at 14. Providing a higher fee for recovery of older debt is at odds with the notion of repose embodied in statutes of limitation, which are generally shorter in California than the five-year threshold for increased payments. *Id.*
- <sup>103</sup> Blake Ellis and Melanie Hicken, "The secret world of government debt collection," *CNN Money* (Feb. 17, 2015), available at <https://money.cnn.com/interactive/pf/debt-collector/government-agencies/index.html>.
- <sup>104</sup> *Crimsumerism*, supra n. 92, at 121.
- <sup>105</sup> *Id.* at 41.
- <sup>106</sup> *Profiting from Probation*, supra n. 48, at 25-26..
- <sup>107</sup> *Id.*



- <sup>108</sup> *Id.* at 26.
- <sup>109</sup> 15 U.S.C. § 1692 et seq.
- <sup>110</sup> *Gulley v. Markoff & Krasny*, 664 F.3d 1073, 1074-75 (7th Cir. 2011) (fines are not debts under the FDCA); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 407 (3d Cir. 2000) (*quid pro quo* required to qualify as debt); *Stubbs v. City of Center Point, Alabama*, 988 F.Supp.2d 1270, 1276 (N.D. Ala. 2013) (traffic tickets are not debts); see also Criminal Justice Policy Program at Harvard Law School, *Confronting Criminal Justice Debt: A Guide for Policy Reform* (2016), 124, available at <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf>. In some jurisdictions, those challenging private agencies collecting criminal justice debt might be able to invoke state Unfair, Deceptive or Abusive Acts and Practices laws (UDAP), although, if those laws do apply, they are generally more limited and not as potent as the FDCPA. See *Crimsumerism*, supra n. 92, at 144; *Unholy Alliance*, supra n. 92, at 3.
- <sup>111</sup> *Crimsumerism*, supra n. 92, at 143; see also *Commercialized (In)Justice*, supra n. 65, at 25 (recounting an agency's multiple threats to file a criminal complaint for failure to pay \$500 for a diversion program, based on original failure to pay a \$6.97 charge).
- <sup>112</sup> 15 U.S.C. § 1692c(b).
- <sup>113</sup> *Criminal Justice Debt*, supra n. 94, at 27.
- <sup>114</sup> *Id.* at 27, 57.
- <sup>115</sup> Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Center for Justice (2015), 1, available at <https://www.brennancenter.org/publication/charging-inmates-perpetuates-mass-incarceration>.
- <sup>116</sup> *Set Up to Fail*, supra n. 46, at 51-53.
- <sup>117</sup> See Berkely Law Public Advocate Clinic, *High Pain, No Gain: How Juvenile Administrative Fees Harm Low-Income Families in Alameda County, California* (2016), [http://64.166.146.245/docs/2016/BOS/20161025\\_813/27510\\_PAC%20High%20Pain%2C%20No%20Gain.pdf](http://64.166.146.245/docs/2016/BOS/20161025_813/27510_PAC%20High%20Pain%2C%20No%20Gain.pdf).
- <sup>118</sup> See Jessica Feieman, *Debtor's Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System* (Juvenile Law Center 2016), available at <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf>.
- <sup>119</sup> *ABA Ten Guidelines on Court Fines and Fees*, supra n. 3, at Commentary to Guideline 1. The Commentary cites to the National Task Force on Fines, Fees and Bail Practices, which was established by the Conference of Chief Justices and the Conference of State Court Administrators. In December 2017, the National Task Force produced a statement of Principles on Fines, Fees and Bail Practices, which similarly stated, "Courts should be entirely and sufficiently funded from general government revenue to enable them to fulfil their mandate. Core court functions should generally not be generated from court-ordered fines, fees or surcharges." National Task Force on Fines, Fees and Bail Practices, *Principles on Fines, Fees, and Bail Practices*, Principle 1.5, available at <https://www.ncsc.org/-/media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx>.
- <sup>120</sup> *Id.* at Guideline 1
- <sup>121</sup> *Id.*
- <sup>122</sup> *Id.* at Commentary to Guideline 1 ("If imposed at all, fees should be commensurate with the service they cover, and consistent with the financial circumstances of the individual ordered to pay, so that the fees do not result in a substantial hardship to the individual or his/her dependents.").
- <sup>123</sup> *Id.*
- <sup>124</sup> *Set Up to Fail*, supra n. 46, at 54.
- <sup>125</sup> For example, one company operating in Tennessee discouraged individuals from using its waiver/reduction procedures by delaying individual's ability to seek relief, noting that there was an additional fee for filing the request, and suggesting the request would involve a deep probe into personal finances. The company was eventually forced to shut down after a debtor's prison class action lawsuit. *Id.* at 50.
- <sup>126</sup> *ABA Ten Guidelines on Court Fines and Fees*, supra n. 3, at Commentary to Guideline 1 and Guideline 4 (Mandatory Ability-to-Pay Hearings).
- <sup>127</sup> *Id.* at Commentary to Guideline 1.
- <sup>128</sup> "A judge should always be permitted to waive or reduce any fee if an individual is unable to pay." *Id.*
- <sup>129</sup> Criminal Justice Policy Program at Harvard Law School, *Confronting Criminal Justice Debt: A Guide for Policy Reform* (2016), 11 (citing Iowa Code §§ 321.40 (9) and 321.210B), available at <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf>.
- <sup>130</sup> *ABA Ten Guidelines on Court Fines and Fees*, supra n. 3, at Guideline 3 and Commentary to Guideline 3.
- <sup>131</sup> Jessica Silver-Greenburg, "In Prosecutors, Debt Collectors Find a Partner," *New York Times* (Sept. 5, 2012), available at <https://www.nytimes.com/2012/09/16/business/in-prosecutors-debt-collectors-find-a-partner.html>.
- <sup>132</sup> *Unholy Alliance*, supra n. 92, at 9 (only two of 17 counties studied do not contract with private debt collectors).
- <sup>133</sup> Standing Committee on Ethics and Personal Responsibility, *Formal Opinion 469: Prosecutors and Debt Collection Companies* (Nov. 12, 2014), available at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_opinion\\_469.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_469.authcheckdam.pdf).
- <sup>134</sup> "Dear Colleague" Letter from Vanita Gupta and Lisa Foster, Office for Access to Justice, Civil Rights Division, U.S. Department of Justice (Mar. 14, 2016), available at <https://finesandfeesjusticecenter.org/articles/us-doj-dear-colleague-letter/>.
- <sup>135</sup> Department of Justice Office of Public Affairs, "Attorney General Jeff Sessions Rescinds 25 Guidance Documents" (Dec. 21, 2017), available at <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>.
- <sup>136</sup> *ABA Ten Guidelines on Court Fines and Fees*, supra n. 3, at Guideline 9.
- <sup>137</sup> *ABA Criminal Justice Standards: Treatment of Prisoners* (2010), Standard 23-10.5, available at [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_treatmentprisoners/](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners/).



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